

7-1-2005

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Recommended Citation

Markus D. Dubber, *Making Sense of the Sense of Justice*, 53 Buff. L. Rev. 815 (2005).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol53/iss3/6>

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Making Sense of the Sense of Justice

MARKUS DIRK DUBBER†

INTRODUCTION

This paper tries to shed light on an overused, yet understudied, concept in modern legal and political discourse: the sense of justice.¹ Courts cite it,² scholars invoke it³ and measure it,⁴ presidential candidates prize it,⁵ and eulogists praise it.⁶

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1. See, e.g., *State v. Maldonado*, 645 A.2d 1165, 1181 (N.J. 1994) (“[L]aw in the last analysis must reflect the general community sense of justice.” (quoting Frances B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70 (1933))).

2. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (earlier decision barring admission of victim impact evidence at capital sentencing hearing “conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement”).

3. See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 54 (2000) (calling for constitutional interpretation that “quests after the American People’s particular sense of justice as embodied in the unfolding words, deeds, and spirit of the Constitution and its Amendments.”).

4. See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW*, at xv (1995) (charting community’s sense of justice regarding criminal law doctrines).

But what is it? What do people mean when they refer to the sense of justice? The answer is, of course, that they mean a great many things, and sometimes they mean not much at all. All too often, the sense of justice appears roughly to have the significance of an exclamation point; the preferred resolution of a given justice dispute is justified as not only right and proper, but so much so that any other resolution would “shock” the sense of justice. Alternatively, one might dismiss the sense of justice as simply beside the point, an irrational emotional impulse dangerously out of place in a system of abstract legal and political norms equally applied. Finally, in its communal variant, the sense of justice might function as little more than a stand-in for more obviously vacuous notions such as “common sense” or “community sentiment.”⁷

5. See, e.g., Interview by the National Press Club with Ralph Nader, presidential candidate, on Nat'l Public Radio (Jul. 23, 2000) (stating Supreme Court nominees should have a “sense of justice, which is essential in order to have a proper sense of when there's injustice”).

6. See, e.g., Richard W. Benka, *Remembrances of William O. Douglas on the 50th Anniversary of his Appointment to the Supreme Court*, in SUPREME COURT HISTORICAL SOCIETY 1990 YEARBOOK (1990) (Douglas's “decisions were profoundly governed by his sense of justice”).

7. Celebrations of the communal sense of justice are particularly common in discussions of the jury. See, e.g., *State v. Maldonado*, 645 A.2d 1165, 1181 (N.J. 1994) (“[T]he jury in a criminal prosecution serves as the conscience of the community and the embodiment of the common sense and feelings reflective of society as a whole.”); *United States v. Arnett*, 342 F. Supp. 1255, 1261 (D. Mass. 1970) (stressing the “nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect” (quoting S. REP. NO. 90-891, at 22 (1967))). For an admittedly random sample of some of the more commonly cited communal senses of justice, beginning with the least specific one, “ours,” see *Harris v. Alabama*, 513 U.S. 504, 522 (1995) (“community's sense of justice”) (Stevens, J., dissenting); *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (“public sense of justice”); *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 202 (N.Y. 1918) (“our sense of justice”); Jennifer S. Geetter, *Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System*, 28 AM. J.L. & MED. 1, 72-73 (2002) (“our sense of justice”); Heather Leawoods, *Gustav Radbruch: An Extraordinary Legal Philosopher*, 2 WASH. U. J.L. & POL'Y 489, 513 (2000) (“universal sense of justice”); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512 (1976) (“people's sense of justice”); Judith Welch Wegner, *Imagining the World Anew: The Course in State and Local Government Law and the Future of Legal Education*, 3 WASH. U. J.L. & POL'Y 741, 757 (2000) (“civic sense of justice”). Nazi ideology surely made the most pernicious use of the notion of a communal sense of justice, the *gesunde*

There is more to the sense of justice, however, or so I shall argue in this paper. To assemble a serviceable account of the sense of justice requires leaving the comfortable confines of American jurisprudence, which has contributed precious little to this subject, with one notable exception: Edmond Cahn's *The Sense of Injustice*.⁸ Cahn described the sense of justice as a type of "empathy or imaginative interchange," through which each member of a group "projects himself into the shoes of the other."⁹ This definition, I think, is eminently sensible, as far as it goes. Unfortunately, Cahn's interest in the sense of justice did not go so far as to explain *how* this phenomenon arises and, assuming we understand how the sense of justice works, *why* it should matter in legal and political discourse.

Luckily, the sense of justice has received sustained attention in several of the law's sister disciplines. *Moral psychology*, for one, has explored notions of moral sentiment and empathy for centuries. *Political theory*, too, deserves our attention, mainly because John Rawls, the most influential political philosopher of our time, assigned the sense of justice a pivotal, though generally underappreciated, role in his theory of justice. Even *linguistics* will get a closer look because of the intriguing parallels between a sense of justice and a sense of language, and of moral and linguistic competence.

In the end, I think, we will find that the sense of justice, properly understood, does have a place in the way we talk—and argue—about matters of justice. In fact, understood as a general moral competence that consists of a bundle of affective and cognitive capacities, the sense of justice is the glue that holds communities of justice together in a modern world void of substantive commonalities.

This article proceeds in three parts. Part I locates the sense of justice within a rich literature on sympathy and

Volksempfinden. See Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227 (1995).

8. EDMOND N. CAHN, *THE SENSE OF INJUSTICE* (1949). Other legal systems have been somewhat less delinquent. See, e.g., MICHAEL BIHLER, *RECHTSGEFÜHL, SYSTEM UND WERTUNG: EIN BEITRAG ZUR PSYCHOLOGIE DER RECHTSGEWINNUNG* (1979); ERWIN RIEZLER, *DAS RECHTSGEFÜHL: RECHTSPSYCHOLOGISCHE BETRACHTUNGEN* (1921).

9. CAHN, *supra* note 8, at 24 (emphasis omitted).

moral sense that includes not only contributions by the classics of moral psychology (Hutcheson, Hume, Adam Smith, Rousseau), but also by some scholars who are generally associated with a radically different, rigidly rationalistic, view of human judgment (most notably Kant and Hegel). If Part I seeks to answer the question of what makes the sense of justice a “sense,” Part II considers what makes it a sense of “justice.” Part I defends the sense of justice against crude charges of arbitrary emotionalism; Part II highlights the function the sense of justice plays in Rawls’s and Habermas’s theories of justice. Both Rawls and Habermas regard the sense of justice as a normative competence, the widespread—if not universal—development of which is necessary for the establishment and stability of political communities. Part III then explores how the so-called *linguistic analogy* between justice and language might inform an account of normative competence that supplements traditional liberal accounts of autonomous agents by incorporating the sense of justice as a basic capacity for empathy as mutual roletaking.

I. FROM PITY TO RESPECT

At the outset, it helps to remind ourselves that attempts to make sense of the sense of justice aren’t exactly new. They belong to a long and distinguished tradition of inquiry that reaches back at least to the Scottish Enlightenment, though we might well trace this project back yet further in time—as Martha Nussbaum has done in her study of what she calls “the ancient pity tradition.”¹⁰

The work of Adam Smith is as good a place to start as any. Smith argued that society is held together by mutual bonds of sympathy and a general sense of justice.¹¹ According to Smith, the sense of justice is the voice of the

10. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 66 (1995) [hereinafter *POETIC JUSTICE*]; see also MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 297-441 (2001) [hereinafter *UPHEAVALS OF THOUGHT*].

11. See, e.g., 1 ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 308 (London, A. Millar 1759) (“Our sensibility to the feelings of others . . . is the very principle upon which that manhood is founded.”); see also Martha C. Nussbaum, *Equity and Mercy*, 22 *PHIL. & PUB. AFF.* 83 (1993).

impartial spectator: "this great inmate,"¹² "the ideal man within the breast,"¹³ "reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct, . . . who, whenever we are about to act so as to affect the happiness of others, calls to us, with a voice capable of astonishing the most presumptuous of our passions, that we are but one of the multitude, in no respect better than any other in it."¹⁴ The sense of justice is not only shared by all humans, or at least by all "commonly honest" humans, but also quite powerful:

There is no commonly honest man who . . . does not inwardly feel the truth of that great stoical maxim, that for one man to deprive another unjustly of any thing, or unjustly to promote his own advantage by the loss or disadvantage of another, is more contrary to nature, than death, than poverty, than pain, than all the misfortunes which can affect him, either in his body, or in his external circumstances.¹⁵

To Smith, this universal and fundamental sense of justice makes good evolutionary sense because it permitted the maintenance of human communities. Maintaining human communities in turn was crucial because of man's fundamentally social nature. Given this vaguely socio-biological account of the role of the sense of justice, Smith showed little interest in the definition of the *objects* of our sense of justice: he did not develop a theory of moral personhood. According to Smith, the sense of justice reflects nothing other than "the general fellow-feeling which we have with every man merely because he is our fellow-creature."¹⁶ This view of the origin of the sense of justice may explain much altruistic behavior, particularly among family members, but it remains to be seen whether it can help us understand the phenomenon of a sense of *justice*.

Smith's thoughts on the operation of the sense of justice are more useful for our purposes than his ideas regarding

12. 1 SMITH, *supra* note 11, at 296.

13. *Id.* at 301.

14. *Id.* at 277.

15. *Id.* at 279-80.

16. *Id.* at 184.

its origin. He emphasizes the need to imaginatively identify with the object of one's judgment. "By the imagination we place ourselves in his situation, we can conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him, and thence form some idea of his sensations."¹⁷

Much has been made of the question whether this imaginative identification maintains the distinction between self and other.¹⁸ I'm not sure how much turns on the answer for our purposes, but it seems that a fusion between self and other, either by eradicating the other through incorporation into the self—or vice versa—would describe a psychopathological symptom, rather than a process of moral judgment.¹⁹ At any rate, empathy and sympathy couldn't be distinguished if we couldn't take another's position without becoming her.²⁰ Similarly, it would be difficult to explain the fact that sadists and confidence men appear to possess remarkable empathic abilities, without however collapsing the distinction between ego and id.²¹ Without that distinction, they would be psychotic; with that distinction, they are committing a crime against another person.

Where Smith stood on this issue isn't clear. His construct of an impartial spectator that *represents* the moral view suggests that even if he did believe that observer and object become one in the observer's imagination, the observer wasn't making the moral judgment in this state. That judgment was possible only once he assumed the perspective of the impartial spectator, from where he could imaginatively identify with any number of

17. *Id.* at 9.

18. See Martin L. Hoffman, *Toward a Theory of Empathic Arousal and Development*, in THE DEVELOPMENT OF AFFECT 227, 242 (Michael Lewis & Leonard A. Rosenblum eds., 1978).

19. See, e.g., Lawrence Blum, *Compassion*, in EXPLAINING EMOTIONS 507, 509 (Amélie Oksenberg Rorty ed., 1980) (identity confusion).

20. On the distinction between the capacity for empathy (*Einfühlungsvermögen*) and actual sympathy (*Mitgefühl*—"feeling with")—and pity (*Mitleid*—"suffering with"), see SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO (James Strachey trans., Boni & Liveright 1922) (1921).

21. See, e.g., Blum, *supra* note 19, at 511.

persons, switching back and forth between their viewpoints, presumably without leaving too much of himself behind in the process.

Smith's judicious spectator (figuratively) personifies a feature of moral judgment that Smith's fellow Scotsman David Hume also recognized as crucial, and at about the same time: the reciprocal equality of judge and judged. As Annette Baier puts it, to Hume "[t]he moral agent occupies both the position of judge and of judged," and "the capacity of any to adopt the moral point of view, to be moral judges, depends upon their own willingness to be subject to correction."²² In Hume's own words, it's the "great resemblance among all human creatures" that "must very much contribute to make us enter into the sentiments of others, and embrace them with facility and pleasure."²³

But what is the identity that would enable one person imaginatively to cross the gap separating herself from another, and to see things from the other's point of view?²⁴ Nussbaum has traced one answer to this question, common vulnerability, in her study of the emotion of pity. Following Aristotle, she takes one of the cognitive elements of pity to consist of the belief that the pitier's possibilities are similar to those of the sufferer.²⁵ The feeling that "there but for the grace of God, go I" or, slightly more cheerfully, that in Rousseau's words "[e]ach may be tomorrow what the one whom he helps is today,"²⁶ is what accounts for our ability to imagine ourselves as another: we're all the same in our vulnerability to suffering, and more specifically "our common vulnerability to pain."²⁷ (One dramatic variant of

22. Annette Baier, *Master Passions*, in *EXPLAINING EMOTIONS*, *supra* note 19, at 403, 420-21.

23. DAVID HUME, *A TREATISE OF HUMAN NATURE* 318 (L.A. Selby-Bigge ed., Oxford Univ. Press 1967) (1739); *see also id.* at 322, 359, 608.

24. On identity as a precondition for identification, *see* FREUD, *supra* note 20.

25. NUSSBAUM, *POETIC JUSTICE*, *supra* note 10, at 65; *see also* NUSSBAUM, *UPHEAVALS OF THOUGHT*, *supra* note 10, at 316 (discussing compassion).

26. JEAN-JACQUES ROUSSEAU, *EMILE OR ON EDUCATION* 224 (Allan Bloom trans., Basic Books 1979).

27. NUSSBAUM, *UPHEAVALS OF THOUGHT*, *supra* note 10, at 319.

this general point is the claim, also advanced by Rousseau, that we all share the inevitability of death.)²⁸

This won't do for a moral point of view, however, for—as Nussbaum points out—we can be pretty sure that we will be immune from certain kinds of suffering. Ordinarily, white people in the United States won't suffer from racism, heterosexual men won't suffer from sexual harassment, rich white people won't get harassed by the police, and so on. But what's more, the moral point of view doesn't seem to depend on possibility estimates of this kind. From the moral standpoint, it shouldn't matter how likely it is that this or that will happen to me. The whole point of morality, as opposed to prudence, is supposed to be that these considerations don't come into play.²⁹ Perhaps pity has something to do with this sort of calculus; in that event, however, pity wouldn't qualify as a moral sentiment, like the sense of justice, but would be better thought of as an ethical sensation triggered by the observation of someone pitiable or even pitiful, i.e., someone in a decidedly inferior position vis-à-vis ourselves, someone incapable of helping herself.³⁰

We do seem to have a different emotional attitude toward objects capable of experiencing pain than toward those that are not. If the object of our judgment can't feel pain itself, we can't feel its pain in her stead, we can't feel *for it*. That may be why we react differently toward the sight of a tree being chopped down than we do toward a dog being run over by a car.

Yet it's quite another thing to claim that the capacity for pain by itself makes someone, or something, the object of moral emotions. It may well be that “vulnerability makes us

28. ROUSSEAU, *supra* note 26.

29. This is one of the ideas behind Rawls's original position which, through a veil of ignorance, attempts to model the abstract moral point of view. Rawls renders probability considerations of this sort irrelevant indirectly, not by declaring them so, but by making them impossible due to the ignorance of the deliberator.

30. See Blum, *supra* note 19, at 512 (contrasting pity with compassion).

proper objects of sympathy and caring,”³¹ or pity. But it doesn't make us proper objects of empathy, or moral sentiments. We may feel a dog's pain, but we can't empathize with it in a moral sense because it lacks the capacities requisite for moral personhood.

There is a sophisticated version of the common vulnerability thesis that attempts to isolate a specifically human vulnerability. What we share with objects of moral sentiments thus wouldn't merely be the common vulnerability to pain, but the common *human* vulnerability to pain. So, rather than share the inevitability of death, we might share the consciousness of that inevitability. And rather than share a common vulnerability to pain, and the consciousness thereof, we might regard ourselves as sharing vulnerability to a pain specific to us as persons. Drawing on Schopenhauer's work, Habermas appears to hold this view. He argues that the human subject is uniquely, and constitutionally, vulnerable because she can only become a person, i.e., develop a personal identity, by exposing herself to interpersonal relations. She can create herself only through others.³²

But this version of the common vulnerability thesis is a far cry from the claim that the moral community includes everyone (and everything) subject to what Habermas calls “cruder threats to the integrity of life and limb.”³³ The difference is that the notion of a “chronic fragility of personal identity”³⁴ presumes an account of personhood. It's that account which holds the key to the problem of the identity which gives rise to moral empathy. As we'll see, what matters in the end is the commonality of personhood itself, rather than its common vulnerability.

31. John Sabini & Maury Silver, *Emotions, Responsibility, and Character*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 165, 170 (Ferdinand Schoeman ed., 1987).

32. See JÜRGEN HABERMAS, *Morality and the Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 195, 199-200 (Christian Lenhardt & Shierry Weber Nichol森 trans., 1990).

33. *Id.* at 199.

34. *Id.*

To understand the sense of justice and its identificatory basis as a moral sentiment—a sentiment of justice—we need to move beyond the Scottish Enlightenment and take a look at the German Enlightenment, in particular the work of Kant and Hegel. Kant and Hegel's relationship to the Scottish moral sense school, and their thought on the role of moral sentiment, has been unjustly neglected. The usual story about Kant paints a simple picture: Kant was an adherent of the moral sense school until his Copernican turn, after which he categorically rejected the positions of that school. The line on Hegel's relation to moral sense philosophy is similarly straightforward: He was the ultimate philosopher of objective reason who not only thought the notion of an innate moral (or religious) sense ludicrous,³⁵ but also fought the emotionalists and sentimentalists of his time tooth and nail.³⁶

While both of these stories certainly bear more than a grain of truth, they fail to account for a significant element in Kant's moral theory and misinterpret Hegel's appropriation of that theory in his own philosophy of right. When all is said and done, Kant's moral theory turns on the concept of what he called the "peculiar" non-sensuous moral sense (*Moralgefühl*), which explains every human and, more generally, every non-perfectly rational being's heartfelt concern for and knowledge of the categorical imperative (not to treat another merely as a means), the central principle of morality. Kant's moral sense manifests our *respect* for the moral law and is evoked whenever we recognize that we, or someone else, act according to, and are motivated by, its dictates.³⁷

35. See generally Markus Dirk Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1593-97 (1994) (discussing Hegel's critiques of F.H. Jacobi and Schleiermacher).

36. For his assault on Jacob Fries, see the *Preface* to GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) [hereinafter *ELEMENTS*]. See also Dubber, *supra* note 35, at 1593-96.

37. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 59 (Ak. 460) (James W. Ellington trans., Hackett 1981) (1785) [hereinafter *KANT, METAPHYSICS OF MORALS*]; IMMANUEL KANT, *KRITIK DER PRAKTISCHEN VERNUNFT* 46, 86-95 (Ak. 38, 73-81) (Karl Vorländer ed., Felix Meiner Verlag 9th ed. 1985) (1788) [hereinafter *KANT, ZWEITE KRITIK*]; IMMANUEL KANT, *METAPHYSIK DER SITTEN* 530-31 (A35-37) (Wilhelm Weischedel ed., Suhrkamp 8th ed. 1982)

Upon closer inspection, Kant's harshest polemics are not directed at those who assign emotion a place in moral theory. Kant's criticism focuses on those who, like Smith's teacher Francis Hutcheson, portrayed the moral sense as a unique perceptive faculty.³⁸ By the end of the eighteenth century, however, Scottish moral sense philosophy itself—and Smith in particular—had come to reject Hutcheson's peculiar version of the peculiar moral sense.³⁹

But Kant was far from denying sentiment a role in the moral point of view, however firmly he came to reject the idea that it, as a specific capacity, alone could bear the weight of moral theory as a whole. Today, Kant's moral theory is associated most closely with the notion that persons deserve respect as persons, that personhood confers a common dignity that stems from a universal capacity for self-government, or autonomy. One can regard Kant's moral thought as a continuous attempt to work out the foundations and the meaning of this respect owed all persons as such.

Kantian respect, however, is also a moral sentiment. Already in his early work, Kant recognized that, in J.B. Schneewind's words, "moral principles are . . . but the awareness of the feeling of the dignity of human nature."⁴⁰ The problem was that this feeling alone, without a proper

(1797) [hereinafter KANT, METAPHYSIK]. Every moral being possesses this *Moralgefühl*, which should be cultivated and strengthened. KANT, ZWEITE KRITIK, *supra* at 46 (Ak. 38); KANT, METAPHYSIK, *supra* at 530-31 (A36). See generally A.M. MacBeath, *Kant on Moral Feeling*, 64 KANT-STUDIEN 283 (1973); HENRI LAUENER, HUME UND KANT: SYSTEMATISCHE GEGENÜBERSTELLUNG EINIGER HAUPTPUNKTE IHRER LEHREN 152-59, 196-205 (Francke Verlag Bern & Munich 1969).

38. KANT, METAPHYSICS OF MORALS, *supra* note 37, at 46 n.30, 59; KANT, ZWEITE KRITIK, *supra* note 37, at 45-46; KANT, METAPHYSIK, *supra* note 37, at 530-31. This also applies to Hegel's comments on emotion and morality in the *Philosophy of Right*. See Dubber, *supra* note 35, at 1596. On Hutcheson, see FRANCIS HUTCHESON, AN ESSAY ON THE NATURE AND CONDUCT OF THE PASSIONS AND AFFECTIONS WITH ILLUSTRATIONS ON THE MORAL SENSE (London, J. Osborn & T. Longman 1728). See also W. L. TAYLOR, FRANCIS HUTCHESON AND DAVID HUME AS PREDECESSORS OF ADAM SMITH (1965).

39. 2 ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 293-305 (London, A. Millar 1759).

40. J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY 502 (1998).

understanding of its origin and operation, was neither universal nor sturdy enough to ground moral action. It's a feeling of intra-communal identification that's strongest among family members but weakens as its circle of identification, or of sympathy, expands, eventually to encompass all moral persons. "[A]s soon as this feeling has risen to its proper universality, it has become sublime, but also colder."⁴¹ This is a familiar problem for theories of interpersonal obligation that deny the need to abstract from substantive communities at some point, and are forced to stress the familial aspects of even the largest and most anonymous political community. "Benevolence to strangers," as Hume recognized, "is too weak for this purpose."⁴²

Kant saw the beginnings of a solution to this problem in the work of Rousseau:

I feel the whole thirst for knowledge and the curious unrest to get further on, or also the satisfaction in every acquisition. There was a time when I believed that this alone could make the honor of humanity and I despised the rabble that knows nothing. *Rousseau* set me to rights. This dazzling superiority vanishes, I learn to honor man⁴³

Rousseau not only spoke of the respect that is due all persons as such, but he also hinted at what it was about persons that entitled them to this respect: the capacity for autonomy. Kant's theory of autonomy, and therefore his entire moral theory, is an account of the feeling of respect for all persons. In the end, Kant integrated his insight into the significance of the moral sentiment, namely the respect due all moral persons as such, with a theory of the moral standpoint that abstracted from particular substantive characteristics of the person. He thereby placed morality on a universal footing not subject to the vagaries of benevolence, a feeling neither universal nor deeply enough felt. In this way, he could extend moral obligation even to someone

41. IMMANUEL KANT, *OBSERVATIONS ON THE FEELINGS OF THE BEAUTIFUL AND SUBLIME* 58 (John T. Goldthwait trans., 1991); SCHNEEWIND, *supra* note 40, at 502; *see also* HUME, *supra* note 23, at 481-83.

42. HUME, *supra* note 23, at 491.

43. SCHNEEWIND, *supra* note 40, at 489.

who didn't feel benevolence toward outsiders; whether she did or didn't feel benevolent was irrelevant, what mattered was that she was bound to identify with a fellow person because they both shared the universal capacity for self-government, the capacity which gave them moral status in that, on the one hand, they could decide on a conception of a good and, on the other, could pursue that conception, and be responsible for their actions in that pursuit.

The moral sentiment of respect for other persons as moral agents therefore is not a simple sentiment of benevolence. It is a mediated sentiment, mediated through the recognition of a capacity for self-government, which finds expression in the categorical imperative. Respect for the moral law—Kant's *Moralgefühl*, the sense of the moral—therefore ultimately is respect for the moral persons whose autonomy it manifests and protects. And the sense of the just is simply the analogue to the sense of the moral in the context of political, rather than moral, theory.

Hegel too can be seen as clarifying the moral significance of that point of identification which gives rise to the sense of justice as a mediated form of empathy. Hegel didn't have much to say about the sense of justice (or *Rechtsgefühl*) in particular. He did draw a useful distinction, however, between *Gefühl* and *Empfindung* (sensation) by contrasting the subjectivity of *Empfindung* with the potential objectivity of *Gefühl*.⁴⁴ He also pointed out that we speak of a *sense*, rather than a *sensation*, of justice or of self.⁴⁵

Now, Hegel saw that a person evaluating an offender's moral desert or contemplating fundamental questions about the institutions of justice and their effect on herself and others cannot see herself in another's particular characteristics without first recognizing that she already shares at least one basic characteristic with that person. It is the acknowledgment of this identity, however formal, that permits the onlooker to engage in the sort of empathic

44. GEORG WILHELM FRIEDRICH HEGEL, ENZYKLOPÄDIE DER PHILOSOPHISCHEN WISSENSCHAFTEN §§ 399-412 (1830) [hereinafter ENZYKLOPÄDIE]; see also HEGEL, ELEMENTS, *supra* note 36, at 35-37.

45. See HEGEL, ENZYKLOPÄDIE, *supra* note 44, § 402 (Rechts- or Selbstgefühl, instead of Rechts- or Selbstempfindung).

thought experiment that is required for a full assessment of desert or a considered judgment on issues of institutional justice.⁴⁶

That basic characteristic, that point of identification, was their shared personhood. This most abstract equality remains as the background condition governing all interactions between individuals in modern society.⁴⁷ No matter what other identities they acquire, as members of families or of other substantive communities, they will always remain identical in their personhood.⁴⁸ And, according to Hegel, it's that personhood that marks them as bearers of rights, as legal subjects entitled to claim right, and to be punished for violations thereof.

Law is a relation of people considered as persons. Its general norm is "be a person and respect others as persons."⁴⁹ To *be* a person, however, is to manifest one's capacity for autonomy.⁵⁰ To respect another person as such is to respect her as someone endowed with that capacity. This becomes clearest in Hegel's discussion of crime and punishment. There he explains that the essence of crime is one person (the offender) treating another as a non-person (the victim), while punishment treats the offender as a person by holding him responsible for his actions.⁵¹

Hegel's analysis of the significance of abstract identification doesn't add much to Kant's account. He does make

46. Cf. SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* (James Strachey trans., 1922) (1921) (holding identity as precondition for identification).

47. This baseline identity is the subject of the first part of his *Philosophy of Right*, Abstract Right.

48. See ELEMENTS, *supra* note 36, at 189-380 (includes the third portion of the book, Ethical Life, which discusses these other aspects of personal existence).

49. See *id.* at 69.

50. GEORG WILHELM FRIEDRICH HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS ODER NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE* Z35 (Frankfurt a.M., Suhrkamp 1986); *id.* at 89 (Hegel's Bemerkung zu § 33) (1986) ("I have Right because I am free.").

51. *Id.* at 182 (Hegel's Bemerkung zu § 95) (1986). See generally Dubber, *supra* note 35, at 1577. In this sense, the offender can be said to have a right to be punished. See Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 *LAW & HIST. REV.* 113 (1998).

clear, however, that although this identification is necessary, it cannot be sufficient in an actual political community. The difference between morality and politics is that morality can lay the foundation for, and set the minimum standards of, legitimacy. But morality cannot pretend to capture political life in its full complexity. Without acknowledging the intricate interplay between various communal memberships and commitments, between different identities, the role of the status of moral personhood in fact may be obscured. For it's precisely because these substantive attachments are so strong, and at times so confusing, if not conflicting, that taking the moral point of view—or the point of view of justice—is so crucial. The theory of justice thus does no more than work out the place for this moral point of view, from which all persons are considered as such, in a complex society of multiple communities. And the commitment to justice is nothing more than the commitment to *always also*—not always only—regard everyone as a person, no matter what else she might be or try to be.

Kant's (and therefore also Hegel's) relation to Rousseau on the nature of the identification, or "resemblance," for purposes of the sense of justice is difficult to nail down, partly due to Rousseau's inconsistent statements on this topic, which varied from context to context, and medium to medium. In *Emile*, for instance, Rousseau used a *Bildungsroman* to explore problems of moral education.⁵² And it's there that we find his most extensive treatment of the sense of justice. He lays out a process of moral development that prefigures much of what Piaget was to document much later. From self-recognition, and the development of a sense of justice with respect to oneself, he moves to other-recognition, and then imaginative roletaking, through which the recognition of the sense of justice of another, and therefore mutual roletaking and the sense of justice properly speaking, becomes possible.

But in *Emile*, Rousseau isn't very specific about the nature of the identity between self and other—and *Emile* and the gardener in particular—which makes the all-important roletaking possible. As we saw earlier, he speaks

52. See ROUSSEAU, *supra* note 26.

loosely of the inevitability of death as the sign of our common humanity.⁵³ To point out to Emile that he too might, through some cruel blow of fate, be reduced to gardenerdom may be an effective pedagogical device, but it doesn't make for a sound foundation for a moral theory, nor was it designed to make for one.

In the *Social Contract*, Rousseau had more to say about personhood and the capacity for autonomy.⁵⁴ But there, unlike in *Emile*, he was primarily concerned with *political* legitimacy, i.e., the question of how to construct a form of government consistent with this capacity. It was left to Kant to develop a *moral* theory based on the idea that freedom meant self-government, so that to be free means not to be free of rules, but to be governed by rules one gives to oneself. Moreover, whether Rousseau's notion of the all-powerful general will is, in the end, compatible with the idea of autonomy is at least an open question.⁵⁵

It was Kant who recognized the crucial importance of the connection between the sense of justice and the moral capacity of persons as such. I may well recognize another person (Kant's shoemaker, Rousseau's gardener) as sufficiently like me to imaginatively engage in mutual roletaking with her. But then again, I may not. And if I do not, I haven't shown myself to lack a sense of justice, but merely a sense of intraspecies solidarity. I would lack a sense of justice only if I failed to perceive the other person *as a fellow person*, endowed with the same capacity for autonomy that I possess. From a sociological—and maybe a pedagogical—point of view, it doesn't matter which characteristic ends up triggering my identification with another. From the moral point of view, it does. The sense of justice is only a *moral* sentiment, or a sentiment of *justice*, if it attaches to persons as moral agents.

Since the days of the Scottish and German Enlightenment, the moral significance of the identification

53. See *id.* at 222.

54. JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT (Christopher Betts trans., Oxford Univ. Press 1994).

55. See, e.g., Joshua Cohen, *Reflections on Rousseau: Autonomy and Democracy*, in THE SOCIAL CONTRACT THEORISTS 143-63 (Christopher W. Morris ed., 1986).

underlying empathy has not attracted much attention. But the general explicatory role of identification has. The social sciences, characteristically unconcerned with the normative implications of their discoveries, have described various processes of identification, based on various common characteristics. Some writers have spoken of points of identity that are at least not inconsistent with notions of shared personhood. So Lawrence Blum has mentioned a "shared humanity," and the recognition that observed suffering was "the kind of thing that could happen to anyone, including oneself insofar as one is a human being."⁵⁶ But it generally remains unclear, and unexplored, what that might mean.

The exception is John Rawls. He is the first modern moral philosopher to once again give serious thought to the moral standing of the sense of justice. In fact, Rawls's work on the sense of justice can be seen as an attempt to elaborate on Kant's discovery that moral sentiment and moral capacity, and autonomy in particular, were connected. For Rawls, the sense of justice is the moral sentiment par excellence, the capacity and the desire to experience and act according to particular moral sentiments toward others.⁵⁷ The sense of justice is the ability and the willingness to take up the point of view of justice, which means to regard others as equal and rational persons who are capable of and entitled to autonomy.

Rawls's project of finding a role for the sense of justice in legal and political theory has met with little interest, in sharp contrast to other aspects of his work.⁵⁸ This is unfortunate. Invocations of the sense of justice are a fact of legal life in the United States and elsewhere. Beyond the realm of legal doctrine and discourse, the sense of justice can play an important role in an account of political life in modern society, including the very existence of a system of law that makes private harm its public business. Thinking about the sense of justice can help us better understand what Rawls calls the "basis of equality," or the concept of

56. Blum, *supra* note 19, at 511.

57. See John Rawls, *The Sense of Justice*, 72 PHIL. REV. 281 (1963).

58. What's more, Rawls himself appears to have abandoned it. See JOHN RAWLS, *POLITICAL LIBERALISM* (1996).

personhood, and particularly into those basic competences that allow us to function and to interact with others in a political community devoid of consensus about substantive virtues. Here the study of the sense of justice connects up with research into constitutive competence in other disciplines, including developmental psychology and linguistics, and the sense of language in particular. The latter connection lies at the heart of discourse ethics in particular, which very consciously sets out to identify communicative competence as a presupposition of the communicative process which, in the view of its adherents, is the only source of legitimation in modern pluralistic society.

II. MORAL AND COMMUNICATIVE COMPETENCE

The sense of justice plays a central role in the two most ambitious political theories of our time, Rawls's justice as fairness and Habermas's discourse ethics. What's more, it plays a *similar* role in both Rawls's and Habermas's system. This is perhaps not surprising, given that both pursue similar projects: to develop a theory of the legitimacy of political institutions in a pluralistic society. Without the aid of religious or moral authority, however derived and however constituted, they struggle to find some other, formal, foundation for political legitimacy, or justice. In Habermas's view,

[o]nly the rules and communicative presuppositions that make it possible to distinguish an accord or agreement among free and equals from a contingent or forced consensus have legitimating force today. Whether such rules and communicative presuppositions can best be interpreted and explained with the help of natural law constructions and contract theories or in the concepts of a transcendental philosophy or a pragmatics of language or even in the framework of a theory of the development of moral consciousness is secondary⁵⁹

The difference between Rawls and Habermas is that Rawls pursued the first option ("natural law constructions

59. JÜRGEN HABERMAS, *Legitimation Problems in the Modern State*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 178, 188 (1979).

and contract theories”) and Habermas the third (“a pragmatics of language”). As we’ll see, however, the two converge in their common interest in the fourth—and their rejection of the third (“transcendental philosophy”). Both have tried to anchor their theories of legitimation in research on developmental psychology, and the work of Piaget and Kohlberg on moral competence in particular. And both have stressed the analogy between their work and that of Noam Chomsky, insofar as Chomsky is interested in the nature and origin of linguistic competence, which may or may not differ from that of moral competence.

The notion of competence, or capacity, plays a crucial role in Rawls’s and Habermas’s search for formal foundations. While Rawls focused more straightforwardly on moral competence, Habermas sought to map out a more general—and formal—“communicative competence.” While Rawls explored the preconditions for moral behavior, and thus for just behavior since justice is the political manifestation of morality, Habermas sought to specify the preconditions of social interaction, and therefore communication, in general, without limiting himself to moral discourse.

Rawls gave much thought to what he called the basis of equality, i.e., “the features of human beings in virtue of which they are to be treated in accordance with the principles of justice.”⁶⁰ By contrast, Habermas preferred to focus on a more abstract “interactive competence,” i.e., those capacities that allow a speaker to function in the sort of discourse that defines public life, “the general qualifications for role behavior that together form interactive competence”⁶¹ and “the ability of a speaker oriented to mutual understanding to embed a well-formed sentence in relations to reality.”⁶²

For our purposes most significant, Rawls and Habermas agree that the requisite competence includes the sense of justice. Rawls explains that to be entitled to equal

60. JOHN RAWLS, *A THEORY OF JUSTICE* 504 (1971).

61. JÜRGEN HABERMAS, *Moral Development and Ego Identity*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY*, *supra* note 59, at 69, 86.

62. JÜRGEN HABERMAS, *What is Universal Pragmatics?*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY*, *supra* note 59, at 1, 29.

justice, all we need is "the capacity for moral personality."⁶³ Human beings are moral persons, i.e., they have the capacity for moral personality, insofar as they share two characteristics: "they are capable of having (and are assumed to have) a conception of their good" and "they are capable of having (and are assumed to acquire) a sense of justice."⁶⁴

The sense of justice in turn is defined as "a skill in judging things to be just and unjust, and in supporting these judgments by reasons" and "[a] desire to act in accord with these pronouncements and expect a similar desire on the part of others."⁶⁵ In short, the sense of justice, which Rawls alternately refers to as a "moral capacity"⁶⁶ or "power,"⁶⁷ a "mental capacity . . . involving the exercise of thought,"⁶⁸ and a "moral sentiment"⁶⁹ or "sensibility,"⁷⁰ is "an effective desire to apply and to act from the principles of justice and so from the point of view of justice."⁷¹

That sense of justice, however, itself presupposes two capacities, one cognitive, the other volitional. To be *effective*, the sense of justice presupposes a certain skill, the ability to identify and understand principles of justice well enough to apply them to a particular case (the cognitive capacity familiar from the insanity defense in criminal law⁷²). But that's not enough. The person, once she has understood and applied the principles properly, must be able to act

63. RAWLS, *supra* note 60, at 505.

64. *Id.*

65. *Id.* at 46.

66. *Id.*

67. *Id.* at 51.

68. *Id.* at 48.

69. *Id.* at 51.

70. *Id.* at 46.

71. *Id.* at 567.

72. See, e.g., MODEL PENAL CODE § 4.01(1) (1962). It's no accident that insanity in criminal law is often described as absence of a sense of justice. See Janet A. Tighe, *Francis Wharton and the Nineteenth-Century Insanity Defense: The Origins of a Reform Tradition*, 27 AM. J. LEGAL HIST. 223, 239 (1983) (moral insanity).

according to them (the volitional capacity⁷³). Add to these capacities the *willingness*, or desire, to do so, and one has a full-fledged sense of justice.

In *A Theory of Justice*, Rawls stresses this last, motivational, aspect of the sense of justice, as opposed to the capacities that must be presupposed for its exercise. (The criminal law, by contrast, focuses on the underlying capacities.) It's this motivational component that assures the *stability* of a set of principles of justice. Rawls argues that it's not enough to have a set of principles of justice, and to establish political institutions on their basis. Members of such a "well-ordered society" also need to see their sense of justice reflected in these institutions. If they see justice being done, and justice being done to them in particular, they are more likely to act according to their sense of justice—and therefore comply with the rules of the well-ordered society, which are presumptively just—rather than in their personal interest. In such a society, the sense of justice as a desire to act according to the principles of justice simply becomes the "desire to comply with the *existing rules*."⁷⁴

Ideally, the members of a well-ordered society eventually come to realize that, in a society governed by the principles of justice, their personal interest also is the public interest, so that acting according to their sense of justice is also to their personal advantage. In Rawls's language, they see that their conceptions of the good and of the just converge, that "being a good person . . . is indeed a good for that person."⁷⁵ But being good in such a well-ordered society, "in which institutions are just and this fact is publicly recognized," means "having an effective sense of justice."⁷⁶

For our purposes, the role of the sense of justice in guaranteeing stability is of only secondary importance. Even Rawls acknowledges that stability is only a supplemental factor that the parties in the original position

73. See, e.g., MODEL PENAL CODE § 4.01(1) (1962).

74. RAWLS, *supra* note 60, at 312.

75. *Id.* at 577.

76. *Id.*

will consider in their deliberations about the basic design of their political community, everything else being equal.⁷⁷ Still, the connection between the sense of justice and the stability of a political order may provide some content to the otherwise dangerously empty notion that "law in the last analysis must reflect the general community sense of justice."⁷⁸

Rawls's account of the convergence of the sense of justice and individual conceptions of the good is his attempt to address the problem of alienation, first identified by Hegel. To Hegel the legitimacy and therefore the stability of a political order depended on the extent to which it reflected rationality, and in particular the rationality of its constituents, and was seen by them to do so. Rawls takes from Hegel the general idea of identification between individual and state, but substitutes the concept of the sense of justice for the more ambitious, and notoriously nebulous, Hegelian notion of rationality, or Reason.

So in Rawls, the stability of the state is achieved by ensuring that its constituents see themselves reflected in it, not as fellow manifestations of Reason, but as moral persons. They will obey the state's commands insofar as they perceive the state as treating them as persons entitled to equal justice. But Rawls ends up not all that far from Hegel. For rationality, though understood more narrowly as individual intellectual capacity,⁷⁹ turns out to be among the prerequisites for moral personhood.⁸⁰

Rawls's account of the acquisition of the motivational aspect of the sense of justice is straightforward. Essentially, we develop a desire—as opposed to a capacity—to act justly, i.e., from the standpoint of justice, because we've been treated kindly in the past. We love our parents because they love us, and treat us accordingly.⁸¹ We come to like, if not love, our colleagues because they like us, and treat us

77. *See id.* at 455.

78. *State v. Maldonado*, 645 A.2d 1165, 1181 (N.J. 1994) (quoting Frances B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70 (1933)).

79. *See RAWLS*, *supra* note 60, at 46.

80. *See id.* at 12.

81. *Id.* at 463.

accordingly.⁸² And so it is with the sense of justice, properly speaking: “We develop a desire to apply and to act upon the principles of justice [i.e., a sense of *justice*] once we realize how social arrangements answering to them have promoted our good and that of those with whom we are affiliated,”⁸³ i.e., our family and our “associates.”⁸⁴

Now this reciprocal account well may be accurate as a matter of developmental psychology (though Rawls does not much concern himself with garnering empirical support). I may well be more likely to show kindness to strangers if strangers have shown kindness toward me, or my own. But whether this account has any normative significance is another matter—and Rawls doesn’t claim it has. It’s a supplementary speculation about why we might be inclined to act according to our sense justice, rather than according to our personal advantage. And it does that well enough.

More interesting is the question of why we develop a sense of justice in the first place, not why we continue to act on it. To acquire a sense of justice presumes that we are *capable* of viewing and treating another person as a moral person, i.e., as a person entitled to justice. We can’t be motivated to exercise a capacity we do not have.

One way of seeing the limited relevance of motivation, or desire, for a theory of *justice* is to think about what happens if someone possesses the intellectual capacity for a sense of justice, but not the motivation to act on it. In other words, let’s consider the fact of crime, a phenomenon that Rawls concedes exists even in a well-ordered society. Without the possibility of crime in such a society governed by the principles of justice, there would be no need for a separate account of stability.

Now in an important sense a criminal offender, who by hypothesis is a person with a motivational deficit, is clearly entitled to equal justice. While he may lack a full-fledged sense of justice, i.e., he may not have *realized* his capacity for a sense of justice, he does have the requisite capacity. And, as Rawls stresses repeatedly, the capacity is enough

82. *Id.* at 470.

83. *Id.* at 474.

84. *Id.* at 470.

for moral personhood; its full realization isn't required. In other words, we may "assume," for purposes of theory-building, that everyone who is capable of having a sense of justice will also actually have acquired that sense, but that assumption is not irrefutable.⁸⁵ In legal terms, there is a rebuttable presumption that everyone with the capacity for a sense of justice will in fact have a sense of justice.

Consider the insanity defense. It removes certain individuals from the scope of retributive justice. It is impossible to direct resentment—as a moral sentiment, or a sentiment of justice—at an insane person because such a person lacks the cognitive and volitional capacity required for a sense of justice. She cannot understand the principles of justice, nor can she apply them to her case or, even if she can do both, she can't get herself to act accordingly—at least in modern versions of the defense.⁸⁶

If, by contrast, the absence of a *motivation* to act justly even in the presence of the capacity to do so would remove a person from the realm of resentment, or even indignation, then every criminal offender by hypothesis would be beyond punishment. For the very act of crime illustrates the lack of motivation to act justly, assuming of course we're dealing with crime in the proper sense, excluding so-called "police" or "regulatory" offenses, which have nothing to do with justice or injustice, and in this sense are *ajust*. Crime, by contrast, is an act of injustice, in that it consists of one person treating another as a nonperson.⁸⁷

Now the absence of motivation alone surely can't remove a person from the community of retributive justice. But perhaps the *reason* for this absence is relevant. Recall that Rawls sees the development of this motivation as the result of experiencing similarly motivated behavior directed toward oneself—and others with whom one identifies—by others. So I love my parents because they love me, like my colleagues because they like me, and respect fellow persons

85. *Id.*

86. *See, e.g.*, MODEL PENAL CODE § 4.01(1). Traditionally, criminal insanity was limited to the absence of cognitive capacity. *See M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.).

87. *See generally* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (2002).

because they respect me. This raises the obvious question of what to do with individuals who failed to experience these acts of kindness at all, or any, of these levels of ethical life.

The problem is aggravated by the fact that Rawls postulates a cumulative and temporal order among familial love, associational affection, and moral respect. The acquisition of one presumes the acquisition of the preceding sentiment, so that moral respect presumes associational affection which in turn presumes familial love. This means that already the lack of parental love will block the development of associational affection and therefore also of the sense of justice later on. And the image of family life that Rawls paints does not match the reality of the childhood experiences of a good many criminal offenders, or for that matter of many who end up leading perfectly law-abiding lives:

The parents . . . love the child and in time the child comes to love and to trust his parents The parents' love of the child is expressed in their evident intention to care for him Their love is displayed by their taking pleasure in his presence and supporting his sense of competence and self-esteem. They encourage his efforts to master the tasks of growing up and they welcome his assuming his own place.⁸⁸

The reason why someone's lack of motivation to act justly might matter has nothing to do with the presence or absence of a sense of justice. The question here is whether this "defect or deprivation," as Rawls describes it,⁸⁹ can be attributed to that person, whether it is her "*fault*."⁹⁰ But even to assess her fault, as a moral concept, already is to recognize her membership in the community of justice, in this case the community of retributive justice. Fault, thus, cannot be a relevant criterion for determining moral status.

Rather than focus on origins, we might consider distinguishing between *levels* of desire, or motivation.

88. RAWLS, *supra* note 60, at 463-64. Rawls of course isn't *trying* to describe actual child rearing practices. He is laying out the process of acquiring a sense of justice in a well-ordered society, where the parents are well-intentioned and the children well-behaved.

89. *Id.* at 506.

90. *See* Rawls, *supra* note 57, at 302.

Perhaps we commit crimes not because we have *no* desire to act justly, but because we have an insufficiently strong desire, which can falter in the face of great temptation, i.e., of some opportunity to advance our personal interest at the expense of another, and therefore of justice. (Would I snatch your expensive laptop computer, for instance, if I could be sure that I wouldn't get caught?)

Even if this makes sense in theory, and I'm not sure it does since the only evidence of the level of person's moral motivation might consist of its insufficiency as evidenced in the criminal act, there remains the problem that *as a matter of fact* we don't inquire into a person's desire to act justly when it comes to deciding whether she is subject to retributive justice. All that matters is that she *could* have acted otherwise, not how much she would have wanted to.

Here it might be useful to distinguish the sense of justice, a *moral* sentiment, from other senses of obligation, or *ethical* sentiments. Many criminal offenders do identify very strongly with fellow members of certain substantive communities, including their family and extra-familial, associations, like gangs or sports teams. These offenders, no matter how devoted they might be to their own, need not have developed a sense of *justice*. They obviously possess the capacity for mutual identification required for any sense of obligation toward another. If they operate within a gang, rather than as lone wolves (as serial killers tend to do), they also have shown some reflective capacity for identification outside the biological, or quasi-biological, family unit. But they need not have developed the specific ability to take the moral point of view, and thus to see others as persons. Instead, the lack of this ability may well account for their tendency to see others exclusively in terms of their membership, or nonmembership, in a substantive community, such as a gang. This attitude accounts for the ferocity of gang warfare, for instance, but also of international, and even more plainly of interethnic, conflict.

None of this is to say, by the way, that the rational capacity for a sense of justice is sufficient for criminal liability. It's sufficient merely for treatment as a moral person, and therefore for the assessment of moral desert. It is *necessary* for criminal liability (hence the insanity defense), but not sufficient. For criminal liability, the person must actually have acted on that capacity, i.e., she

must have manifested her capacity for personhood in an act. Sanity is required, but so is voluntariness and culpability. Moral condemnation, by contrast, can attach to thoughts alone.

So the absence of any or even a sufficiently strong motivation to act justly does not remove a person from the realm of *retributive* justice. The mere capacity to act justly is enough. Criminal punishment treats the offender with the requisite rational capacity for a sense of justice as though she also possessed the requisite motivational capacity. It's "rehabilitative" in the sense that by treating the offender as having a fully realized sense of justice, she will in fact develop one, and act accordingly in the future.⁹¹

Individuals with the rational capacity for a sense of justice thus can still be punished, even if they lack the motivational aspects of the sense of justice, "the capacity for the natural attitudes of love and affection, faith and mutual trust."⁹² This conclusion is confirmed by the fact that the motivationally challenged remain "full subject[s] of rights"⁹³ in other contexts of justice as well. As a matter of *distributive* and of *restorative* justice (the flipside of retributive justice), then, someone without the desire to act justly is just as entitled to just treatment as anyone else.

The lack of desire to comply doesn't by itself disqualify anyone from fair treatment in the distribution of goods. Even if her disrespect for principles of justice has manifested itself in criminal behavior, we may decide to punish her, and therefore limit her exercise of certain rights, but we do not remove her from the realm of justice altogether, nor would we punish her for her motivational deficit alone, but instead for her unjust treatment of another person who herself was entitled to just treatment. This is not to say that this was always so; but criminal offenders are no longer "outlawed," stripped of their

91. This is the sense in which Hegel's essentially retributivist theory of punishment also has a reformative aspect. See, e.g., J. Ellis McTaggart, *Hegel's Theory of Punishment*, 6 INT'L J. ETHICS 479 (1896).

92. Rawls, *supra* note 57, at 302.

93. *Id.* at 305.

citizenship, attainted, or deprived entirely and permanently of their civil rights.⁹⁴

The offender's manifest disrespect for justice, and therefore for other persons, likewise doesn't deprive her of the right to have the state restore her personhood through the institutions of civil and criminal justice, should she ever be the victim rather than the offender—the object rather than the subject of a crime, or any other unjust act. From the perspective of justice, a motivationally challenged murderer is as entitled to receive damages for breach of contract or tortfeasance, or to have her murderer prosecuted, as anyone else. (Once again, whether actual state practice always respects this principle of justice and prosecutors vigorously in fact pursue crimes committed against prison inmates, or offenders in general, is another matter.⁹⁵) In Rawls's formulation, "the duty of justice is owed only to those who can complain of not being justly treated,"⁹⁶ and she most certainly can *complain* about unjust treatment if she is being dealt with as anything other than an equal and rational person, even if her complaint will not in fact be heard or acted upon.

So far, we have noted cases in which a motivational deficit doesn't affect a person's right to make justice claims. We owe a duty of justice to anyone who possesses the basic rational capacities, cognitive and volitional, that are necessary for an effective sense of justice. But being entitled to just *treatment* doesn't imply being entitled to *decide* matters of justice. Someone devoid of respect for other persons, without the desire to act justly, cannot dispose of

94. See U.S. CONST. art. I, § 9 (prohibition of bills of attainder); *Trop v. Dulles*, 356 U.S. 86 (1958) (forfeiture of citizenship constitutes cruel and unusual punishment); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 31 (2d ed. 1898) (outlawry in medieval law). Nonetheless traces of these practices remain in contemporary American law, as is evidenced by the widespread practice of felon disenfranchisement. See generally PATRICIA ALLARD & MARC MAUER, *REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS* (2000), available at http://www.sentencingproject.org/pubs_05.cfm.

95. Cf. David Grann, *How the Aryan Brotherhood Became the Most Murderous Prison Gang in America*, *NEW YORKER*, Feb. 16, 2004, at 157, 167 (law enforcement officials describing intraprisson crimes as N.H.I.s—"No humans involved").

96. Rawls, *supra* note 57, at 303.

matters of justice, because she is incapable of assuming the standpoint of justice. Put another way, anyone is precluded from determining matters of justice, or resolving justice disputes, insofar as she cannot act according to her sense of justice, rather than personal interest.

To take the extreme case of criminal law again, a sociopathic offender has the right to a just disposition of her case; she does not have the right to sit in judgment of others. Nor does she have the right to sit in judgment of herself. When it comes to the ability to assume the perspective of justice, we ask much more of our judges—and our jurors—than we do of our criminal defendants.

The defendant's right to be treated justly demands not that she decide her case, but that she be permitted—but not required—to *participate* in the process culminating in a decision. Both the defendant and the prosecutor in a criminal case, as well as the defendant and the plaintiff in a civil case, must be allowed to participate in the application of the appropriate norms to their conflict. But they need not, and in fact may not, decide their case. For if they were to decide their case, they could not be trusted to be motivated by principles of justice. The temptation to be moved by considerations of personal advantage would be too great.⁹⁷ Without the opportunity to participate in the resolution of their dispute, the parties would be treated merely as objects of disposition, rather than as agents capable of self-determination: Their autonomy must be respected even if they lack an effective sense of justice. Deciding matters of justice, by contrast, requires not only the capacity for autonomy, but an *effective* sense of justice as well. This function is performed not by the parties to the conflict, but by a third party, the judge, or the jury. This third, impartial, party is the institutional manifestation of

97. This is the foundation of the age-old rule that no one may be a judge in his own cause, as a matter of justice—which on the face of it is a direct *violation* of the fundamental principle of legitimacy in the modern state, autonomy, rather than its vindication. In fact, it's not a primary principle of justice, but an enabling principle of prudence which makes justice possible given the background realities of human nature in a not-so-well-ordered society. See, e.g., 1 POLLOCK & MAITLAND, *supra* note 94, at 410 (judgment of peers, rather than king, in treason cases "based on the maxim that no one should be judge in his own cause").

the standpoint of justice in the face of likely self-interestedness, or partiality, among the parties to the conflict.

But given the unlikelihood of actual, rather than potential, moral self-judgment—most dramatically illustrated by the refusal of guilty offenders to confess—how can the autonomy of the parties be respected nonetheless, and the legitimacy of the process ensured? In two ways, one direct, the other indirect: (1) directly (but not dispositively), through the parties' right to *participate* in the process, and (2) indirectly (and dispositively), through the resolution of the conflict by a third party in a process of judgment that reflects both parties' autonomy through roletaking from the perspective of justice, i.e., through exercising her sense of justice. The jury decides as the parties would decide, had they assumed the standpoint of justice.

Ideally, of course, the parties would resolve their dispute in fact through settlement, considering what is just. The objection to this disposition is not principled, but once again prudential. The question is whether the parties are so situated with respect to each other that we can be confident that their negotiations will take the form of a justice discourse among equal persons, rather than simply reflecting their power differential, in which case the stronger party may very well trample the autonomy of the weaker.⁹⁸ The most extreme case here is, once again, presented by the criminal law, where the power differential between the state and the accused is notoriously steep: Plea bargaining, the process by which over 90% of criminal cases are resolved, is not objectionable in principle (on the contrary, it is preferable as an unmediatedly autonomous process), but as a matter of prudence given the radically unequal bargaining positions of prosecutors and defendants.⁹⁹

98. This concern, arguably, underlay the maximum hours law struck down in the famous case of *Lochner v. New York*, 198 U.S. 45 (1905), and accounts for much of modern labor law, a curious mixture of direct and indirect empowerment.

99. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547 (1997); see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (proposing reforms to level the playing field).

Now in the case of the definition—rather than the application—of the principles of justice themselves, or other subsidiary norms in keeping with these principles, the same distinction can be drawn. While anyone with the rational capacity for moral personhood must be permitted to participate in the discourse about the definition of norms, only those persons who are actually motivated by their sense of justice are entitled to decide what the norm should look like, i.e., to lay down the law, to *legislate*, in the true sense of the word.

This, I think, is the limited meaning of Kant's otherwise cryptic remark that the criminal may not make criminal law.¹⁰⁰ Insofar, but only insofar, as she is self-interested, the criminal cannot take the standpoint of justice. If, however, she chooses to exercise her capacity for a sense of justice, and to respect other persons as such, she is entitled not only to participate in the debate about the definition of norms, but to define the norms herself, even if she has been labeled a "criminal" on the basis of past conduct.

Here too the distinction between participation and decision finds an institutional manifestation, this time in the distinctions between elected representatives and the electorate, and between the rights to be voted for and to vote (or the passive and active franchise). The body of representatives itself is charged with deciding issues from the standpoint of justice, a constraint that doesn't apply to their constituents, who nonetheless are permitted to participate in the debate, including by casting their vote. The act of voting does not require taking the standpoint of justice. Voters regularly do, and are expected to, manifest merely their personal self-interest.

This is not true of the persons they vote for. These representatives decide definitional matters of justice in general as their constituents would, *from the standpoint of justice*, i.e., by imaginatively exercising their sense of justice, much like jurors decide applicatory questions of justice in particular cases. The distinction between participation and decision also is illustrated by the practice of *lobbying*, whose practitioners are entitled to introduce arguments into public debate which, if considered from the

100. KANT, METAPHYSIK, *supra* note 37, at 457 (A203-04/B232).

proper standpoint of justice, may win the day, despite the obviously, and explicitly, self-serving motivation for their indirect introduction into the justice discourse by persons without the authority to bring it to a resolution.

And here too we find the legitimacy of the process, in this case of defining rather than applying norms, derive itself from both direct participation and indirect, vicarious, self-judgment. The representatives re-present their constituents, they decide as if they were their constituents, through empathy from the standpoint of justice; the representatives *decide* as the represented would decide if they were to exercise their capacity for a sense of justice, rather than to pursue their personal advantage.

To put it yet another way, only the capacity for moral personhood is required to *make* a justice claim, to "complain of not being justly treated," i.e., to demand justice. But the actual exercise of that capacity is required to *dispose* of such a claim, i.e., to do justice. To do justice and to take the standpoint of justice are two ways of expressing the same idea.

Rawls developed the construct of the original position to capture what it means to take the standpoint of justice. Persons in the original position, in deliberating about the principles of justice, abstract from all characteristics of their fellow deliberators that are irrelevant from the standpoint of justice. In that way, they regard each other as moral persons. Insofar as we imagine ourselves in the original position, which is an imaginative thought experiment we can undertake at any time, we are acting on our sense of justice. That doesn't mean that we disregard our self-interest. It simply means that we regard our self-interest as the interest of someone who is nothing more than a moral agent, and in that sense is equal to all other participants in the discourse. In Rawls's words, the point of the veil of ignorance—i.e., the abstraction from morally irrelevant characteristics—is "to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice."¹⁰¹

101. RAWLS, *supra* note 60, at 19.

In Rawls's scheme, thinking about justice thus requires two kinds of imaginative roletaking. First, we must imagine ourselves in the original position. Second, when in the original position, we must imagine ourselves in the shoes of everyone who might be affected by the justice decisions we make, and the choice of principles of justice in particular. The same holds, analogously, for our assumption of the standpoint of justice to imaginatively deliberate on lower-order norms under the conditions of a modified original position, in which the veil of ignorance is partially lifted to reveal to us facts about our particular political community, as for example in constitutional or legislative deliberations. But since we take the standpoint of justice, this empathic roletaking considers objects of identification not only as having certain interests, but also as being objects of justice, i.e., as persons who can make justice claims.

Understood as a particular, moral, form of empathic roletaking, the sense of justice thus plays a central role in Rawls's theory of justice, and not merely as a guarantor of the stability of a well-ordered society. It plays a similar role in Habermas's discourse theory. As Thomas McCarthy has stressed, the discourse participants are conceptualized as "moral agents" who are "trying to put themselves in each other's shoes."¹⁰² And again, "Habermas's discourse model, by requiring that perspective-taking be general and reciprocal, builds the moment of empathy *into* the procedure of coming to a reasoned agreement: each must put him- or herself into the place of everyone else in discussing whether a proposed norm is fair to all."¹⁰³ Both Habermas and Rawls rely on the sense of justice. They differ on the nature of the moral deliberation, or discourse, that depends on it. Rawls is content with an individual's thought experiment (the original position and its variations), whereas Habermas requires actual public discourse.

Rawls began by constructing an abstract account of the moral point of view, the original position, including an

102. Thomas McCarthy, *Introduction* to JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* vii, viii (Christian Lenhardt & Shierry Weber Nicholsen, trans., MIT Press 1990) (1983).

103. *Id.* at viii-ix.

account of the persons who take that point of view. From that construction, he tried to derive a set of principles of justice, as one possible, rational, outcome of deliberations in the original position, given its constraints.

Habermas starts not far from Rawls, and then doesn't go quite as far. Instead of constructing the original position, a thought experiment designed "simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice,"¹⁰⁴ Habermas constructs an ideal speech situation that, based on an analysis of actual communicative behavior, captures the *presuppositions* of actual public discourse, including discourse about what is just. In the words of his fellow critical theorist Hans-Otto Apel, Habermas's "universal pragmatics" is about determining "what we must necessarily always already presuppose in regard to ourselves and others as normative conditions of the possibility of understanding; and in this sense, what we must necessarily always already have accepted."¹⁰⁵ These presuppositions in turn generate certain norms of deliberative conduct that, if followed, add up to what Habermas calls the ideal speech situation. An agreement is legitimate insofar as the conditions under which it was reached match the conditions of the construct of the ideal speech situation. The ideal speech situation, in other words, embodies all those "rules and communicative presuppositions that make it possible to distinguish an accord or agreement among free and equals from a contingent or forced consensus."¹⁰⁶

The ideal speech situation thus serves a function analogous to that of the original position in Rawls's theory. But unlike Rawls, Habermas is content with constructing the abstract conditions of legitimacy. He does not move on to develop a particular theory of justice, i.e., a set of principles of justice that might result from deliberation under these conditions.

This is an important difference between Habermas's and Rawls's work. But it's not of particular interest for our

104. RAWLS, *supra* note 60, at 18.

105. HABERMAS, *supra* note 62, at 2.

106. HABERMAS, *supra* note 59, at 188.

purposes. What matters to us is the similarity between Habermas's and Rawls's approach, and one point of similarity in particular, namely their recognition of the significance of a sense of justice in modern political theory. That similarity emerges most clearly when we focus on their common interest in the concept of fundamental communicative (Habermas) or moral (Rawls) competence, and in particular in their shared interest in the work of Piaget and Kohlberg, on the one hand, and of Noam Chomsky, on the other.

III. THE SENSE OF JUSTICE AND THE SENSE OF LANGUAGE

In their search for what we must presuppose about a person participating in justice deliberation (moral personhood for Rawls, communicative competence for Habermas) both ended up with the notion of the sense of justice as a bundle of human capacities that are developed over time, through the experience of social life in ever widening communities. Rawls and Habermas both view their task as analyzing the sense of justice, which both take to be a basic human capacity. Both assume that we already know what it means to take the moral point of view or to engage in the discourse constitutive of interpersonal relations. It's simply a matter of bringing these presuppositions to light.

Habermas seeks to expose that "intuitive knowledge" which lets us engage in interpersonal dialogue. "Ascertaining the so-called intuitions of a speaker," he explains, "is already the beginning of their explication."¹⁰⁷ This communicative competence presupposes certain cognitive skills that make it possible to recognize and to comply with rules. But as an interactive, or interpersonal, competence it also requires the ability to distinguish between self and other, and eventually to place oneself in the shoes of other participants in the interaction. This empathic component also explains the connection between interactive competence and moral consciousness, which—as Rousseau already pointed out—requires the very same capacity for imaginative roletaking. As Habermas puts it,

107. HABERMAS, *supra* note 62, at 19.

drawing on the work of Piaget and Kohlberg, "[t]he correlation between levels of interactive competence and stages of moral consciousness . . . means that someone who possesses interactive competence at a particular stage will develop a moral consciousness at the same stage."¹⁰⁸

In other words, the sense of language and the sense of justice overlap. They involve the same fundamental capacities. To understand one therefore is to understand (much about) the other. Rawls makes this connection between the two senses, or competences, even more explicit than does Habermas: "It is plausible to suppose that any being capable of language is capable of the intellectual performances required to have a sense of justice."¹⁰⁹ What's more, Rawls sees the task of political and moral theory as analogous to that of linguistic theory. While the former seeks to "describ[e] our sense of justice,"¹¹⁰ the latter attempts to describe "the sense of grammaticalness."¹¹¹

The precise relationship between the sense of justice and of language depends on one's account of each sense. Piaget and Kohlberg argued that the senses of justice and of language resemble all other cognitive skills in that they are socially determined except for an innate capacity, a sort of general intelligence. On this account, the intellectual capacity underlying the sense of justice and the sense of language would coincide. By contrast, Chomsky postulated the existence of an innate and exclusive language "organ" equipped with quite detailed instructions for the speedy generation of common language grammars. In Chomsky's theory, the capacity for the sense of justice presumably would differ from the capacity for a sense of language as the latter capacity is unique.¹¹²

108. HABERMAS, *supra* note 61, at 91.

109. Rawls, *supra* note 57, at 302.

110. RAWLS, *supra* note 60, at 46.

111. *Id.* at 47.

112. On the debate, see LANGUAGE AND LEARNING: THE DEBATE BETWEEN JEAN PIAGET AND NOAM CHOMSKY (Massimo Piatelli-Palmarini ed., 1980).

Rawls and Habermas both rely on Piaget and Kohlberg, as well as on Chomsky.¹¹³ They adopt Piaget and Kohlberg's account of the development of cognitive and moral competence—the sense of justice. Yet they clearly view themselves as pursuing Chomsky's project of mapping the “linguistic intuition of the native speaker”¹¹⁴—the sense of language—in the moral and political sphere.¹¹⁵ As the project of Chomsky's universal linguistics is to “reconstruct the rule consciousness common to all competent speakers,” so Habermas's universal pragmatics analyzes “a universal capability, a general cognitive, linguistic, or interactive competence.”¹¹⁶ Just as Rawls tries to “characterize one (educated) person's sense of justice”¹¹⁷ in a well-ordered society and Habermas explores the interactive competence presupposed in discourse within an ideal speech situation, so Chomsky is interested in the linguistic competence of “the ideal speaker-listener, in a completely homogeneous speech community, who knows its language perfectly and is unaffected by such grammatically irrelevant conditions as memory limitations, distractions, shifts of attention and interest, and errors (random or characteristic) in applying his knowledge of the language in actual performance.”¹¹⁸

The resolution of the debate between Piaget/Kohlberg and Chomsky about the nature of the sense of language is of secondary importance for our purposes. What matters is that, as Habermas remarks, both theories attempt “to reconstruct the universal linguistic ability of adult

113. This feature of Rawls's work, and the connections between moral theory and linguistics in general, only recently have begun to attract attention. See, e.g., GILBERT HARMAN, *Moral Philosophy and Linguistics*, in *EXPLAINING VALUE AND OTHER ESSAYS IN MORAL PHILOSOPHY* (2000); John Mikhail, *Rawls' Linguistic Analogy: A Study of the “Generative Grammar” Model of Moral Theory* (Cornell University Ph.D. diss. 2000); Susan Dwyer, *Moral Competence*, in *PHILOSOPHY AND LINGUISTICS* 169-70 (K. Murasugi & R. Stainton eds., 1999).

114. NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* § 4 (1965); see also Hans-Martin Gauger & Wulf Oesterreicher, *Sprachgefühl und Sprachsinn*, in *SPRACHGEFÜHL: VIER ANTWORTEN AUF EINE PREISFRAGE* 9, 29 (Deutsche Akademie ed., 1982).

115. RAWLS, *supra* note 60, at 47.

116. HABERMAS, *supra* note 62, at 14.

117. RAWLS, *supra* note 60, at 50.

118. CHOMSKY, *supra* note 114, § 4.

speakers. (In a strong version, this linguistic competence means the ability to develop hypotheses that guide language acquisition on the basis of an innate disposition; in a weaker version, linguistic competence represents the result of learning processes interpreted constructivistically in Piaget's sense.)¹¹⁹ And it is this general project that marks the point of convergence between moral, political, and linguistic theory, and the study of the sense of justice and that of language.

Now the concept of a sense of language, or "what the Germans call *Sprachgefühl*,"¹²⁰ has been subject to many of the same misinterpretations as that of a sense of justice (or what the Germans call *Rechtsgefühl*). Both concepts received the greatest attention in Germany, and there underwent similar transmogrifications. Both concepts emerged from the rich soil of German Romanticism, at the beginning of the nineteenth century. And both were bound up with the Romantics' rediscovery of German nationalism. The aggressively irrational National Socialist notion of the healthy sentiments of the German *Volk* resonated with early nineteenth century talk of a communal German sense of justice.¹²¹ Likewise, the sense of language was conceived of as a communal attribute, a defining characteristic of the German *Volk*. According to the great Romantic linguist (and collector of German fairy tales), Jacob Grimm, a *Volk* was but a community of people who speak the same language and share the same sense of language.¹²² Just as the sense of justice, the sense of language could be found in its pure form among the simple folk. German lay jurors were said to have immediate access to truth and justice, unobstructed by juridical learning derived from the traditional study of Roman law texts.¹²³ Likewise, Grimm

119. HABERMAS, *supra* note 62, at 32.

120. EMMON BACH, AN INTRODUCTION TO TRANSFORMATIONAL GRAMMAR 3-4 (1964) ("What we must account for [in linguistics] includes what is known as the native speaker's 'intuition' about what he says and hears, what the Germans call *Sprachgefühl*.").

121. See Dubber, *supra* note 7, at 229.

122. 16 GRIMMSCHES WÖRTERBUCH 2758 (entry "Sprachgrenze") (quoting Jacob Grimm).

123. See Dubber, *supra* note 7.

admired (German) women for “their healthy maternal wit (*gesunder Mutterwitz*)” and “their unspoiled sense of language.”¹²⁴

At the same time, however, and again in analogy to the sense of justice, the sense of language also was perceived as the special skill of the expert, rather than the instinctive sense of correctness shared by all native speakers. As the experienced jurist developed a *sensus iuridicus*, a feel for the correct solution of a juridical problem, so the expert linguist had a sense for proper grammar. It was the sense of language thus understood that the early Romantic Dictionalrian Joachim Heinrich Campe invoked when he declared that he distinguished between correct and incorrect language usage on the basis of his sense of language, which he shared with all other professional writers.¹²⁵ Similarly, the sense of language was also a sense *for* language, a feeling for the appropriate expression, the proper turn of phrase, a skill that could be acquired and perfected.¹²⁶

But as in the tradition of the sense of justice, so also in that of the sense of language, among the heap of communal and elitist misconceptions that today retain at best historical—or perhaps aesthetic—interest, but have no place in a theory of the modern democratic state, there is the beginning of a project that is worth continuing. And once again it is enlightenment thought that produced an account that looks as fresh today as it did two centuries ago. In the case of the sense of justice, this foundation was laid, as we saw earlier, by the Scottish moral sense thinkers, along with Kant and Hegel. In the case of the sense of language, that honor goes to Wilhelm von Humboldt.

It was Humboldt who first postulated the sense of language as a universal human linguistic competence, in particular the capacity of generative grammar, which accounts for the otherwise inexplicable phenomenon of the

124. See GRIMMSCHES WÖRTERBUCH, *supra* note 122, at 2753.

125. JOACHIM HEINRICH CAMPE, *Preface* to WÖRTERBUCH DER DEUTSCHEN SPRACHE xvi (Braunschweig 1810).

126. *E.g.*, 3 MORIZ HEYNE, DEUTSCHES WÖRTERBUCH (Leipzig: S. Hirzel 1906) (entry “Sprachgefühl”).

acquisition of basic grammatical competence within a short span of time and without extensive environmental guidance or actual language training.¹²⁷ (Humboldt may well have picked up the concept of a sense of language from Campe, who was his private tutor as a child, and with whom he apparently stayed in touch throughout his life.¹²⁸)

Chomsky has always acknowledged his debt to Humboldt.¹²⁹ Humboldt's conception of the sense of language as a basic competence mirrors Kant's view of the sense of justice as the capacity for moral empathy. As Chomsky explains, Humboldt saw that it's because of "the virtual identity of this underlying system in speaker and hearer that communication can take place, the sharing of an underlying generative system being traceable, ultimately, to the uniformity of human nature."¹³⁰ So language is possible because we share a sense of language; and justice is possible because we share a sense of justice.

For Piaget—and Kohlberg, Rawls, and Habermas after him—the sense of language and the sense of justice develop as the child learns to integrate herself into the social world around her. Both arise "through the progress made by cooperation and mutual respect—cooperation between children to begin with, and then between child and adult as the child approaches adolescence and comes, secretly at least, to consider himself as the adult's equal."¹³¹ As the child learns to navigate an ever wider social world, and to negotiate relationships with ever more—and more remote—

127. See WILHELM VON HUMBOLDT, ON LANGUAGE: ON THE DIVERSITY OF HUMAN LANGUAGE CONSTRUCTION AND ITS INFLUENCE ON THE MENTAL DEVELOPMENT OF THE HUMAN SPECIES (Michael Losonsky ed., Peter Heath trans., 1999) (1836).

128. See Gauger & Oesterreicher, *supra* note 114, at 13.

129. CHOMSKY, *supra* note 114.

130. T.C. WILLIAMS, KANT'S PHILOSOPHY OF LANGUAGE: CHOMSKYAN LINGUISTICS AND ITS KANTIAN ROOTS 12 (1993) (quoting NOAM CHOMSKY, CARTESIAN LINGUISTICS 70-71 (1966)).

131. See JEAN PIAGET, *Moral Judgment: Children Invent the Social Contract* (1932), in THE ESSENTIAL PIAGET 159, 190 (Howard E. Gruber & J. Jacques Vonèche, eds. 1977).

persons, she develops both interactive competence and moral consciousness.¹³²

In other words, the rational skills—the conceptual competence—required to communicate and to get along with others are identical. These include the fundamental *cognitive* ability to recognize norms (of language or of justice) and to apply them to particular cases. Moreover, they include the *volitional* ability to act according to the norms, once recognized and applied. Cognitive competence, in other words, is not enough. In linguistic terms, communication breaks down if the speaker commits grammatical errors, even though she is in fact familiar with the rules of grammar and, in theory, knows how to apply them.

In addition to these basic, monologic, rational capacities, an effective sense of language and of justice, as varieties of interactive competence, require certain dialogic capacities. They require the *psychological* ability to distinguish between self and other. Without that distinction, *interpersonal* interaction is impossible. At the same time, the recognition of interpersonal difference must be mediated by the ability to recognize identities in the face of difference. Without the recognition of identities, there will be no interpersonal *interaction*, no social integration. That integration, moreover, requires the *imaginative* capacity to transform recognized identity into identification. By placing myself in the shoes of another, by identifying with her, I can interact with her, talk *with* her, rather than *at* her.

Here the sense of language reveals itself as a precondition of interactive competence. The sense of justice is one aspect of that discursive competence, one that comes into play when the point of the discourse is justice. But the ability to empathize, in the formal sense of imaginative roletaking, is presupposed in communication of any kind, as becomes clear once we follow Habermas and consider discourse in general, rather than justice deliberation in particular (as Rawls did).

The sense of justice differs from general communicative competence, and therefore the sense of language, in one

132. HABERMAS, *supra* note 61, at 69, 91.

crucial respect. The rules involved are rules of justice, rather than merely rules of grammar, or more generally of communication. As a result, the sense of justice presupposes the abstraction from certain characteristics of its object. That abstraction in turn presupposes the capacity to do so and, for the sense of justice to be effective, the willingness to do so and to act accordingly. Acting on one's sense of justice means identifying with another as a moral person, rather than as the member of some particular community. Dialogue among family members, for instance, is certainly possible, but it's not a dialogue *about justice* unless all participants assume the standpoint of justice and treat one another as equal rational persons, rather than as family members. The notion of a justice dialect, specific to a particular community defined by relation or region, is self-contradictory. In this regard, the sense of justice is more substantive than is the sense of language. It does not merely presuppose the ability to identify and comply with *some* rules of justice, but with rules of justice that are consistent with one's perception of others as persons. The sense of justice thus differs from a broader ethical, or normative, sense, which would be more closely analogous to a sense of language as it would not privilege one type of norm over another.

The sense of justice, in other words, is a moral sentiment, rather than merely a universal competence. Unlike the sense of language, it requires an act of reflection, through which another person is conceptualized as a fellow moral person. And that recognition of fellow moral personhood then gives rise to respect and, assuming an effective sense of justice, the desire to treat its object *justly*.

To recognize another as a fellow moral person, however, is to recognize another as possessed of the capacity for autonomy. As Kant realized, it's that recognition of another as equally capable of self-government which gives rise to the sense of justice as a moral sentiment. The capacity for autonomy now presupposes the same conceptual capacities as do the sense of justice and the sense of language. The capacity for autonomy, too, presumes the cognitive capacity to recognize and apply norms, as well as the volitional capacity to adhere to them. And yet, the capacity for autonomy differs from the sense of justice and the sense of language in one important respect: it presumes the capacity

to *generate* norms, and not merely to understand and to follow them. The moral person has the ability to create norms and govern *herself* through them. Put another way, autonomy is not merely government by norms (which would be consistent with other-government, or heteronomy), but self-government by norms (or auto-nomy).

In sum, the sense of justice is motivated by the mutual recognition among persons of this capacity to govern oneself by generating, understanding, and following norms. The principles of justice are the principles that govern the interaction among moral persons who recognized one another as such. Through empathic mutual roletaking, these principles of justice coincide with the norms by which the moral person governs herself. This is the meaning of the coincidence of the reasonable and the rational in Rawls, and of the principle of universalizability in Kant.

Through mutual roletaking the distinction between respect for others and respect for oneself collapses along with the distinction between other and self. The sense of justice is the other-regarding aspect of the capacity for autonomy; the sense of justice exposes the social component of the fundamental moral capacity, which otherwise might be misunderstood as entirely self-regarding, and thus amoral. It is this function of the sense of justice, its quality as a *social* sense, that is highlighted by exposing its connection to the sense of language, or communicative competence. Without empathic roletaking, neither Kant's kingdom of ends, nor Rawls's original position, nor Habermas's ideal speech community would have any moral significance. Without the sense of justice, autonomy would be the amoral characteristic of hermits.

CONCLUSION

As a formal capacity shared by all persons as such, the sense of justice is the prerequisite for judicial decision-making as well as for jury deliberation, for legislative action as well as for police behavior. It does not decide cases, or determine action; it sets the framework within which justice is possible. And as a universal capacity, it is what connects all members of a community of justice, across official and unofficial roles. At bottom, it's the ability and willingness to recognize others as equal and rational

persons and treat them as such, by placing oneself in their shoes and experiencing things from their point of view, even if that point of view is substantively—and substantially—different from our own.

Understood in this way, the sense of justice is a necessary condition for the existence and stability of a political community governed by law. Legal institutions spring from our ability and willingness to experience the concerns of others as our own, not because they are members of our family, our race, our sports club, or even our nation, but because they are persons and therefore entitled to justice. Put another way, the sense of justice makes solidarity possible in a modern pluralistic society.

Finally, as Rawls has stressed, a legal system will remain stable only if we see it as doing justice, so that we can expect to be treated justly as well, should we become the object of state action for one reason or another. We must regard the system as operating on the same assumption of reciprocal respect among equals. In that way, but only in that way, must we see ourselves reflected in the state's institutions. Even if we do not share the particular principles of justice animating the actions of state officials, we will be inclined to act according to our sense of justice as long as the state treats us as persons equipped with the formal capacity to develop, experience, and follow a sense of justice.