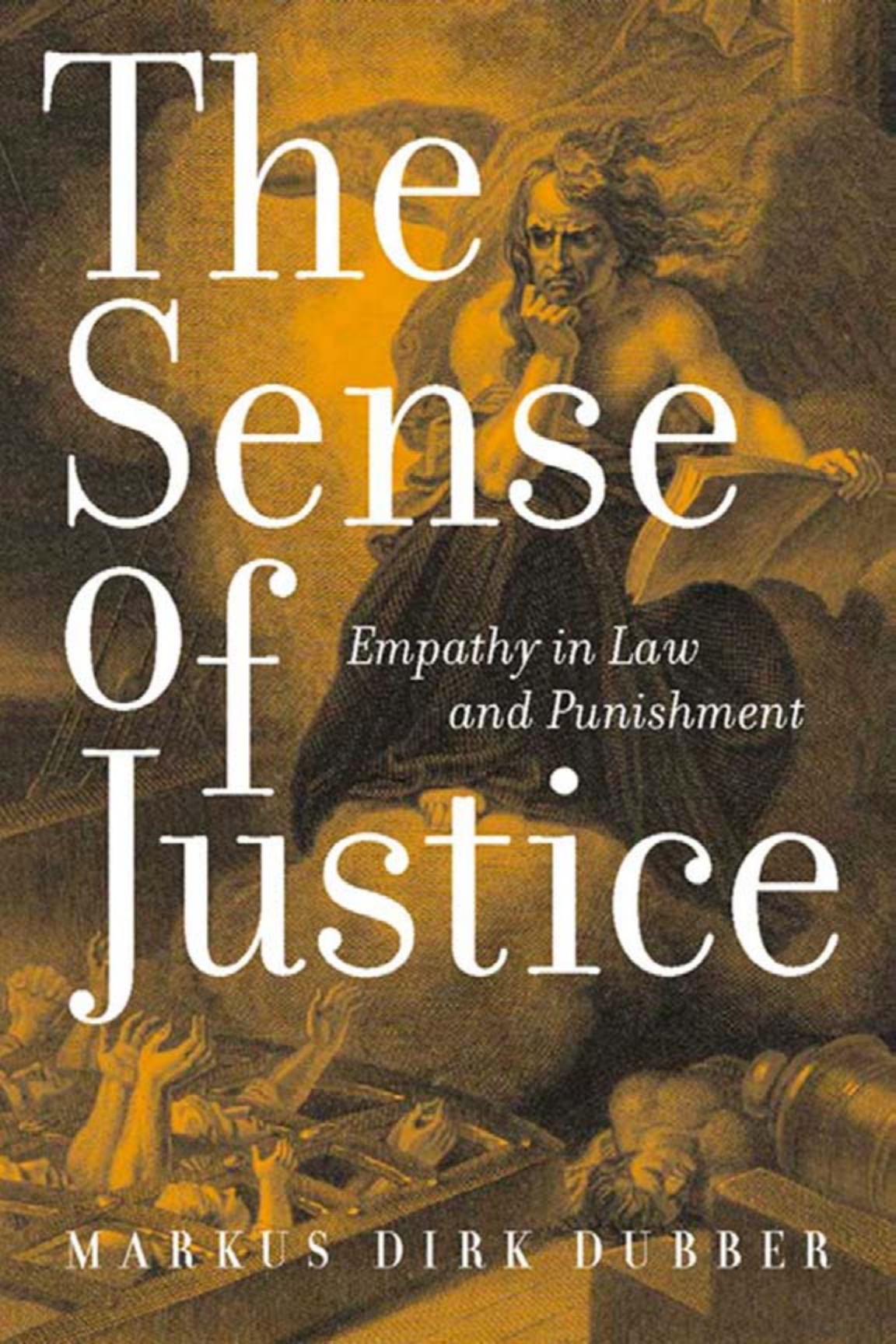
The Sense of Justice
Empathy in Law and Punishment
MARKUS DIRK DUBBER

The Sense of Justice

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This book is dedicated to the memory of Dirk Dubber.

Contents

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Introduction

The Significance of the Sense of Justice

In 1967, a state criminal jury in Jackson, Mississippi, acquitted Ku Klux Klan member Ernest Avants of the murder of Ben Chester White, a sixty-seven-year-old black man who worked as a farmhand. At the time, convictions for white-on-black crimes were hard to come by in Mississippi courts. The state put on evidence that Avants, along with two other Klansmen, brutally killed White to lure Martin Luther King Jr. to their state so that they could assassinate him. Thirty-six years later, in February 2003, Avants, now seventy-two, was convicted by a federal jury in Jackson of the same crime, based on the same evidence, after federal prosecutors discovered the murder had been committed on federal land, which gave them independent jurisdiction and rendered double jeopardy protections inapplicable.[1] For the second trial, ninety-six potential jurors were questioned because it proved difficult to find jurors who didn't think Avants was guilty of the crime before the trial began. The jury returned a guilty verdict after only three hours, following a three-day trial.[2]

That same month, Enaam Arnaout, a forty-one-year-old U.S. citizen, pleaded guilty to a federal racketeering conspiracy count to avoid a trial on charges that he provided "material support" to al-Qaida. According to the guilty plea, Arnaout's "Benevolence International Foundation" had funneled charitable contributions in the 1990s to Muslims fighting in Bosnia-Herzegovina, while his donors thought they were supporting widows, orphans, and the poor. Explaining his client's decision to plead, Arnaout's lawyer remarked, "One has to question whether a fair and impartial jury could be found anywhere in America today that could sit in judgment of an Arab-American in a case involving allegations of terrorism." With the plea Arnaout, who was born in Syria, faced a maximum punishment of twenty years in prison. If convicted of all charges at the jury trial, he would have faced ninety years.[3]

These apparently disparate cases are connected by a central, yet curiously understudied, concept in legal thought and practice: the sense of justice. Both arise from dramatic breakdowns of the sense of justice. The wanton destruction of human life in the name of a fanatical cause—be it in a Mississippi swamp or in New York City[4]—implies a categorical disrespect for its victims and their rights as persons to the point that their treatment is no longer subject to ordinary constraints of justice.

The perpetrators of acts of extermination literally feel no moral compunction about eliminating their victims because their victims are beyond the pale of justice. Their *sense* of justice doesn't engage because their victims aren't entitled to *justice*. To them, it makes no more sense to treat their victims "justly" or "unjustly" than it would a rock or a mule. The most extreme, and systematic, example of this total detachment of the sense of justice is the Holocaust, as exemplified by the figure of Adolf Eichmann, who—banally or not—regarded his Jewish victims not as persons but as objects of bureaucratic disposition.[5]

But it is not only in extermination, or even in crime more generally speaking, that we see failures of the sense of justice. The response to fundamental denials of personhood in crime itself puts great strains on the sense of justice. The temptation to deny the relevance of our sense of justice to those who denied it to others, and *for that reason,* is great. Not only crime, then, may disengage the sense of justice, so may its punishment. In fact, some might mistake the urge to deny an offender our sense of justice for a command of the sense of justice itself, confusing vengeance with justice, and incapacitation with punishment.

Here the sense of justice appears as a communal phenomenon, pitting the outraged community of actual and potential victims—*us*—against the offender, individually or communally—*them*.[6] The cry for justice drowns out particularized judgments of culpability and responsibility that can only be reached by putting one's sense of justice to work. A person, suspect, defendant, beyond the pale of justice cannot be justly condemned, only disposed of in light of some perceived exigency of security, or self-protection.

Demands for punishment as an act of communal self-affirmation against outside threats turn on a clear distinction, or at least the yearning for a clear distinction, between insiders (us) and outsiders (them). This distinction is often uncomfortably difficult to draw on the basis of criminal conduct alone, given that a moment's reflection will reveal that we too have occasionally crossed the line to criminality, or at least have

felt the temptation to cross it, as the criminal life and those who live it continue to fascinate as much as shock us.[7] The line between victim-self and offender-other is much brighter when it tracks other communal boundaries that run through social life. And there is no brighter communal line than that marked by race and ethnicity.

Racial-ethnic divides, and their attendant failure of the sense of justice, shape both the Avants and the Arnaout case. Avants was convicted of having murdered Ben White because of his race, to facilitate the murder of another man, Martin Luther King, because of his race. Ben White was beyond his murderers' sense of justice because he was black, and they were white.

At the same time, it may well be that White's murderers were not brought to justice for that very reason. The jury in Avants's 1967 Mississippi state trial might well have shared his view of White as a man beyond the pale.[8] More specifically, the jury might well have identified with Avants, but not with White.[9] To this day, a murder case involving a black victim is significantly less likely to result in a death sentence than is one involving a white victim, even as racial *offender*-bias in death cases has dissipated since the revival of capital punishment in the 1970s following the Supreme Court's decision in *Furman v. Georgia*.[10]

If there is a justification for the use of so-called victim impact statements in criminal sentencing, and most controversially in capital sentencing hearings, then it surely must be that they facilitate the sentencer's identification with the victim.[11] The great danger of victim impact evidence is, however, that the identification will be irrelevant to the task at hand—doing justice. Here an important, though often ignored, distinction must be drawn between the sense of justice, on one hand, and emotional identification on the basis of some actual, or perceived, commonality, on the other. From the standpoint of justice, for instance, the race or ethnicity of the victim is as irrelevant as that of the offender. Intraracial identification cannot influence justice judgments any more than can identification based on height, weight, or social class.

Conversely, in Arnaout's case, the defendant was not willing to take the chance that white non-Muslim jurors would refuse to identify with the *defendant* as a person and dispose of him as an alien threat to the community they view themselves as representing. In fact, the detention of suspected members of the Taliban and al-Qaida at Camp X-Ray, Guantanamo Bay, for the express purpose of placing them beyond the pale of American constitutional rights or even of human rights accorded

prisoners of war under international law, as well as the establishment of military tribunals to process "unlawful enemy combatants" had the U.S. News and World Report wondering whether "our sense of justice [will] be a second casualty of war."[12]

It is possible of course that Avants's second jury, in 2003, refused to empathize with him for a similar reason. In sharp contrast to his first trial, in 1967, Avants the Klansman may have become the outsider against whom "the community" was eager to define itself, and to erase memories of an ugly era long since past by disposing of Avants as a monstrous relic.

As victim impact evidence bears the risk of triggering emotional responses on the part of the decision maker that are irrelevant in matters of justice, so defense attorneys have a tendency to exploit any and every possible point of identity between their client and the jury, in the name of an acquittal, or at least a hung jury. To counterbalance this understandable inclination, American courts traditionally have given so-called "antisympathy" instructions in capital sentencing hearings. Here is one example:

> You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.[13]

Criticism of antisympathy instructions has focused on their effect of interfering with defense lawyers' strategy to evoke any sort of emotional connection between the sentencing jury and their client, no matter how arbitrary or ajust. There is much force to this objection, especially since jurors may well tend to interpret antisympathy instructions as prohibiting sympathy for the *defendant* only, who is after all the focus of the sentencing hearing and the object of their judgment. The potential for the one-sided preclusion of sympathy increases exponentially with the introduction of victim impact evidence, which tends to be presented to evoke the very sort of sympathy for the victim that defense attorneys attempt to evoke for their client, and with the same disregard for its arbitrary nature.

The better argument against antisympathy instructions, however, may be that they throw out the baby with the bathwater.[14] By aiming to exclude arbitrary emotional responses, they indiscriminately exclude *all* emotional responses, including relevant ones like the sense of justice, which springs from the recognition of another person *as a person,* and therefore as someone entitled to equal respect and, most importantly, justice.

Now criminal trial lawyers, prosecutors, and defense attorneys alike struggle not only to encourage jurors to empathize with the defendant or the victim, but they also work hard to *bar* empathy with "the other side." Among the more unsavory defense tactics is the concerted effort to portray the victim as someone whose suffering for one reason or another isn't quite worthy of just consideration, particularly popular in rape cases. More common is the prosecutorial strategy of dehumanizing defendants, particularly in capital cases, which, as a rule, involve extraordinarily heinous acts of violence. As capital defendants are portrayed —either directly through (victim impact) testimony or indirectly by implication—as ahuman (and subhuman) monsters, predators, dogs, and trash, they are located outside the realm of the sense of justice, even without an explicit antisympathy instruction.[15]

Efforts to prevent the "wrong" empathy (that is, empathy with the other side)—and to enable the *right* empathy—start even before the trial has begun. The ritual of jury selection consists largely of each lawyer's attempt to stack the jury with people who will empathize with her side, rather than the other, with both sides guessing which jurors will show the "proper" empathic reaction, or lack thereof. These judgments are rarely based on empirical jury research; instead they tend to rely on often inarticulable intuitions and, quite frequently, prejudices. The American criminal justice system considers these prejudices irrelevant, however irrational they may be, except insofar as they are based on such constitutionally significant juror traits as race and, more recently, gender. American constitutional law has found it difficult to root out racial prejudice in jury selection, however, partly because American *criminal* law generously grants each side in a trial a number of so-called peremptory challenges, which allow lawyers to strike jurors without explaining why. (They also get to strike an unlimited number of jurors "for cause.") Only if there is some good reason to suspect racial discrimination will the judge be required even to inquire into the grounds

for a lawyer's rejection of a particular juror. Then, if the lawyer can formulate some reasonable, "neutral," explanation for disapproving of the juror in terms of trial strategy, the peremptory challenge will stand.[16]

Occasionally outsiders are permitted a glimpse into the nebulous world of jury selection. Consider the notorious case of Thomas Miller-El: Miller-El, a black Texas death row inmate, filed a habeas corpus petition in federal court, claiming racial discrimination in the jury selection at his 1986 state trial for capital murder. Remarkably, Miller-El could produce a Dallas District Attorney's manual that specifically instructed prosecutors to get rid of minority jurors because "they almost always empathize with the accused."[17] No less remarkably, the Fifth Circuit Court of Appeals initially denied Miller-El a certificate of appealability because it considered the district court's denial of his habeas petition so obviously correct as to not be "debatable." The Supreme Court disagreed, thus permitting Miller-El to appeal the district court's decision to the Fifth Circuit. When the Fifth Circuit affirmed the district court on the merits, the Supreme Court again reversed, granting Miller-El's habeas petition and ordering him released from death row.[18]

The cases of Ernest Avants and Enaam Arnaout highlight several important points about the sense of justice and its significance in law. First, it is useful to think of the sense of justice as a particular variety of empathy, or imaginative role taking. As such it presumes some identity between the person judging and the person being judged, for without that identity the former will be neither willing nor able to imagine herself in the latter's position. The sense of justice breaks down completely when I, as a person, come to believe that I have so little in common with another person as to deny her the status of personhood altogether, at least for purposes of my judgment and treatment of her.

Second, the jury is the most visible institutional manifestation of this view of the sense of justice as empathy in American law. But to say that the jury is representative of the sense of justice isn't saying much. For the jury might be misconceived as representative of some community's sense of justice-as-vengeance directed at a defendant who already, simply by his status as defendant, has been substantially ostracized and who, in the case of a conviction, witnesses the official pronouncement of his full outsider status, with the guilty verdict as the culmination of the trial as degradation ceremony.[19]

Third, the sense of justice breaks down not only in the face of negative emotions, but in the face of positive ones as well. Vengeance should

not be confused with a sense of justice, but neither should benevolence. Both turn on morally irrelevant identifications with the member of some community. While vengeance presumes the morally irrelevant identification with a victim of some wrong, benevolence turns on a similarly irrelevant identification with the sufferer of some hardship. Arnaout's "Benevolence International Foundation" provides a convenient example. It was a charity run, and funded, by Muslims for Muslims. Its objective was to extend benevolence to fellow members of an ethnic community across national borders. Benevolence, unlike vengeance, is commendable, but, like vengeance, it is discriminating in its object. Benevolence is directed at the fellow community member, vengeance at the outsider who has harmed a fellow community member. They are both manifestations of a communal instinct rather than of a sense of justice.

What we need is an account of the sense of justice that elucidates its operation and exposes its function within the legal system in general, and the criminal justice system in particular. This book proposes such an account.

The sense of justice is as ubiquitous as it is ill-defined. Without a clearer understanding of its operation and function, the sense of justice is easily misunderstood as a vague reference to the unsettling role of emotions, or even of sentimentality, in law, and thus may be used to subvert justice rather than to do justice.

The sense of justice has made frequent, though strangely disconnected, appearances in legal (and political and moral) discourse for centuries. And so, to expose the hidden ubiquity of the sense of justice, this book begins by piecing together a critical analysis of its various permutations and rhetorical functions in legal theory and practice, ranging far and wide, from eighteenth-century court opinions[20] to nineteenth-century works of jurisprudence,[21] early twentieth-century monographs,[22] and, eventually, to current statutes, cases, and legal commentary.[23] We then move on to develop an account of the sense of justice that elucidates its key role in the operation of a system of law. It will be argued that, understood as a type of moral competence, and the capacity for empathic role taking in particular, the sense of justice is nothing less than that bundle of cognitive and affective capacities which connects individuals in a modern pluralistic state. The sense of justice as empathy makes individuals' claims the business of the state community, and thereby makes justice and governance through law possible.[24]

To appreciate the sense of justice means to understand both what

makes it a *sense* of justice and a sense of *justice*. It's important, in other words, not to privilege one of its halves over the other. We need not merely a theory of empathy, or a theory of justice. We need an account of empathy's role in discourse about what is just.

To come to grips with the sense of justice as a *sense* of justice, we must look beyond the borders of jurisprudence, to psychology, and moral psychology in particular. Despite decades of intermittent effort, jurisprudes still don't understand the individual psychology (or, if you like, the phenomenology) of judicial decision making,[25] and legal judgment in general. We still don't know precisely, or as precisely as we can figure it out, how we—and not just judges or other state officials—come to make judgments of law, and judgments of justice in particular. The sense of justice, it will be argued, plays a central role in the phenomenology of legal judgment.

The sense of justice, however, is not merely an individual phenomenon. Those who speak of law and justice often invoke the sense of justice of this or that *community,* where that community is not always specified.[26] We need to investigate the connection between the individual sense of justice and the communal sense of justice, if any can be made out. Here insights from social psychology and sociology will be helpful.

Recent work in moral psychology will help us correct a common misconception about the sense of justice as a *sense.* Occasionally the sense of justice is still associated with emotionality, and therefore with irrationality.[27] The sense of justice, however, is a moral sentiment, an emotional response triggered by an identification based on characteristics relevant from the standpoint of justice.[28] Note that the sense of justice is a sense (or sentiment) and not a sensation (or feeling)—in German, a Rechts*gefühl* and not a Rechts*empfindung*.[29]

The point here is not to distinguish the psychological phenomenon from its physical manifestation, but to distinguish a rational psychological phenomenon from an arational one. The sense of justice is neither necessarily irrational nor necessarily rational.[30] The sense of justice is a sense of the appropriateness regarding a given resolution of a legal conflict based upon the application of principles of justice, rather than a psychological (or physiological) sensation unattributable to principles and their satisfaction, but instead to a bad breakfast or, for that matter, the racial characteristics of the parties to the conflict. To the extent it is

rational, the sense of justice is susceptible to rational analysis and debate, and therefore has a place in legal and political discourse.

Exploration of the sense of justice as a sense of *justice* will take us into the realm of political theory, and the work of John Rawls in particular. In an unfairly neglected aspect of his theory, Rawls assigns a pivotal role to the sense of justice.[31] In Rawls's view, the sense of justice assures the stability of a given political system by permitting the constituents of that system to identify with its institutions. A political system is stable to the extent that its constituents recognize its institutions as reflecting their sense of justice, so that what they perceive as just is also what their institutions regard, portray, and pursue as just.[32]

The remainder of this book will proceed as follows. Chapter 1 provides an overview of the many and varied uses to which the sense of justice has been put in American law. To illustrate the significance of the sense of justice at all levels of legal practice (and to add a touch of authenticity), this chapter will rely heavily on illustrations drawn from many corners of legal doctrine, discourse, and theory.

Chapter 2 then shifts focus from generally bald invocations of the sense of justice in American legal discourse to previous attempts to provide an account of the sense of justice. Much of the discussion in this chapter will be *historical,* some of it *comparative,* some *interdisciplinary.* Looking back in time makes sense because most of the serious thinking about the sense of justice has occurred between 1750 and 1950. (Adam Smith's groundbreaking study of the sense of justice appeared in 1759,[33] the American school of jurisprudence that showed the greatest interest in the sense of justice was Legal Realism, and the only book-length American treatment of the sense of justice appeared in 1949.)[34] Glancing, comparatively, across the Atlantic makes sense not only because of the Scottish Enlightenment's contribution to moral psychology, but also because German work on the sense of justice has both been extensive and has had considerable influence on American thought on this issue. (The most comprehensive study of the sense of justice is Erwin Riezler's *Das Rechtsgefühl,* published in 1923.)[35] Finally, only if we enlist the aid of other disciplines, including psychology, sociology, philosophy, and linguistics, can we hope to make sense of a complex phenomenon like the sense of justice, which is both sentiment and principle. Perhaps not surprisingly given that it operates at the margins of law, the sense of justice looms large in the two schools of thought that

laid the foundation for much of what we now think of as interdisciplinary approaches to law: the historical school of jurisprudence in the first half of the nineteenth century and sociological jurisprudence in the second.

In chapter 3, we will then home in on some of the central features of traditional accounts of the sense of justice. Using as our foil the most careful analysis of the sense of justice in American jurisprudence, Edmond Cahn's, we will consider some of the misconceptions that have dogged writings on, and invocations of, the sense of justice in the past, and that have given it a bad name. The traditional, and traditionally amorphous, view of the sense of justice will be contrasted with one that more carefully defines the nature and the significance of the sense of justice in a system of law. To that end we will differentiate between the sense of justice as a moral sense, rather than as a sense of mores, or ethical sense, and contrast the traditional substantive notion of the sense of justice with a formal one uncommitted to any particular set of ethical norms, define the process of empathic identification triggering the sense of justice as reflective rather than reflexive, restrict the sense of justice to a personal, rather than a communal, phenomenon, and, finally, highlight the egalitarian character of the sense of justice as a competence shared by all persons as such, rather than a special skill possessed by some—be it the *Judiz* of professional judges or the *intime conviction* of lay jurors.

Next, chapter 4 draws on work in moral psychology, social psychology, political theory, and linguistics to construct a theory of the sense of justice as moral competence. Moral psychology teaches us the crucial distinction between pity and respect, both of which are sentiments, but only the latter of which has moral significance. Social psychology helps us appreciate the central role of identification in the process of rendering judgments of justice. Political theory, particularly Rawls's work and, to a lesser extent that of Jürgen Habermas, has attempted to specify what that basic moral competence consists of, drawing on Jean Piaget's (and Lawrence Kohlberg's) work in developmental psychology, and, most interesting, on Noam Chomsky's theory of a sense of language, or *Sprachgefühl* (which itself harks back to Wilhelm von Humboldt's hypothesis of a universal linguistic competence). In this way, the analogy between the sense of justice and the sense of language, and between moral and linguistic competence, has been fruitfully revived, an analogy

that reaches back to the first appearance of these two concepts in early-nineteenth-century German Romantic thought.

Chapter 5 then narrows the focus of our inquiry to American penal law. Throughout the book, illustrations of the role of the sense of justice are drawn for various areas of law. Still, the sense of justice occupies—and is acknowledged to occupy—a particularly important role in the criminal justice system, where jury trials remain the paradigmatic event (despite the dominance of plea bargaining) and the legal system remains openly committed to doing justice (as opposed to, say, efficiently allocating resources—no one talks about a "contract justice system" or a "tort justice system").[36] We will explore in some detail the functions of the sense of justice throughout all three aspects of penal law: substantive criminal law (or criminal law, for short), which deals with the general principles of criminal liability and the definition of specific offenses, and will receive the bulk of our attention; procedural criminal law (or criminal procedure, for short), which deals with the application of the norms of substantive criminal law in particular cases; and the law of punishment execution (prison law or correction law), which governs the infliction of sanctions imposed following a determination of guilt in the procedural stage of the criminal justice system.

The book concludes by sounding a cautiously optimistic note regarding the continued usefulness of the sense of justice as empathy for contemporary legal and political discourse.

1

Uses and Abuses of the Sense of Justice

The sense of justice can be found throughout American discourse about law. Court opinions refer to it (but not statutes),[1] so do newspaper columns.[2] Legal textbooks encourage their readers to consult it,[3] legal commentary invokes it,[4] and, occasionally, even books are written about it—or its cousin, the moral sense[5]—though generally not by lawyers, at least not recently.[6]

People, including judges and law professors, tend to have unpleasant encounters with their sense of justice. That is, they tend to notice the sense of justice when it has been offended,[7] affronted,[8] or shocked,[9] and when they come upon something repugnant,[10] revolting,[11] even nauseating,[12] to it. Appropriately, the only book-length treatment of the sense of justice in the United States, from 1949, is actually about the sense of *injustice*.[13]

The Supreme Court once built an entire due process jurisprudence on the question whether a particular state action "offend[ed] 'a sense of justice.' "[14] This jurisprudence, however, is no more. The sense of justice today survives only in a remote corner of the vast due process universe, the "outrageous government misconduct" defense, a sort of minientrapment that hangs on by a thin thread, as a tenuous anachronism.[15]

The most vociferous critique of the sense of justice test came from within the Court itself. Justice Black waged a persistent, and ultimately successful, campaign against what he liked to call the "natural-law-due-process formula," invoking a common, and generally uncomplimentary, association between the sense of justice and natural law. So in the 1947 case of *Adamson v. California,* Black thundered that the "natural-law-due-process formula . . . has been used in the past, and can be used in the future, to license [the Supreme] Court . . . to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."[16]

Recently, the Justices' sense of justice has been relegated from majority opinions to dissents. Dissenting in *Rummel v. Estelle,* an eighth amendment recidivism case, Justice Powell pointed out that "[a] statute that levied a mandatory life sentence for overtime parking . . . would offend our felt sense of justice."[17] Or take Justice Marshall's desperate appeal, in his classic *Furman v. Georgia* dissent, to the hypothetical sense of justice of the no less hypothetical "average citizen," which surely *would* conflict with capital punishment *if* she only knew more about it.[18]

Lower courts have been less careful to excise the sense of justice from their vocabulary, perhaps because their legitimacy has not been similarly questioned over the years. (They may be courts, but at least they're *not* the U.S. Supreme Court.)[19] There the sense of justice has popped up in all and sundry contexts, including but by no means limited to the review of criminal penalties[20] and punitive damage awards,[21] the expunging of arrest records,[22] the recovery of a frivolous penalty in a tax case,[23] a decision granting a motion to dismiss for improper venue,[24] the applicability to the Act of State doctrine to the dissolution of corporations abroad,[25] the dismissal of a motion to set aside a stipulation,[26] the denial of workers' compensation to an employee who had refused to get medical treatment,[27] the opportunity for spouses to present evidence of a professional practice's goodwill value in a divorce case,[28] the propriety of a jury verdict override in a rear-ender case,[29] the denial of an expert exam of clothing and hair samples,[30] the rule that a personal representative of a decedent may not pursue a tort action if the sole beneficiary has settled,[31] ineffective assistance of counsel,[32] requiring a father to continue paying child support "to enrich the mother,"[33] a husband to pay alimony to a remarried wife,[34] or a married man to come to the aid of his overdosing paramour,[35] prohibiting voir dire regarding issues in a case,[36] sovereign immunity,[37] extending murder liability to the owner of a pit bull who killed a two-and-a-half-year-old boy,[38] and on and on.

Occasionally, lower courts still wield the sense of justice as an all-purpose weapon to condemn misconduct by the executive branch in the strongest possible terms. It is in these opinions that the Supreme Court's sense of justice ("natural-law-due-process") formula lives on, long after the Court itself has moved on to other, presumably more objective, standards. Recently, a California court had this to say to a prosecutor who had an investigator eavesdrop on the defendant's conversations with his attorney in the courtroom:

> We would be remiss in our oaths of office were we to discount or trivialize what occurred here. The judiciary should not tolerate conduct that strikes at the heart of the Constitution, due process of law, and basic fairness. What has happened here must not happen again. The prosecutor ". . . used methods that offend 'a sense of justice.' " This is conduct which ". . . shocks the conscience."[39]

The sense of *justice,* however, has proved just as useful as the sense of *injustice*. While the latter makes a formidable critical tool, the former exerts considerable powers of legitimation, not only in particular cases but also in support of sweeping principles of law. So a no-compete clause was held to be in accordance with "a fair sense of justice."[40] So was the rule preventing a criminal defendant from incriminating a deceased victim,[41] the distinction between the right of custody and that of visitation,[42] the principle that a borrower must pay interest,[43] that the amount of contribution among co-tort feasors should be determined in relation to their negligence rather than equally distributed,[44] that incapacity through accident excuses the failure to file a claims notice,[45] that a woman is not an accomplice in an abortion performed on her,[46] that the prosecutor has a duty to permit discovery,[47] and, again, on and on.

Treatments of the insanity defense are particularly saturated with sense of justice talk. The defense requires both the presence of a sense of justice, in two ways, and its absence. "It is," after all, "the sense of justice propounded by those charged with making and declaring the law—legislatures and courts—that lays down the rule that persons without substantial capacity to know or control the act shall be excused."[48] The application of this rule dictated by legislators' and judges' sense of justice in turn requires the sense of justice, this time the jury's, for "[t]he jury is concerned with applying the community understanding of this broad rule to particular lay and medical facts. Where the matter is unclear it naturally will call on its own sense of justice to help it determine the matter."[49] The jury, in other words, exercises its sense of justice in assessing a particular defendant's claim of insanity, and that's a good thing:

> Legal tests of criminal insanity are not and cannot be the result of scientific analysis or objective judgment. There is no objective standard by which such a judgment of an admittedly abnormal offender can be measured. They must be based on the instinctive sense of justice of ordinary

> men. This sense of justice assumes that there is a faculty called reason which is separate and apart from instinct, emotion, and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts. This ordinary sense of justice still operates in terms of punishment. To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.[50]

But what is insanity other than *the lack* of a sense of justice, or more precisely conscience or moral capacity, on the part of the defendant?[51]

And last, but certainly not least, the principle of racial integration, rather than separate-but-equal, flows from the sense of justice, at least in the view of a New Jersey trial judge in a public housing segregation case shortly after World War II:

> Man's sense of justice, coupled with an enlightened understanding of our common humanity, would dictate that if there be no segregation in the field of civil duty and sacrifice, there be none in the realm of human dignity and equality.[52]

Less dramatically, the sense of justice also has helped courts perform such everyday functions as interpreting statutes, contracts, and common law defenses, as well as finding facts. So it turns out that the scope of the "substantial impairment defense" in criminal law is to be determined in reference to the sense of justice,[53] that contracts are to be read in light of the sense of justice,[54] and that parenthood is to be recognized whenever a contrary finding would violate the sense of justice.[55]

Depending on the court (and the statute), the sense of justice either does or doesn't control the statutory interpretation. When strict construction is required, for instance, then the statute must be construed strictly, even in violation of the sense of justice.[56] In the interpretation of other statutes, by contrast, the "good sense of justice should prevail,"[57] except in the face of the "clearest expression of legislative intent" to the contrary.[58]

Remarkably, while courts often consult their (or someone else's) sense of justice, they don't always get to heed its call.[59] There's not only the maxim of statutory interpretation requiring strict construction even in

the teeth of a contrary sense of justice. More often than a maxim of interpretation it's the judge's institutional role as a member of the judiciary that stands between her and her sense of justice. So, for instance, a judge might write a crabby concurrence bemoaning the fact that she must apply the principle of contributory negligence in tort law despite what she perceives to be its inconsistency with the sense of justice. But there's nothing she can do about it unless and until the legislature abandons the principle.[60] These proclamations of impotence implicitly or explicitly rely on a narrow view of the judicial function as discovering, rather than creating law. As the first sentence of a Georgia opinion put it,

> The law as it is written compels us in this case to arrive at a conclusion that shocks our sense of justice; but judges have the power only to declare the law, not to make it or amend it.[61]

As one might expect, the executive branch, and not only the legislature, can force a judge to go against her sense of justice. After laying out in considerable detail just why and how the court's sense of justice demanded expunging a criminal record, a federal district court in the end decided to succumb to the realities of the bureaucratic state:

> But, alas, with a full recognition of the foregoing we are also aware that to expunge the records in this case would set the stage for expungement in all similar cases where a verdict of acquittal is rendered. We hesitate to do this through judicial action because of the practical administrative problems which a decision of this type could create for the government. We are of the opinion that the expungement of arrest records is a question which should be dealt with as a legislative matter by the Congress and not by this Court.[62]

Occasionally even (judge-made) common law principles, rather than legislative pronouncements, cause a similar paralysis of judicial judgment in light of the sense of justice. So a Massachusetts court couldn't help but uphold a limited car warranty even though it didn't "commend[] itself to the sense of justice of the court."[63] In this case, it was the *legislature* that might give the court's sense of justice its due in the face of contrary judicial precedent: "We hope that should a similar case arise under the Uniform Commercial Code we shall not be so bound by precedent."[64]

Yet at the same time, the sense of justice has proved a popular way *around* the otherwise ironclad rule of stare decisis. In a much-cited passage, Judge Cardozo announced in 1921 that, " '[when] a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment."[65] This passage has provided considerable relief for Supreme Court Justices eager to salve their stare decisis conscience. A court out of touch with "the sense of justice" (presumably not its own, but some community's), is not only authorized, but *required,* to ignore precedent. The alternative would be nothing less than anarchy. So Justice Marshall warned in 1972 that

> [t]he jurist concerned with "public confidence in, and acceptance of the judicial system" might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.[66]

Not surprisingly, the popularity of the sense of justice as precedent trump stems partly from its usefulness across the ideological spectrum. Most recently, Justice Scalia invoked this passage to justify his—successful—call for the reversal of *Booth v. Maryland,* the decision that had barred the admission of victim impact evidence in capital cases. Quoting Marshall, Scalia pointed out that the Court was obliged to overturn *Booth* to retain its legitimacy in the eyes of the public because the decision "conflict[ed] with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[67] Marshall dissented.

With such frequent recourse—if not necessarily adherence—to the sense of justice it's crucial that participants in the adjudicatory system be equipped with a healthy sense of justice. That appellate courts possess this sense is a given—it's appellate judges, after all, who tend to write the opinions requiring its consultation. So tributes to great appellate judges often praise their sense of justice.[68]

There certainly is a broad consensus, even outside the chambers of appellate judges, that appellate judges *should* have a finely honed sense of justice. When Ralph Nader was asked during the 2000 presidential campaign about what he'd look for in a Supreme Court appointment,

he responded: "A sense of justice, which is essential in order to have a proper sense of when there's injustice."[69]

Yet even appellate judges concede that there are many factual questions that remain beyond the scope of an appellate judge's sense of justice, however keen. These are therefore frequently entrusted to the trial court's "sense of justice and equity."[70]

Should the oddball trial judge either lack a sense of justice, or ignore its call, there's no need to worry. For there is always the sense of justice of other system participants that prevents deviant judges "from causing too much harm." As Dan Kahan explains, all judges need to "gain[] the assent of other participants in the criminal justice system, including prosecutors, who generally do not file charges against persons who have not violated serious moral norms; juries, who generally will not convict such individuals; and other judges, who are constantly on the lookout for those of their number who lack situation sense or the disposition to submit to it."[71]

Occasionally, and especially in earlier opinions, one reads of prosecutors whose sense of justice impels them to act or not act in one way or another.[72] It's also in these older cases that we find courts commenting on the sense of justice as the motivation for the behavior of lay persons who ended up as nonofficial participants in the legal system for one reason or another. So in the nineteenth century, a Georgia court upheld a father's promise to support his illegitimate child despite his contention that the mother had pressured him into making it by threatening legal action. As the court explained, it may well have been his sense of justice, rather than the mother's coercion, that impelled the father to provide for his child.[73] Similarly, a Tennessee court used the construct of a hypothetical sense of justice to determine how much a woman, appropriately named Tennessee, should receive after the death of her incompetent sister, Martha, in exchange for having supplied "[a]ll the wants of this unfortunate sister" and having been "tender, affectionate, and attentive to her." According to the court, Tennessee "should be allowed . . . such compensation as Martha Harris would have accorded her sister, if she had acquired full possession of her mental faculties before her death, and had possessed an ordinary sense of justice."[74] Recall that the criminally insane were said to lack a sense of justice.[75]

Of all system participants, lay and official, jurors are most closely associated with the sense of justice. They are said not only to *possess* a sense of justice—in fact, a particularly pure strain thereof, unencum-

bered by legal learning—but also to *represent* (or reflect) one, namely that of "the community."[76] For instance, a federal court upheld a one-year residency requirement for jury service on the ground that it "assures some substantial nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect."[77] In fact, as we've seen, the jury is often said to provide a sense of justice check for the occasionally unreliable sense of justice of the trial judge and the prosecutor.

Particularly in criminal law, the jury's sense of justice plays a crucial role, and not only because civil cases are rarely tried before a jury. We have already quoted extensively from a court opinion placing the insanity issue in the hands of the jury as the representative of our "collective conscience." The sense of justice has even been invoked to support a particular version of the insanity defense, as opposed to the insanity defense in general. For instance, we can read in a leading American criminal law treatise, LaFave & Scott's *Substantive Criminal Law,* that the traditional *M'Naghten* insanity test has been praised because it identifies " 'that group that is popularly viewed as insane,' and whose 'acquittal will not offend the community sense of justice.' "[78]

The drafters of the Model Penal Code were particularly fond of finding a place for the jury's sense of justice in substantive criminal law. For instance, the drafters justified criminal liability for negligence by limiting it to cases where "the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong."[79] Now one might harbor serious doubts about basing criminal punishment on a concept as amorphous as "the community's general sense of right and wrong," unless of course one can point to an institutional reflection of that sense, the jury. Negligence liability therefore was unproblematic because it was up to the jury to decide in each case whether the defendant's conduct, or omission, ran afoul of the sense of justice of the community it represented.

The jury's sense of justice plays an even greater role in the law of causation. The Model Code's—and LaFave & Scott's—solution to the causation problem was to turn the causation inquiry in tricky cases over to the jury's sense of justice. That way "our" sense of justice will remain intact:

> When intended results come about in a highly unlikely manner, the defendant should not be punished for those results (as opposed to punishment for attempting to bring them about), for to do otherwise would

> bring the criminal law into sharp conflict with our sense of justice. Thus, the Model Penal Code appropriately deals with this situation by putting the issue squarely to the jury's sense of justice; the inquiry is whether the actual result is "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."[80]

Moreover, as the treatise makes plain, it's not only the Model Code drafters who would put the issue of legal cause (as opposed to factual cause) "to the jury's sense of justice."[81] The most comprehensive and sophisticated scholarly treatment of the causation question, Hart & Honoré's *Causation and the Law,* likewise thought the question one of "the plain man's sense of justice."[82] In fairness, LaFave & Scott do, at one point, sound a note of caution: " 'putting the issue squarely to the jury's sense of justice,' " as the Model Code drafters did, had "[t]he disadvantage . . . that there may be inequality in application of this flexible standard by juries."[83]

Recently the vagueness of this sense of justice standard formed the basis for a constitutional challenge in a remarkable New Jersey case, *State v. Maldonado,*[84] which represents the most sustained effort by a modern American court to grapple with the function of the sense of justice in American law:

> Our strong "sense of justice" requires us to consider the remoteness of . . . adventitious outcomes when determining criminal liability, but our inability to express what feature of unusual or extended causal chains affects our sense of justice makes developing a precise and definite standard that will accommodate our sense of justice difficult, and we have found none better than the "too remote to have a just bearing" standard. . . . The only practical standard is the jury's sense of justice.

> Despite the vagueness of the "not too remote" standard, however, the authors of the Model Penal Code ultimately decided that it represented the best solution, concluding that what was really involved was a communal determination by a jury about how far criminal responsibility should go in cases of this kind: a community's sense of justice on whether a defendant, otherwise clearly responsible under the criminal law, should be relieved of punishment because the result appeared too distant from his act.

> The question, then, is whether the law can constitutionally accommodate this conflict [between the desirability of limiting criminal liability for results otherwise falling within the law's prohibition but whose occurrence was so far from the ordinary or expectable as to leave doubt about the justice of imposing such liability, and the impossibility of fashioning language to define the extent of such limitation in a way to assure acceptably consistent application] in what the most learned of our colleagues have concluded is the best way, or whether, because of the indefiniteness involved, the law must abandon the search. If we choose the latter course, we face an intolerable predicament, for we would be forced either to extend criminal responsibility regardless of remoteness, or to confine it restrictively, severely limiting its scope and effectiveness simply to avoid the possibility of arbitrary application. Therefore, we choose the former—the law is constitutional—and we do so as a matter of our own sense of sound policy.
>
> In many, many other areas the law cannot be precise but must be practical. Even in the fashioning of rules of liability, this Court bluntly has acknowledged that its sense of sound policy and justice may be the ultimate touchstone. . . .
>
> This "sense of justice" is clearly involved in many criminal cases. Juries possess not only the unwritten power of nullification, but juries also have the almost-absolute ability to determine life and death in sentencing proceedings under our capital punishment law. The acknowledged power of jurors, seemingly irrationally, certainly not explicitly rationally, to exercise lenity by not convicting of certain charges when the rest of their verdict may clearly indicate guilt is but another example. What other explanation exists for our accommodation of jurors' instincts but our faith in their "sense of justice"? . . .
>
> As we said about our acceptance of jury nullification, our trust in juries to understand and apply the "not too remote" element "is indicative of a belief that the 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." "[A]nd law in the last analysis must reflect the general community sense of justice."[85]

Here, in a single opinion, we have at least four varieties of the sense of justice: the jury's, the community's, the court's, and even "our[s]." And these different carriers bring their sense of justice to bear on the law in various ways.

1. If we disregard the reference to "our" sense of justice for the moment, the *jury* follows its sense of justice in every case, even to the point of nullifying the law. (There is no mention of the sense of justice of individual jurors, but rather of the jury as a whole. The equivocation between a juror's and the jury's sense of justice masks the—as we shall see crucial, but often overlooked—distinction between the sense of justice as a personal and as a communal phenomenon.) The causation question thus is only one, relatively minor, instance of the jury's power—even obligation—to decide cases on the basis of its sense of justice.
2. But that sense of justice itself reflects the *community's* sense of justice—a smaller community's sense of justice reflecting that of a larger one.
3. And, more broadly, it turns out that law in its entirety derives its legitimacy from the sense of justice of the "general community."
4. Moreover, not only juries, but *judges*—including appellate judges—are guided by their sense of justice, not only in (re)deciding particular cases, but "[e]ven in the fashioning of rules of liability." Finally, and most remarkably, the court ascribes its decision *in this particular case* to that very sense of justice.

In sum, the *Maldonado* court's sense of justice shields the jury's sense of justice against constitutional attack, for otherwise the law would lose touch with the source of its legitimacy, the sense of justice. The circle of the sense of justice in American law is complete.

2

The Sense of Justice in Legal Thought

The New Jersey Supreme Court's opinion in *State v. Maldonado*[1] is noteworthy not only because it relies on the concept of the sense of justice so frequently and so openly, but also because it attempts to justify, or at least to explain, that reliance by assigning the sense of justice a central place in American law. This effort is all the more remarkable since American legal scholarship has yet to work out a comprehensive account of the sense of justice. An overview of the previous jurisprudential contributions to this subject is quickly assembled.

At the outset it must be said that, for the most part, jurisprudes have shown no greater interest than have judges in explaining just what they have in mind when they invoke the sense of justice. In legal commentary, as in judicial opinions, references to the sense of justice communicate a certain sense of urgency and depth of conviction.[2] A conclusion isn't simply correct, it's required by the sense of justice. An argument isn't just unconvincing, it offends the sense of injustice.

Take Holmes, for example. On the very first page of *The Common Law,* he announced that "[t]he life of the law has not been logic: it has been experience," as every American lawyer knows. What's not quite so well known is that Holmes went on to assign the sense of justice a prominent place in that "experience": "The felt necessities of the time, the prevalent moral and political theories, *intuitions of public policy, avowed or unconscious,* even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[3] No further attempt is made to explicate this oracular pronouncement. We are told that the sense of justice, or something like it, is "the life of the law." No less, and no more.

Holmes instead moved on to put the sense of justice to rhetorical use. For instance, he considered, and summarily dismissed, the claim that

the preventive theory of punishment "conflict[ed] with the sense of justice,"[4] without explaining what preventive punishment has to do either with "the sense" or with "justice." Note that Holmes didn't dismiss the claim that anything might conflict with "the sense of justice" as empty, or irrelevant, or both, as one might expect. He instead disagreed with the particular assertion that preventive punishment violates that sense, whatever it might be.

Rather than ban the sense of justice from jurisprudential discourse, Holmes endorsed it as a meaningful, and ultimately decisive, test of legitimacy. Elsewhere in *The Common Law,* for example, he cautioned that his impatience with weak-kneed refusals to acknowledge the plain fact that "[p]ublic policy sacrifices the individual to the general good"[5] should not be taken as a denial "that criminal liability, as well as civil, is founded on blameworthiness." Why? Because "[s]uch a denial would shock the moral sense of any civilized community."[6]

And there is more. Later on in *The Common Law* we learn that one of "the reasons" for the act requirement in criminal law is "that an act implies a choice, and that it is *felt to be impolitic and unjust* to make a man answerable for harm, unless he might have chosen otherwise."[7] To cite a better-known example, Holmes rejected strict liability in torts—or more precisely "[t]he undertaking to redistribute losses simply on the ground that they resulted from the defendant's act"—because it "offend[ed] the sense of justice."[8]

Next, consider another classic of American jurisprudence, Professor Francis Sayre's 1933 article on "public welfare offenses," the very source of *Maldonado*'s theory of the sense of justice.[9] Sayre's influential, and still often-cited, article dealt with a group of offenses he dubbed "public welfare offenses" that imposed criminal liability without requiring proof of criminal intent. It also made much of the sense of justice as the ultimate test of legitimacy, the last great hope for American criminal law in the modern bureaucratic state. While Sayre endorsed the emergence of certain "modern" strict liability offenses—namely, those designed to protect the "public welfare" through the criminal regulation of food, drugs, traffic, and so on—he was unwilling to eliminate the intent requirement for other, "traditional" offenses, like homicide, theft, and the like, which carried serious punishment. Remarkably Sayre argued that it was the sense of justice that would halt the spread of strict liability in American criminal law, predicting, incorrectly, that "[t]he sense of justice of the community will not tolerate the infliction of pun-

ishment which is substantial upon those innocent of intentional or negligent wrongdoing."[10] That was a bad thing because, as Sayre further announced in the tone of an apparent truism, that "law in the last analysis must reflect the general community sense of justice."[11] Later on in the same article, Sayre declared that "[t]o subject persons entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice: and no law which violates this fundamental instinct can long endure."[12]

Sayre isn't particularly helpful here, and it's telling that the *Maldonado* court could find no more solid scholarly foundation for its celebration of the sense of justice. Why is it that law "must reflect the general community sense of justice"? What would it mean for a law to do that? And how would we determine that sense of justice? What, after all, is the sense of justice, that "fundamental instinct"? And what community does Sayre have in mind here?

The *Maldonado* court also turned to the distinguished drafters of the Model Penal Code for support. This made sense since the New Jersey statute at issue in *Maldonado* was lifted from the Model Code, and the drafters of the Code had come up with the idea that the causation inquiry should be turned over to the "jury's sense of justice."[13] In the Code, and in the accompanying multivolume set of commentaries, one finds many invocations of the sense of justice, but no explanation—or even reference to an explanation provided elsewhere—of what it means to say that some rule or other comports with, or doesn't, with that sense.

In fact, the drafters not only incorporated the sense of justice—more precisely the jury's sense of justice—into criminal law doctrine, as in the law of causation. They also relied on their very own, or rather the "common," sense of justice in support of the theoretical underpinnings of the Code itself.[14] Take the Code's infamously Draconian provision on attempt, which did away with the long-standing rule that unsuccessful attempts should be punished, if at all, less severely than consummated crimes.[15] In the drafters' view, treating someone who fails to accomplish her criminal goal on account of a "fortuity" differently from someone who does succeed "would involve inequality of treatment that would shock the common sense of justice."[16] For emphasis, the drafters added that "[s]uch a situation is unthinkable in any mature system designed to serve the proper goals of penal law."[17] This reference to the "maturity" of a legal system did little to explain the previous one to "the common sense of justice."

The *Maldonado* court turned to a 1933 article on public welfare offenses for the general proposition that the legitimacy of law derived from its foundation in the sense of justice. Invocations of the sense of justice in American legal scholarship, however, aren't a thing of the past, nor are they limited to criminal law. As we saw above, judges occasionally recount their struggles with their, or someone else's, sense of justice. And so do the jurisprudes.

The sense of justice, for example, might force a commentator to abandon an otherwise promising line of argument. For instance, in a recent article on "Driving while Black," David Sklansky carefully and compellingly explored ways in which search and seizure law might be used to combat racial discrimination in traffic law enforcement. Sklansky considered, among other things, the possibility of "bringing affirmative action of this kind to Fourth Amendment doctrine, particularly as a way to combat conscious or unconscious bias on the part of police, prosecutors, and judges." He concluded that he could not pursue this otherwise attractive idea, however, because "separate Fourth Amendment rules for minority suspects probably would offend *most Americans' sense of justice,* far more than affirmative action in employment decisions and academic admissions, because of the widespread feeling, which I share, that individualized fairness is especially important in the criminal justice system."[18]

As another example taken from recent scholarship, consider an important article by Akhil Amar on constitutional theory. Amar there made the case for "a spacious but not unbounded version of constitutional textualism," which he calls "documentarianism." When the time came to explain why his version of textualism wasn't blind to considerations of justice and yet in its flexibility managed to remain "disciplined," Amar drew a crucial distinction between two varieties of the sense of justice, one good, one bad:

> The document itself begins by trumpeting its aim to "establish justice" and we fail to best fit the document if we simply ignore this aim. But a proper justice-seeking reading of the document does not warrant an interpreter to invent his own theory of justice and call it "the Constitution." The documentarian 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.[19]

"Documentarianist"—rather than narrowly "textualist"—constitutional interpretation thus requires plumbing the people's sense of justice, rather than the Justices', and *for that reason* is superior to free-flowing judicial subjectivism. Telling the two apart, of course, has not always been easy, leading some to suggest that invocations of some community's sense of justice are a mere fig leaf for unbridled discretion.[20] But how can we differentiate between two varieties of the sense of justice if we don't know what the sense of justice is, unmodified?

Now it would be tempting to conclude on the basis of these examples from court opinions and academic writings, that *no one* had taken the trouble to investigate what the sense of justice might be, and that it was a rhetorical device whose usefulness was directly related to its spaciousness and speciousness. There is, however, a significant tradition of serious thought about the sense of justice, reaching as far back as the Scottish Enlightenment, or even Aristotle, depending on how deep one wants to dig. This is the history of the study of the nature, significance, and origin of the moral sentiments: moral psychology. The lineage of this inquiry runs from Adam Smith and Rousseau, but also—less obviously—Kant and Hegel, to Freud, George Herbert Mead, Piaget, Kohlberg, and Rawls.

Parallel to this individual strain in the study of the sense of justice is a communal one. The study of the community's sense of justice falls within the scope of sociology, social psychology, and even evolutionary biology (especially in its late variant, sociobiology), and reaches at least as far back as Vico's *sensus communis*; major contributors to its study include Savigny, Durkheim, and, once again, Freud and G. H. Mead.[21] The communal sense of justice has also played an important role in political ideology, illustrated most strikingly by the Nazis' notion of the sense of the justice of the German people (the *Volk*) as the source of state power, law included.

The distinction between these two varieties of the sense of justice of course isn't categorical. Their connection is as close as that between the individual experiencing the one and the community experiencing the other. Many, perhaps most, accounts of the sense of justice have sought to elucidate the connection between the individual's and the community's sense of justice. It's no surprise that Freud and Mead made significant contributions to our understanding of both.

We'll track both theoretical strands of the sense of justice, individual

and communal. In the end, however, we will disentangle them, and then, in chapter three, discard one in favor of the other. We will develop a conception of the sense of justice, and of language, that is individual —more specifically, personal—rather than communal. As we'll see in greater detail in chapter four, the sense of justice is best viewed as a formal capacity for understanding and following principles of justice, no matter what they might be. It's not a source of principles of justice, nor a guide to their discovery. Contrary to Romantic views of the sense of justice as a communal characteristic, there's no German or American sense of justice, or sense of language for that matter. Instead there is a universal communicative capacity shared as persons by all competent participants in any community of justice or language.

Legal Realism and Its Situation Sense

In the United States, the first theorists, legal, political, or otherwise, to show a serious interest in the sense of justice were the Legal Realists of the early twentieth century. Unfortunately, they never managed to produce anything resembling a comprehensive account of the varieties and roles of the sense of justice. As a general matter, they saw little need to distinguish between the sense of justice as an individual and a communal attribute, or among different varieties of an individual sense, or to differentiate between a formal and a substantive sense. They also failed to see the connection between the individual sense of justice and earlier philosophical traditions, in particular the moral sense school, though some, and Jerome Frank in particular, tried to turn to Freud for help. Nor did they explore the connection between the sense of justice and the American sociology and social psychology of the time, which in G. H. Mead had one of the most profound observers of the process of identification through mutual role taking, a phenomenon that is a crucial prerequisite for the development and experience of a sense of justice.

The Legal Realists, in general, did not move beyond the insight that, contrary to the orthodoxy of Langdellian formalism as they perceived (and gleefully caricatured) it, the sense of justice did in fact have an important role to play in judicial decision making.[22] The one possible exception to this rule is, as so often, Karl Llewellyn, who appears to

have been fascinated by the sense of justice no matter what shape or size. Llewellyn gave various, and varying, accounts of the sense of justice throughout his career. His famous concept of the "situation sense" occasionally appeared as a special skill characteristic of early American judges that had long since been lost, sadly.[23] Then again, it emerged as a general prescription for legal interpretation even by ordinary contemporary judges, whom Llewellyn instructed first to get a sense of the situation—that is, to develop a situation sense—and only then to decide the case, driven by, among other things, a "feel for an appropriate rule":

> As you size up the facts, try to look first for a significant life-problem-situation into which they comfortably fit, and only then let the particular equities begin to register; so that when the particular equities do begin to bite, their bite is already tempered by the quest for and feel for an appropriate rule that flows from and fits into the significant situation-type.[24]

At other times, Llewellyn's situation sense might show up as a combination of the two, an "intuitive capacity" shared by all judges old and new, "born of judges' immersion in community and professional norms and sharpened through their exposure to a massive number of cases," which enables them "to derive consistent and generally accepted results from otherwise hopelessly indeterminate formal doctrines."[25] Llewellyn also attempted to reinterpret the situation sense in terms of the holistic *Ganzheitspsychologie* in vogue at the time,[26] which had also left its mark on the often obscure work of Hermann Isay, a German lawyer whose work Llewellyn knew and cited approvingly.[27] In this way, Llewellyn presumably (and somewhat belatedly) heeded his own call, uttered in 1931, that it is "high time that American legal thinking should arrive at a conscious and sociologically defensible working position in regard to European legal thought."[28] Finally, when Llewellyn developed a strong affinity for natural law and Catholicism, the situation sense mysteriously emerged as an organ for the sensing of more or less eternal truths of natural law.[29]

But that was not all. Llewellyn also gave a lot of thought to the communal sense of justice, as opposed to the individual variety—and the individual judge's sense of justice in particular. Apparently under the influence of his encounter with the German theory and practice of com-

mercial law as a visiting professor at the University of Leipzig in 1931–32, Llewellyn became convinced that law, and commercial law in particular, should reflect the sense of justice of the commercial community. During the late 1930s and early 1940s, Llewellyn's attempt to incorporate the German institution of merchant juries into the Uniform Commercial Code failed. Yet, as James Q. Whitman explains,

> Llewellyn's Code retained its deference to "custom," the "law merchant," "good faith" and "reasonableness." In Llewellyn's Romantic vocabulary, however, "custom," the "law merchant," "good faith" and "reasonableness" were not terms of substantive law, but procedural directives, indications to a court that it should refer its decision to lay specialists with *a feel for commercial law.*[30]

But Llewellyn wasn't the only American jurisprude who showed an interest in the sense of justice, nor was he the first. The sense of justice was one of the great discoveries (and hobby horses) of Legal Realism. In 1927, Herman Oliphant exposed the merely instrumental significance of "the over-general and outworn abstractions in opinions and treatises," compared to the judge's sense of justice triggered by "the stimulus of the facts in the concrete cases before him."[31] Only two years later, a remarkable article by a trial judge brought empirical confirmation of Oliphant's professorial hypothesis. In "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," Judge Joseph C. Hutcheson, Jr., of the Federal Court for the Southern District of Texas boldly declared that "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause."[32] Hutcheson's chatty piece is written as a mock confessional that reveals long-kept secrets of the trade:

> "[L]est I be stoned in the street" for this admission, let me hasten to say to my brothers of the Bench and of the Bar, "my practice is therein the same with that of your other worships."[33]

The following year, Professor—later Judge—Jerome Frank said much the same thing in his *Law and the Modern Mind,* one of the more lasting manifestos of Legal Realism.[34] "Whatever produces the judge's hunches makes the law," Frank explained and set out to discover that "whatever."[35] In support, Frank cited not only Hutcheson but also dug

up a letter from Chancellor Kent, one of the champions of nineteenth-century American law, in which Kent admits that "the moral sense decided the court half the time.[36]

But Frank did more than invoke the authority of American judges in a confessional mood. Like Llewellyn he turned to German legal scholarship, in particular to the Free Law Movement (*Freirechtsbewegung*). Since the early years of the new century, 1906 to be precise, the rambunctious Free Lawyers had berated German judges for concealing the true source of their decisions—the sense of justice—behind legal mumbo jumbo and in fact had called for judges to make explicit reference to their sense of justice in their decisions.[37] According to Frank, "it is the sense of justice which the new school [i.e., the Free Law Movement] contends should in all cases control the judge except in those unusual circumstances where explicit language in the code compels the judge to reach what he would otherwise consider an unjust decision."[38]

This was true enough, if not entirely up-to-date. By the time *Law and the Modern Mind* appeared in 1930, many Free Lawyers, including their brashest and earliest exponent Hermann Kantorowicz, had begun to renounce their celebration of the sense of justice some thirty years earlier as a case of excessive youthful exuberance, if not indiscretion.[39]

Llewellyn, by contrast, was far more *au courant*. His favorite Free Lawyer, Hermann Isay, was at—some would say over—the cutting edge of the movement. Plumbing the phenomenological depths of the sense of justice in his 1929 book, *Legal Norm and Decision,* Isay stressed the need for the judge-as-*Führer,* who in his decision divined and crystallized this amorphous phenomenon.[40]

Frank's and Llewellyn's glance eastward on the subject of the sense of justice made sense, and not only because of the Free Lawyers. By that time, German legal scholarship had been engaged in an attempt, and occasionally a struggle, to come to grips with the sense of justice for over a century. And as we'll see shortly, it wasn't the first time that German ideas about the sense of justice exerted an influence on American jurisprudence.

Rechtsgefühle *and Other Senses of Justice*

Given the richness of German writings on the sense of justice and their impact on American legal theory, it's well worth taking a closer look at

that literature. The German debate about the nature and significance of the sense of justice first sounded many of the basic themes that a modern reconception of the sense of justice must work out in greater detail, including the distinction between a communal and an individual sense of justice and the fruitful, though neglected, connection between the sense of justice and the sense of language. What's more, getting a sense of the German sense of justice literature may be the only way to make sense of what American writers might have had in mind when they talked about the sense of justice, whether they went on to sketch accounts of the sense of justice, as did Karl Llewellyn several times over, or were content merely to invoke it, as was true of Jerome Frank and almost everyone else.

A good place to start is Erwin Riezler's 1923 book, entitled simply, *Das Rechtsgefühl* (*The Sense of Justice*).[41] This book gives a useful account of the considerable German literature on the subject, and sets up a taxonomy of the senses of the sense of justice, which is still in use today, and will prove useful for us as well.[42] Riezler distinguished between three varieties of the sense of justice.[43] First, the sense of justice may be thought of as an intuitive sense of how the applicable positive law resolves a given case. An advanced skill, or "tact," of legal judgment sharpened through years of practice and experience, the sense of justice in this sense (*sensus iuridicus,* or "Judiz" in German) resembles Hutcheson's "hunch" and the early Llewellyn's situation sense.[44] As we'll see in a moment, the sense of justice as capacity, and the realization of that capacity, plays an important role in modern political theory. The decisive difference, however, is that the sense of justice, if it is to have a role in theories of legitimacy, cannot be limited to officials of the very state, in this case judges, whose legitimacy is at stake.

Second, and most important for our purposes, there is the sense of *justice* properly speaking, as a sense of what is right and just, regardless of the state of positive law. The sense of justice in this sense presumably would include Chancellor Kent's "moral sense" cited by Frank and the late Llewellyn's situation sense.[45] Understood in this way, the sense of justice emphatically is *not* restricted to state officials, but helps account for the very urge to subject state institutions to legitimacy scrutiny.

Finally, and perhaps least interesting, the sense of justice might refer to an interest in seeing that the applicable positive law, just or not, be followed and the sense of satisfaction derived from recognizing, or actually engaging in, acts that accord with the governing law. In this per-

mutation, the sense of justice is a sort of respect, if not reverence, for the law as law. This aspect is captured, among other things, by Rawls's notion of a sense of justice in a just society.[46] In a society actually governed by principles of justice, it turns out, the interest in—and satisfaction of—seeing justice done (Riezler's second sense) is indistinguishable from an interest in—and satisfaction of—seeing the law followed (Riezler's third sense).[47]

The Legal Realists tended to vacillate between the first and the second Riezler category; they showed little interest in the third. So Frank could rely on Hutcheson's hunch and Kent's moral sense at one and the same time, without distinguishing between the two. And Llewellyn could begin his career by postulating a sense of justice as a sophisticated sort of hunch, only to speculate later on about what natural law principles might drive this sense, and how judges might gain access to them.[48]

The difficulty of distinguishing between the sense of justice as an epistemological guide (Riezler's first sense) and as a substantive ideal (Riezler's second) is reflected in the well-known ambiguity of the German concept of *Recht,* or right. *Recht* encompasses both positive law, or law as fact (lex lata), and justice, or law as ideal (lex ferenda). *Rechtsgefühl,* or feeling of right, therefore is both the sense for what the law is and a sense of what it should be, or a sense *for law* as well as a sense *of justice.*

Although Riezler's taxonomy thus allows one to differentiate among different invocations of the sense of justice, it has two limitations as an analytic device. Insofar as it presupposes a system of legal rules that are applied, compared to principles of justice, or respected, it cannot easily accommodate one important, and prior, function often ascribed to the sense of justice, that of the *origin* of these rules. Moreover, it suffers from an individualistic bias in that it leaves no obvious room for conceptions of the sense of justice as a communal phenomenon, which is a significant shortcoming since so much thinking about the sense of justice has been preoccupied with the communal sense of justice, especially when the concept first entered jurisprudential discourse.

The beginnings of the sense of justice in German legal thought were inconspicuous enough. Riezler traces its first appearance to a 1796 book on jurisprudence by the young P. J. A. Feuerbach, the father of modern German criminal law and author of the influential Bavarian Penal Code of 1813.[49] Feuerbach, however, didn't make much of the term and certainly didn't accord it any great theoretical significance.

A few years later the term entered public discourse after Heinrich Kleist's popular novella "Michael Kohlhaas" appeared in 1810. The duped subject Kohlhaas is led by his somewhat overdeveloped sense of justice to commit a series of increasingly destructive acts in an effort to force a local potentate to give him his due.[50] In Kleist's words, "his sense of justice made him a robber and a murderer"[51] in order to right the injustice of having his horses seized pursuant to an arbitrary new passport decree, and then maltreated. Kohlhaas's redemption comes only when he learns, on his way to the gallows, that the local lord whose mistreatment he had to endure has been sentenced to a two-year prison term by the highest court in Saxony:

> The Elector then called out: "So, Kohlhaas the horsedealer, you have thus been given satisfaction; prepare now to make satisfaction in your turn to His Imperial Majesty, whose representative stands here, for your violation of His Majesty's public peace!"[52]

And so Kohlhaas is beheaded.

The jurisprudential career of the sense of justice began in earnest with the work of Friedrich Carl von Savigny, first professor in Berlin, then Prussian minister of justice, and, most important, founder of the Historical School of Jurisprudence, which would later claim adherents in many countries, including the United States.[53] In contrast to Kleist, Savigny showed little interest in an individual's aspirational sense of justice that may conflict with existing legal norms, or at any rate with those in power.

Savigny and the Historical School conceived of the sense of justice as a communal, not as an individual, attribute. Savigny concerned himself not with individual psychology—not even individual *judicial* psychology—but with the origins of legal norms of the community, that is, with customary law. To function as the motor of legal evolution, Savigny's sense of justice required a critical element. It had to be more than the mere satisfaction of a desire for order or a sense for the applicable positive law, in Riezler's terms. The driving force, however, was not the individual's sense of justice, but that of the community.

But which community? First, the people; second, the jurists, whose job it was to map and manifest the people's sense of justice. Savigny argued that the ultimate source of law was the sense of justice of the people, the *Volk*. By the nineteenth century, however, the German peo-

ple, Savigny suggested, had lost its ability to generate law, thanks to centuries of Roman law dominance. The authority and duty to generate law thus had long since passed into the hands of the (Roman law-trained) jurists, who had come to replace the people as representatives of the *Volksgeist,* or spirit of the people—their collective (or common) consciousness, one might say today.

Still, though the jurists' sense of justice in fact exerted great influence, it ultimately derived its legitimacy from its connection to the sense of justice of the people. That the people's sense of justice had been stunted was a lamentable fact. But this made its detection no less crucial, even if the jurists had to imaginatively re-create it in the process.

Savigny illustrated his understanding of the sense of justice with an analogy between law and language. According to Savigny, both law and language sprang from one and the same source, the spirit of the *Volk*.[54] They reflected, in different ways and to different degrees, the living breathing spirit of the people. It was the job of professional jurists to capture and reflect the sense of justice; linguists were to do the same for the sense of language.

And that's precisely what Jacob Grimm—the older of the Brothers Grimm—did. A student of Savigny's, Grimm established the empirical study of linguistics, assailing those "normative" linguists who dared to do anything other than capture actual language use. As Savigny scolded those who advocated new codes based on theories of the common nature of man for failing to take into account the actual manifestations of the people's (or at least the jurists') sense of justice, so Grimm attacked the early normative linguists who independently promulgated rules of correct language instead of deriving these rules from actual language practices.

The debates of the time over how the dictionarian or grammarian should exercise her discretion in defining proper language rules and usage in many ways paralleled that over the discretion of judges and legislators. The linguistic controversy was often framed in jurisprudential terms. So Joachim Heinrich Campe, whose German dictionary of 1810 exerted a powerful influence on the Grimm brothers, phrased the question of what constrained the discretion of a dictionarian as the question of how much a dictionarian resembled a legislator.[55] Campe, and later Grimm, responded that the dictionarian was not a "language legislator" at all and instead should merely record how the language was actually used. The use of the passive voice is intentional here, as Campe wasn't

particularly worried about how to define that actual language use or, for that matter, how to measure it once defined. Campe instead was content to rely on the language use of the "most language correct" authors, without bothering to resolve the circularity of that solution or explaining why his classification of "correct" language use didn't amount to more than a mere recording of actual usage.[56]

More interesting for our purposes, Campe based his authority to decide between correct and incorrect usage on his *sense of language* (*Sprachgefühl*), which he felt entitled to consult as a matter of course "like any other writer."[57] Campe's attempt to justify his normative interference as a dictionarian with his empirical ideal of language recording thus presages the Free Lawyers' much later claim that judges routinely consult their sense of justice when determining what the law is. It also introduced the concept of the sense of language into German thought.

Later there will be a lot more to say about the sense of language, and its analogy to the sense of justice.[58] Suffice it to say at this point that the analogy would be revived by Noam Chomsky, though in a significantly different—individual and cognitivist—sense. In fact, the connection between Campe and Chomsky may be a bit more direct, and more personal, than might appear at first sight; Campe, it turns out, was private tutor to the young Wilhelm von Humboldt, whose concept of a universal linguistic competence in the form of an innate generative grammar, a sort of abstract sense of language common to all humans, Chomsky rediscovered and recognized as a precursor to his own ideas.[59]

For now, let's stick with Savigny's theory of the sense of justice as a *communal* attribute of the *Volk,* analogous to the sense of language. In this view we find one of the impulses for the development of legal sociology. That discipline came into its own at the turn of the twentieth century, through the work of Eugen Ehrlich in Germany and Roscoe Pound in the United States. Llewellyn's interest in the sense of justice of the merchant community can also be seen as part of this project, except of course that Llewellyn was not content to study the phenomenon as a sociologist, but to reflect it in legal institutions as drafter of the Uniform Commercial Code.

We also find the beginnings of a theory of the lawyer class in modern society, which requires experts for the development and refinement of legal rules since the people are, for whatever reason (inability to appre-

ciate the complexity of modern social and economic arrangements, diversity, and sheer size) unable to formulate and apply these rules themselves. Yet in this theory, the people's sense of justice (or that of some other community) remains the ultimate origin of law, and therefore the ultimate test of law's legitimacy.

This aspect of Savigny's theory can be found, virtually unchanged, in the thought of James Coolidge Carter, an influential American lawyer of the late nineteenth century, perhaps best known for his staunch opposition to codification.[60] In his much cited 1890 presidential address to the members of the American Bar Association gathered in Saratoga Springs, Carter told his audience that "[w]e all know the method by which [the judge] ascertains the law."[61] And this is how it was done:

> The statute book is first examined, and if that speaks to the point and clearly, all doubt vanishes. . . . But in many, indeed most, of the controversies brought before him, no record is found of a precisely similar case, and the law is to be declared for the first time. . . . It is agreed that the true rule must be *found*. . . . In all this the things which are plain and palpable are, (1) that the whole process consists in a *search* to find a rule; (2) that the rule thus sought is the *just* rule—that is to say, the rule most in accordance with the *sense of justice* of those engaged in the search; (3) that it is tacitly assumed that the sense of justice is the *same* in all those who are thus engaged—that is to say, that they have a *common standard of justice* from which they can argue with, and endeavor to persuade, each other; (4) that the field of search is the habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business and manners.[62]

Carter's remarks are noteworthy not only because they highlight the importance of the sense of justice in the judicial decision-making process. They also identify the soil from which Llewellyn's situation sense was to emerge decades later: "the habits, customs, business and manners of the people." Substitute "business community" for "people," and the way to Llewellyn's theory and its application in the Uniform Commercial Code is clear.

In the end, Carter pointed to three carriers of a sense of justice: the individual judge, the community of jurists, and the people. The individ-

ual judge was no more, but also no less, than the voice of the sense of justice of the people as interpreted by the sense of justice of the professional justice seekers, the jurists.

This is a straightforward adaptation of Savigny, as Carter happily acknowledged. But the differences in focus are as revealing as the similarities in approach. There are two characteristic differences between Carter's and Savigny's interest in the sense of justice. Carter is thinking about judges, and judicial decision making in particular. Savigny has in mind not judges, but jurists, meaning professors, specifically professors of Roman law—like himself. Jurisprudes, however, don't decide cases, they construct systems based on principles. Moreover, Savigny is very much concerned with the concept of a German *Volk,* a topic that came to exert enormous power over German thinkers well into the twentieth century. Carter had little to say about the American *Volk;* he appeared to be more concerned with guaranteeing the statutorily unimpeded expansion of commercial enterprise throughout the American continent, rather than decoding the emanations of the spirit of the American *Volk* as a whole. To Savigny, by contrast, the sense of justice was but one way in which the spirit of the *Volk* manifested itself, along with the sense of language.

In Savigny's account, and therefore also in Carter's, one question remains unresolved, however. What is the judge (or jurist) to do if her sense of justice conflicts with that of the people? In a way this question wouldn't have made sense to Savigny or Carter. Savigny didn't give the phenomenon of an individual sense of justice much thought. For him, the operative distinction was that between the jurists and the people, not between the individual and the community. Moreover, even if he had, a conflict between the two was impossible. For one, the people's sense of justice had atrophied to the point where it could hardly conflict with anything. Moreover, if the jurists were charged with divining the people's sense of justice, and nurturing it, to the extent possible, how could their sense of justice conflict with a sense of justice they themselves unearthed?

Carter too showed little interest in the individual judge's sense of justice, as apart from the sense of justice of his fellow members of the bar. The lawyers' communal sense of justice and the sense of justice of the people could hardly conflict because it was, as in Savigny's case, the lawyers' job to determine the people's sense of justice in the first place.[63] The only difference between Savigny and Carter was that Car-

ter had greater confidence in the bar's ability to do just that. In fact, that was the point of Carter's opposition to codification. He thought that a code would not, and could not, pay sufficient attention to the business practices of American entrepreneurs, particularly as they continued to evolve in as yet unpredictable ways. The common law was far more flexible, precisely because it kept its nose to the ground, that is, to the businessman's sense of justice. Carter, after all, saw the common law as a continuous inquiry into the "habits, customs, business and manners of the people." Conflicts between the sense of justice of individual judges and that of the lawyer class didn't seem to bother Carter much. As he explained, correctly, "[I]t is tacitly assumed that the sense of justice is the *same* in all those who are thus engaged" in the search for "the *just* rule." He showed no inclination to challenge this assumption.

At around the same time in Germany, Eugen Ehrlich, the founder of the sociological school of jurisprudence, developed a remarkably similar account of judicial decision making. According to Ehrlich, the communal sense of justice was relevant because it did and should inform the judge's decision in cases that fell within the so-called gaps in the law, whose existence and pervasiveness were debated fiercely and *ad nauseam*. Ehrlich revived the historical school's interest in the communal sense of justice but, for the first time in Germany, addressed the problem of figuring out what that sense of justice might be. Unlike Savigny, Ehrlich did not set out to detect the sense of justice of a community as vast, diverse, and amorphous as the German *Volk*. As Carter did in the United States, Ehrlich focused on prior judicial opinions as manifestations of the sense of justice of the relevant (judicial) community. He also stressed the importance of studying actual business practices to determine the sense of justice of the relevant (business) community.[64]

Unlike Savigny and Carter, Ehrlich recognized the possibility of a conflict between the sense of justice of an individual judge and that of some community, however extensive. The judge, according to Ehrlich, should not follow her subjective sense of justice. Instead she should decide on the basis of the societal *interests* that she can divine based on the interpretation of actual legal practices, taking into account the practices' historical and sociological context.[65] Jurisprudence, and the theory of judicial decision making in particular, therefore should focus not on the "individual psyche" but on the "societal psyche."[66] The judge's job, in other words, was to detect and to implement communal interests underlying the communal sense of justice.

In Isay's theory of judicial decision making, which exerted such influence on Llewellyn and drew heavily on the phenomenologists and value philosophers of his time, the judge didn't so much detect the community's sense of justice, as *divine* it. According to Isay, the judge, as "*Führer,*" could sense the proper resolution of justice disputes, thanks to his exceptional skill in gaining access to moral truths on behalf of the community.[67] In Isay's theory, the judge followed his own sense of justice and the community's at one and the same time. A conflict between the two was once again impossible because the two were identical. Any suggestion to the contrary would amount to challenging the judge's special skill as *Führer* to sense what was right and just.

At the same time, on the other side of the Atlantic Judge Learned Hand was trying to come to grips with the question of just what role his sense of justice was to play in the judicial decision-making process. As Edmond Cahn—easily the American jurisprude who has thought hardest about the sense of justice—has shown, Hand struggled for decades with immigration law cases that turned on the concepts of "crime of moral turpitude" and "good moral character."[68] (Conviction of the former requires deportation of an alien; possession of the latter is a requirement for naturalization.) Hand's problem was this. He was trying to determine what constituted a crime of moral turpitude or a good moral character "by common conscience" or the "moral feelings now prevalent generally in this country," without "substituting [his] personal notions as the standard."[69] So the communal sense of justice trumped his personal one; but how was he to measure such a "nebulous matter" as the communal sense of justice?[70]

Cahn's analysis of Hand's dilemma focused on the question of personal responsibility, or rather its avoidance. According to Cahn, Hand's reference to the common conscience was but a meek attempt to evade the hard choices that a judge was made a judge to make.[71] It didn't matter how hard it was to nail down the moral feelings of the community for one simple reason: the moral feelings of the community didn't matter. What mattered was the judge's sense of justice, not the community's. To illustrate the point, Cahn quoted John Chipman Gray's influential *The Nature and Sources of the Law:*

> We all agree that many cases should be decided by the courts on notions of right and wrong, and of course every one will agree that a judge is likely to share the notions of right and wrong prevalent in the

> community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right and wrong differ from those of the community,—which ought he to follow—his notions, or the notions of the community? Mr. [James Coolidge] Carter's theory requires him to say that the judge must follow the notions of the community. I believe he should follow his own notions.[72]

Anything else Cahn considered a cop-out, a "vain" attempt on Hand's part to return the task of judging to the community that had assigned it to him in the first place. Certainly the judge whose sense of justice collides with that of the community "must take care to read extensively and ponder deeply." But when all is read and pondered, "the eventual decision ought to rest squarely on his own shoulders."[73] It doesn't help Hand that, as Cahn points out, the statute in question says nothing about the common conscience or anything like it.[74]

That judicial references to some community's sense of justice can help judges deny personal responsibility for their difficult decisions, especially if these decisions inflict hardship on a person before them, makes perfect sense. And the judicial denial of personal responsibility certainly is a problem worthy of careful study. But this phenomenon isn't limited to the community's sense of justice. In fact, that admittedly vague concept doesn't even make the top ten of responsibility evasion tools.[75] On the contrary, positivism, a theory not usually associated with solicitude for common consciences or any other sources of law beyond that in the books, is at least as likely to be associated with this judicial strategy.[76]

In the end, Cahn managed no more than to illustrate another instance of the misuse of the construct of a communal sense of justice, a concept that has been as useful as it has been amorphous, and has been criticized for that very reason, ever since Savigny first introduced it into legal discourse in the form of a sense of justice of the community of the German *Volk*. It's no surprise that Gray's comments, in *Nature and Function,* responded to the invocation of the people's sense of justice by James Coolidge Carter, Savigny's American epigone.

The construct of a communal sense of justice—by combining three malleable concepts, community, sense, and justice, or nonsense on stilts on stilts on stilts—is flexible, or empty, enough to fit into any rhetorical strategy. Its use is not limited to the avoidance of personal responsibility,

by justifying the judge's failure to consult her sense of justice. It might with equal, if no greater, success be employed to the opposite effect, namely to pass the judge's personal sense of justice off as a manifestation of the community's. In that case, the judge would do what Cahn urges her to do, that is, to turn to her sense of justice rather than the community's. If Cahn found this unacceptable as well, he didn't say so.

At any rate, Cahn's dismissal of the communal sense of justice as facilitating responsibility avoidance is entirely appropriate, if not particularly original. Once one steps outside Cahn's immediate concern with judicial responsibility, however, his critique of Hand's waffling reveals a more differentiated account of the sense of justice. Cahn's considered views on the sense of justice, applied in his critique of Hand and laid out in greater detail in a book on the subject, usefully capture not only the attractiveness of the sense of justice as a theoretical concept, but also its many pitfalls.

Judge Hand's dilemma, and Cahn's treatment of it, deserves careful consideration. It's worth a closer look because it documents how a thoughtful American judge and a no less thoughtful American law professor tried to come to grips with the sense of justice, practically and theoretically.[77] Their approaches to the topic illustrate both the significance, and the limits, of the sense of justice in legal and political thought.

3

The Sense of Justice Misconceived

Learned Hand's practical dilemma and, more important, Edmond Cahn's theoretical resolution of it, both rest on a general misconception, or rather a series of misconceptions, of the sense of justice. In fact, upon close inspection Hand's dilemma has nothing to do with the sense of justice. These misconceptions are important, not only because they are common, but also because they point the way to a theory of the sense of justice, properly conceived. We will now address them one by one.

Justice, Not Ethics

Cahn's first confusion is that between justice and ethics. The sense of justice, understood as the ability and desire to adhere to principles of justice, does not shed light on the evaluation of someone's conduct or character as good, immoral, or turpitudinous under some particular moral code or other. To think it does is to confuse the sense of justice with an ethical sense.

Hand's dilemma is a moral, or more precisely, an *ethical* dilemma, not a dilemma of justice.[1] It calls for the definition, or rather the detection, of a particular theory of the good, a theory of morality, and its application to a particular case. Detecting a moral code is difficult, as sociologists and anthropologists know all too well. But these empirical, or epistemic, difficulties, though certainly formidable, have nothing to do with the sense of justice.[2] Theories of justice are agnostic as to particular moral codes.

Cahn faults Hand not for turning to moral views from the standpoint of justice. On the contrary, he criticizes him for *failing* to do just that. In fact he accuses Hand of a kind of moral treason, that is, "lend[ing] aid

and comfort to those who would palliate the practice of evil."[3] In Cahn's view, the immigration statutes that so troubled Hand are no different than all "those statutes which have a direct reference to morality." As examples, Cahn cites criminal laws containing "such statutory terms as 'injurious to public morals,' or 'obscene,' or 'crime involving moral turpitude.' "[4]

Instead of faulting Hand for his spinelessness in the face of these moral imperatives, Cahn might have done better to find fault with the statutes themselves. Cahn confuses justice with ethics here, and overlooks the distinction between law and morals that is a cornerstone of modern legal thought. Cahn can't chide Hand for "seriously distort[ing] the function of the court as pedagogue and moral mentor in a democratic society"[5] for one simple reason: neither the law, nor "the court" applying it, has or can have such a function. Maybe it's true that "[w]hat the community needs most is the moral leadership of such a man as Learned Hand and the full benefit of his mature and chastened wisdom."[6] But not in Hand's capacity as a judge and not by means of state action through law.

In the end, Cahn's enthusiasm for the sense of justice is the flipside of a deep anxiety about the immorality of his society. The sense of justice is a virtue without which vice will spread like a disease, and the forces of good (us) will lose the fight against the forces of evil (them), and those "of good moral character" will fall prey to those not "of good moral character," who wear "the badge of moral turpitude" or are "tainted with" this moral leprosy.[7]

Anglo-American law, of course, has a sorry history of persecuting those "not of good fame" who have committed, or might commit, offenses "contra bonos mores," that extends at least to the sixteenth century.[8] When Cahn cites "the ugly frenzy known as national prohibition," he doesn't mean that immorality is irrelevant in law in general, but that the *community's* sense of immorality has no place in judicial decision making.

Cahn is not alone in mistaking the sense of justice for a sense of morals. The confusion between the sense of justice as a condition of interpersonal conduct and the sense of justice as enforcer of a code of personal conduct helps account for the popularity of the sense of justice among what one might call moral conservatives. These are people who strongly identify with a certain moral system, and who—on the as-

sumption that the tenets of this system are (or should be!) endorsed by the majority of a particular political community—believe that the law should be used to enforce that morality against the minority of those who don't adhere to it. This misunderstanding of the sense of justice often manifests itself in its use as synonymous with terms like moral sense, moral feelings, common conscience, and the like.[9]

When used in this sense, the sense of justice is triggered not when someone is treated unjustly, that is, not as a person or legal subject, but when certain ethical precepts have been violated. Now there are of course certain acts that are both unethical and unjust, but it's only their violation of principles of justice that calls for the vindication of justice. An injustice occurs anytime one person treats another not as an equal and rational person, and thereby denies the other her status as an object of justice. But not every unethical, or immoral, behavior that violates some code of conduct or other qualifies as unjust in this sense. The examples cited by Cahn, namely, conduct that is " 'injurious to public morals,' or 'obscene,' or [a] 'crime involving moral turpitude,' "[10] all illustrate the point—they are immoral at best, but not unjust.

Today, the most frequently cited example of the confusion between a sense of justice and a sense of morals is the punishment of homosexual conduct.[11] It simply doesn't matter, from the standpoint of justice, whether some or most people consider gay sex immoral. The problem, to put it in the terms of Judge Hand's dilemma, is not figuring out the "moral feelings now prevalent generally in this country" with respect to gay sex. No matter what these feelings might be, or how prevalent they are, the last thing *justice* demands is that they be enforced through law. On the contrary, the sense of justice militates *against* the punishment of homosexual sex precisely because that punishment, and the condemnation it implies, fails to respect persons who happen to be gay as persons, where personhood also implies sexual autonomy.[12]

None of this is meant to deny that justice has something to do with morality. But theories of justice are moral theories only if one understands moral theories as dealing with the question of what one has to presuppose about people if one thinks about them as moral persons, that is, as the subjects and objects of moral judgments. Ethics by contrast is about particular, substantive, value systems embraced by particular persons, or groups of persons. Morality is about how people should view each other in the abstract, no matter what ethical system,

or theory of the good, they endorse. I have moral duties, and moral rights, as a person, not as a Muslim, or a Rotarian, or a mother, or a Canadian.

Moral judgment in this sense is not labeling someone as moral or immoral, good or bad, but is the form of judging another as a moral person under the abstract constraints of morality, no matter what that judgment might turn out to be. A moral theory, then, explains what it means to treat someone as a person alone, regardless of her attachments to specific ethical norms or other characteristics. A theory of justice is a moral theory in this sense, but in this sense only.

Deciding whether something amounts to "moral turpitude" or whether someone has a "good character" therefore has nothing to do with justice. Deciding whether a law may require one to make this decision in the first place, however, does. In general, it may not, for the simple reason that the law has no business classifying someone as "turpitudinous" or "bad," not to mention attaching legal sanctions to that classification.

It is unfortunate, to say the least, that the sense of justice is so closely associated with moral conservatism and legal conservatism, which—in the conservative view of the world—is one and the same thing; after all, it would be a dereliction of one's duty as a moral leader not to use the power of the law for moral ends.[13] Now Cahn is no full-fledged moralist. Unlike James Q. Wilson, say, he doesn't try to pass off his moral code as a demand of justice, and his sense of morals as a sense of justice.[14] Instead of laying out his moral system, he instead calls for more morals in the law, and particularly in the application of the law by judges, generally speaking. That's not to say, of course, that Cahn doesn't have a moral code to offer. Calls for more morals tend to boil down to calls for more morals of a particular kind, and Cahn's is no exception. Cahn's particular morals had a religious source.[15] As a sociological matter, Cahn is surely right to emphasize the significance of moral beliefs, and even of religious ones, in the lives of those who make and administer the law. Whether, as a normative matter, they should be encouraged to act according to these beliefs in their official capacities, never mind act as moral or religious "leaders," is of course another question.

Finally, it is worth noting that immigration law, Hand's concern in the cases analyzed by Cahn, is in many ways a special case. Immigration law is about deciding who does and who doesn't belong to a particular—our—political community. Traditionally, that decision has been left

to the unlimited discretion of the state, in the exercise of its sovereign "police power,"[16] for centuries recognized as "the most essential, the most insistent, and always one of the least limitable of the powers of government."[17]

If the state can prevent anyone from joining our community for any reason whatsoever, then *a fortiori* it can do so because a person falls short of some moral ideal. Whether this practice complies with the requirements of justice, which on their face apply to persons as such and not as members of this or that political community, that is, whether immigration law is possible as *law,* is an interesting question, and one that has been answered in various ways.[18] But it's not the question that faced Judge Learned Hand.

Certainly the history of immigration "law" is littered with examples of treating its objects as beyond the pale of justice, and thus beyond the reach of the sense of justice as well. In a 1892 case, a federal court explained that an early Chinese exclusion statute that threatened illegal Chinese immigrants with up to one year's imprisonment at hard labor

> deals with the coming in of Chinese as a police matter, and is the reenacting and continuing of what might be termed a "quarantine against Chinese." They are treated as would be infected merchandise, and the imprisonment is not a punishment for a crime, but a means of keeping a damaging individual safely till he can be sent away. In a summary manner, and as a political matter, this coming in is to be prevented. The matter is dealt with as political, and not criminal.[19]

An earlier U.S. Supreme Court decision, from 1837, had invoked the police power to uphold a New York statute that required ship captains to post bond for immigrant passengers on the ground that it is

> as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.[20]

More recently, thousands of illegal immigrants have languished indefinitely in INS "detention centers," without rights and without recourse, in a permanent state of ajustice.[21] Similar failures of the sense of justice

regarding immigrants include California's notorious Proposition 187 of 1994, which denied essential medical, welfare, and educational benefits to illegal immigrants and, perhaps most dramatically, the differential treatment of noncitizen residents ("enemy aliens") and the targeting of foreign-born citizens (see the Arnaout case from the Introduction) in the domestic War on Terror after September 11, 2001,[22] and sixty years earlier, the mass detention of "all persons of Japanese Ancestry" following the attack on Pearl Harbor.[23]

Abstract, Not Substantive

There is another way of reading Cahn's insistence on the significance of morals in general, rather than *his*—or even the majority's—mores in particular. He after all encouraged Hand to swim against the current of the common conscience, which we may interpret as majority opinion. In this reading, Cahn reminds us that law is subject to the general constraints of morality, where morality is seen as setting the abstract background conditions for the pursuit of specific moralities, or theories of the good.

This view of the connection between justice and morality emerges more clearly in Cahn's 1949 book, *The Sense of Injustice,* than it does in his earlier critique of Hand, which remains mired in substantive morals. There Cahn illustrates several "facets" of the sense of justice as a "general phenomenon operative in the law," including "the demands for equality, desert, human dignity, conscientious adjudication, confinement of government to its proper functions, and fulfillment of common expectations."[24] The sense of justice thus functioned as the guide, the point of access to, principles of natural law. These principles, Cahn suggested, would reveal themselves through "experience and observation" of the sense of justice as a phenomenon, rather than through a deduction of the demands of reason. Cahn went so far as to define justice entirely in terms of the sense of justice: Justice to him "means the *active process* of remedying or preventing what would arouse the sense of injustice."[25]

The "aspects" or "facets" of justice, according to Cahn, were "hardly" universal. But this didn't detract from their significance, for "[c]oncepts may be real without being universal."[26] Cahn was content to enumerate these aspects of experience without systematizing them into

a theory of justice. He did venture the hypothesis, however, that their "universal element would appear exceedingly narrow, and may be restricted to inescapable natural dimensions such as the integral status of individual man."[27]

This vaguely phenomenological approach to natural law via the experience of the sense of injustice also appeared, at around the same time, in the natural law revival in post–World War II Germany. Several writers there attempted to construct a modern natural law theory that would no longer rely on God- or Reason-given highest principles from which more specific principles of justice could be deduced fairly unproblematically. Instead the sense of justice, or rather its violation (particularly by egregious Nazi laws and their application), was to provide a more flexible basis for theories of justice. Helmut Coing, for one, revived and revised Isay's project of using the insights of value philosophy to explain the functioning of the sense of justice and to define its content.[28]

The reference to Isay points to an important problem with a theory of justice that turns on the sense of justice as an intuition of natural law principles. Intuitions are not, by themselves, susceptible to public discourse.[29] Conflicts cannot be resolved by matching intuition against intuition—or, worse yet, intuition against the absence of an intuition. In an intuitionist universe, there's always the danger that conflicts are resolved not through argument, but through power, especially if those wielding power—such as judges, but also jurors—view themselves as having been granted a personal and direct "path to justice."[30]

We will return to the problem of elitism in a little while.[31] For now, let's focus on the underlying conception of the sense of justice itself, namely, as the guide—perhaps the *only* guide—to the principles of natural law, no matter how universal. The problem with natural law, and therefore with the sense of justice as its detector, is not its universality, or not just its universality, but its *substantiveness*. Cahn understands natural law as a set of precepts the origin of which he is not interested in exploring. In the end, his "aspects" of justice therefore once again become indistinguishable from tenets of some substantive value system or other, whether moral, religious, or "natural."

The sense of justice, then, is a guide to what is right and wrong, according to some set of principles which we can only hope to enumerate, but not to understand. To Cahn, justice "remains a word of magic evocations"[32] precisely because we can't subject it to rational inquiry, and

can only hope to plumb its mysterious depths through that special intuitive device, the sense of justice.

Cahn's theory of justice, or rather his list of facets of justice, is intuitionist in more ways than one. Not only does it refuse to connect its principles, or to prioritize them to resolve conflicts among them, but we catch glimpses of Justice only through the intuition of the sense of justice. Justice, as we saw, exists only in the psychological phenomenon of the sense of injustice. In the end, we can do no more than match experience against experience, and perhaps aspect against aspect, with conflicts as irresolvable as those between different moral or religious communities at best, and between feelings of different kinds and levels of intensity at worst.

Now it may well be that Cahn's laundry list of justice aspects, "the demands for equality, desert, human dignity, conscientious adjudication, confinement of government to its proper functions, and fulfillment of common expectations," could find common acceptance as important norms. But it's not clear why these norms would be norms of *justice*. Only once we have a better understanding of what we mean by justice can we decide for ourselves, and with others, whether these norms are principles of justice, as opposed to things that may, or may not, make us feel a particular way, for whatever reason. Only then can we figure out what justice requires in situations that don't resonate with the "facets" on Cahn's list, which he of course doesn't claim is comprehensive.

In a democratic political community it's not enough to compare notes on one's sensation(s) of justice, and we can't be expected to follow the decisions of public officials merely on the basis of oracular pronouncements of their sense of justice. We need *reasons* for action, among which justice is paramount.

Cahn's natural law theory of the sense of justice instead rests content with a body of tenets the derivation of which remains unclear, and which is, or isn't, discovered intuitively. While Cahn leaves open the possibility of different psychological experiences of injustice, and of disagreements on these "facets" of justice, he shows no interest in how they might be resolved. In the context of his attack on Hand's refusal to exercise a judge's function as a moral leader of the community, Cahn is unconcerned about this issue because he is comfortable with elevating the sense of justice of some persons above that of others. Moreover, he sees no difficulty with a concept of justice shrouded in irreducible magi-

cal mystery. Such a theory of the sense of justice may be appropriate for a particular ethical, or religious, community. It is entirely incompatible with a modern pluralistic democratic state.

Cahn's account of the sense of justice is too substantive not because it lays out a comprehensive set of principles of natural law, in the sense of an ethical or religious system, which a person might or might not decide to adopt. Instead, Cahn merely hints at what such a set of principles might look like. His approach to the sense of justice reflects a view of a political community governed by law as a substantive community held together by a basic consensus about, among other things, what justice demands, that is, by a common sense of justice. That's why he didn't need a comprehensive account of what justice demands, or a theory about how conflicts, including intra- and interpersonal conflicts among different senses of justice, might be resolved. Any confusion on this count can be resolved through the careful reflection of the moral leaders of the relevant community. Hence the importance of keeping them honest, and forcing them to do their job, no matter how difficult it might be, as Learned Hand found out.

The sense of justice as a guide to truths, principles, or even facets of natural law will find it as difficult to find room in modern legal and political theory as a substantive conception of natural law. Instead the sense of justice can only play a *formal* role, as a necessary precondition for a theory of justice and for the existence of a legal system. In particular we'll see that the sense of justice makes life in a community of justice possible because it incorporates both a basic cognitive capacity and a related emotional attitude, a sentiment, that allow human beings to treat each other as deserving of just treatment, that is, as governed by principles of justice. Under this, less ambitious account, the sense of justice is simply the moral sentiment which allows and motivates us to act justly, and the accompanying sensations of contentment when we see others, or ourselves, treated justly, that is, as persons, and of discontentment when we see them, or us, treated unjustly, that is, as nonpersons.

Cahn's somewhat eclectic account does contain references to this, formal, significance of the sense of justice. So he notes that the first "aspect" of justice he mentions, equality, reflects the "integral status of man" from the point of view of justice.[33] Similarly, the principle of human dignity is based on the fact that every man, even a stranger in Athens, has "a residual status as a man."[34] Censorship evokes the sense

of injustice because "it insults and degrades the rational claims of the citizen."[35] And again, the common basis of each "facet" of justice is "the integral status of individual man."[36]

Here we have an inkling of the distinguishing feature of justice talk: the conception of its object as a person, rather than as someone or something else. To view another from the standpoint of justice is to view her in abstraction from her other characteristics, including her membership in other, substantive, communities of ethics, politics, residence, age, hairstyle, or whatever. It's to focus on her "residual status as a man [*sic*]." Insofar as this is also the moral standpoint, to regard someone from the viewpoint of justice is to regard her as a moral person.

But Cahn senses more. He not only identifies, without recognizing it, the basic and characteristic "integer" of justice, the moral person capable of making "rational claims." He also sketches the *operation* of the sense of justice among integers who regard themselves from the standpoint of justice. In other words, he captures not only the cognitive, but also the motivational, component of the sense of justice. In Cahn's formulation, the sense of injustice "denotes that sympathetic reaction of outrage, horror, shock, resentment, and anger, those affections of the viscera and abnormal secretions of the adrenals that prepare the human animal to resist attack." And here is how this reaction comes about: "Through a mysterious and magical *empathy* or imaginative interchange, each projects himself into the shoes of the other, not in pity or compassion merely, but in the vigor of self-defense."[37]

Stripped of their magical mystery and their proto-sociobiological speculation,[38] these passages identify the key to the psychological analysis of the sense of justice, empathy as role taking. At least since the Adam Smith of *The Theory of Moral Sentiments* (1759) this mechanism of empathic role taking, this vicarious experience of another's experience without surrendering one's distinctness from the other, this identification without identity, has lain at the heart of moral psychology.[39]

The sense of justice is simply a particular form of empathic response that differs from other similar responses only in the nature of the identification that triggers it.[40] As a sense of *justice* it responds to the identification with another as a fellow moral person, rather than as a fellow member of some other community, where membership in the community is defined only by some shared characteristic, however inconsequential. I may empathize with a member of my bowling team simply because he is a member of my bowling team, or because we come from

the same town, or because we both root for the same baseball team, or like the same soap opera. But that empathy can't qualify as, or even trigger, a sense of justice because these characteristics are irrelevant from the standpoint of justice.

The trick is to become conscious of one's unconscious identifications, and to advance from reflexive to reflective empathy. That's what it means to reflect on one's prejudices, or springs of action, and to strive to do justice, rather than simply to do what comes naturally. That's also what it means to develop a sense of justice, as opposed to a sense of ethics or a sense of family. The discovery of the standpoint of justice is not merely a matter of moral education over the course of one's life, as we move through ever less natural, and more abstract, communities, from the mother to the family to the gang to the state to the moral community or community of justice, and from reflexivity to reflectivity.[41] This discovery, which is often difficult, also has to recur every time we are confronted with the need to judge another.

Having learned to appreciate, in general, what it means to assume the standpoint of justice doesn't imply the effortless ability to actually assume that standpoint when confronted with the often powerful ethical senses triggered by more substantive identifications than the bloodless abstraction of a fellow moral person. The same holds true in cases where no such meaty identifications arise. Now we must work to remind ourselves that, even absent "natural" feelings of empathy, the person before us deserves the empathy due all persons as such. That's also what it means to assume the standpoint of justice, even—and especially—in the face of powerful temptations to differentiate myself from, or to identify myself with, another on other grounds.

Reflective, Not Reflexive

Given that, psychologically speaking, the sense of justice is indistinguishable from any other empathic response, it's perhaps not surprising that the sense of justice often has been mistaken for a reflex, and a self-protective impulse in particular. Recall that Cahn reduces the sense of justice to "those affections of the viscera and abnormal secretions of the adrenals that prepare the human animal to resist attack."[42] But animals can't have a sense of *justice,* or a *sense* of justice for that matter. For to have a sense of justice means not only to possess certain uniquely

human capacities—as Cahn recognizes in his less sociobiological moments—but also to recognize these uniquely human capacities in the object of one's judgment. This is not to deny humans animal status. The point instead is that humans can have a sense of justice precisely insofar as they are also something other than animals.

Now *as* an animal, humans certainly possess animal instincts. These animal instincts are not triggered through identification with other humans per se. Instead, the human animal is viewed in this context as the member of some substantive community with whose members it unconsciously identifies, initially or after a while. The most obvious example is the family, in which each member identifies with the other unconsciously from the very beginning. Other associations humans join consciously, but over a period of time that consciousness gives way, through habit and common experience, to an unconscious identification with its members.[43]

The sense of justice, by contrast, is a *sense,* or a sentiment, rather than an instinct, whether inborn or acquired.[44] It requires conscious abstraction from other identifications. And this abstraction is a uniquely human capacity. For this reason the sense of justice also differs categorically from universal benevolence or love of mankind. Someone who experiences love of mankind has expanded the substantive community of the family, the natural circle of empathy, to all human beings. The community of humans has been transformed into a substantive community.

It's also a sense of *justice* because it regards its object as a person, rather than as, say, a human animal. And to regard someone as a person means to ascribe to her the same uniquely human capacities that I possess myself as a person, including the sense of justice. Justice governs the relationship not between family members, or human animals, but among equal rational persons capable of treating each other as equal rational persons, rather than (only) as fellow members of some substantive community. It's an abstract sort of equality that relies on reciprocal respect among persons, rather than on duties of solidarity arising from substantive fellowship.

This sort of recognition, and the reciprocal relationship to which it gives rise, is impossible without what J. B. Schneewind has called "the invention of autonomy"[45] in enlightenment thought. The concept of an autonomous person as the bearer of rights independent of her membership in some community or other is the central feature of modern moral, political, and therefore also legal theory, all of which contribute,

in different ways and at different levels, to the theory of justice. Without this modern concept of a person equipped with the capacity of self-government, including the capacity to abstract from considerations irrelevant from the point of view of justice and to act according to the dictates of this abstract standpoint, the concept of justice is empty, and so is the concept of a sense of justice. A sociobiological, or Darwinian, account of the sense of justice may help us understand why elephants weep, and why members—human or not—of the same gene pool defend one another, but it cannot explain the sense of justice in its full, modern, sense. And that's the sense that can hope to play a role in a theory of legitimacy, as opposed to a sociological, or anthropological, or even biological account of solidarity in human society.

The cognitive and volitional capacities that come into play in the sense of justice distinguish it from instinctual reflexes. What it shares with reflexive vicarious self-defense, however, is the source of its motivational element. The desire to act justly, that is, according to one's sense of justice, derives from one's identification with another. Without that identification we *could not* put ourselves in the shoes of another—because they wouldn't fit, so to speak—nor would we want to—because they wouldn't be ours, or rather enough *like* ours. The difference between the sense of justice and other empathic instincts is that one is reflective and the other reflexive, that is, that one requires abstraction and the other does not.

There'll be more to say about the capacity for a sense of justice, or justice competence as one might also call it, later on, when we take a closer look at recent work on the nature and development of the sense of justice, and the sense of language, as well as its role in contemporary political theory, and the work of John Rawls and—to a lesser extent—Jürgen Habermas in particular.[46] For now, it's enough to expose a rough distinction between the sense of justice and instinctual responses. Cahn, as we saw, wasn't much interested in the distinction, preferring instead to speak generally of the sense of justice's "biologic purpose . . . in human affairs," having determined that "the evolutionary connectedness of human life and of man's relations is the root fact of law."[47] In the end, then, "the human animal is predisposed to fight injustice."[48]

In another context, however, Cahn did appear to recognize the dangers of an entirely instinctual account of the sense of justice. Recall that he condemned, without elaboration, "the ugly frenzy known as national prohibition," which one might interpret as a massive attempt to shield a

substantive community from the external threat of alcohol, vice, and its carriers, the morally turpitudinous. One finds a similar, though even more visceral, self-protective reflexive in the earlier campaign against opium, and the "Heathen Chinee" dead set on destroying the American way of life—which might include the occasional cold beer, but certainly not the mysteriously destructive drug of the Orient.[49] More recently, the War on Drugs, the centerpiece of the War on Crime of the past forty years, similarly has wreaked havoc on minority communities in the United States in a hostile and futile communal campaign to eradicate the "scourge" of drugs, and more generally, of crime.[50]

In general, however, Cahn is remarkably unconcerned about the patent, and very real, oppressive potential of the sense of justice as herd instinct. The analogy between law and animal behavior was nothing new. Consider this dissertation on the state's power to "stifl[e] the foundations of evil" through preventive police measures, found in a much cited state court opinion from 1848:

> All governments, upon the most obvious principles of necessity, exercise more or less of preventive force, in regard to all subjects coming under their cognizance and control. This is in analogy to the conduct of individuals, and, indeed, of all animal existence. Many of the instincts of animals exhibit their most astonishing developments in fleeing from the elements, from disease, and from death, at its most distant sound, long before the minutest symptom appears to rational natures.[51]

What is new in Cahn is the surprising claim that this imitation of animal reflexes had anything to do with justice.

The confusion between the sense of justice and self-protective impulses is particularly prevalent among certain writers on criminal law. The nineteenth-century English judge and criminal law theorist James Fitzjames Stephen remarked that criminal punishment "is to the moral sentiment of the public what a seal is to hot wax."[52] Then there is Stephen's other, perhaps even better known, quip that "[t]he forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to [these passions] in the same relation in which marriage stands to [sexual passion]."[53]

Once again, Stephen may well be right that the legal institution of punishment can be interpreted as manifesting a certain self-protective

reflex, even the desire to annihilate threats to the herd, that is, vengeance.[54] As Durkheim put it succinctly and around the same time, "punishment has remained an act of vengeance."[55] But surely it isn't, for that reason, just. As a matter of sociology or social psychology, Stephen's observation thus might be correct, if not original. It has no normative significance, however, unless it is based on a theory of justice that reduces justice to the satisfaction of the herd instinct.[56]

That's not to say that the practice of punishment can't be analyzed in this way. On the contrary, it would be impossible to make sense of punitive attitudes—and such phenomena as the recent War on Crime in the United States—without the aid of explanatory models such as those developed by Durkheim, Freud, and G. H. Mead, all of whom stress the connection between the drive to punish and the urge to maintain the substantive community with which one identifies.[57]

But then perhaps Stephen isn't talking about vengeance at all. Perhaps he is trying to capture something like a retributive sense of justice, a "moral sentiment" of "deliberate anger and righteous indignation," that goes beyond a mere reflex. Stephen doesn't give us much guidance on this point. In the end, Stephen's opaque, though characteristically punchy, sayings are most notable for their very confusion. They illustrate the ease, and the frequency, with which the sense of justice is mistaken for a mere reflex.

Michael Moore, picking up where Stephen left off, recently undertook to spell out the second, normative, aspect of Stephen's position.[58] Moore set out to demonstrate the moral significance of retributive emotions and, in particular, to defend them against Nietzsche's claim that the urge to punish boiled down to petty *ressentiment*. The desire for vengeance, to Nietzsche, arose from "reactive affects" caused by the recognition of our weakness in the face of the object of our vengeful feelings, the criminal as oppressor. Since Nietzsche considered *ressentiment* (the general phenomenon of experiencing one's weakness in the face of superior power) the source of all moral judgments, all calls for punishment on the basis of moral indignation necessarily derived from *ressentiment*. Disgusted with the hypocrisy of moral punishment, Nietzsche called for the abolition of the concept of punishment altogether: "Let us eliminate the concept of *sin* from the world—and let us soon dispatch the concept of *punishment* after it! May these exiled monsters live somewhere else henceforth and not among men—if they insist on living and will not perish of disgust with themselves!"[59]

Now it seems pretty clear, even without fully engaging Nietzsche's views, that neither *ressentiment* nor the desire to annihilate external threats to the herd have any moral significance, and therefore don't qualify as a sense of justice, retributive or otherwise. Against Nietzsche, Moore defends retributive emotions on the ground, among others, that they derive, or at least may derive, from such moral sentiments as guilt and "fellow feeling."[60]

Whether or not a retributive sense of justice—which Moore understands as the desire to inflict punitive pain despite the absence of consequentialist benefits and on the basis of desert alone—is possible depends once again crucially on the *kind* of fellow feeling (and of guilt) at issue. A fellow feeling among fellow members of a substantive community, say a family, is not a moral sentiment, strictly speaking. It is an admirable sentiment, and may even be necessary for the development of a moral sentiment under a theory of expanding circles of empathy, but it is not moral itself since it regards its object not as a moral person, but as a fellow family member.

The same point can be made about the nature of the guilt in question. As Rawls has pointed out, based on research in developmental psychology, there is a fundamental distinction between moral guilt, or guilt in the abstract, and substantive guilt, which may take different forms depending on how one perceives oneself and the object of one's guilt feelings. (Rawls distinguishes between authority guilt in the familial community, association guilt in the communities that constitute civil society, and principle guilt, or guilt strictly speaking, as among moral persons as such.)[61]

If guilt and fellow feeling are understood from the standpoint of justice, then they are moral sentiments. The same would hold for the feeling of resentment (not *ressentiment*) one experiences as the result of one's identification with another moral person as such who has suffered harm at the hands of another moral person.[62] And this indignation, or vicarious resentment, in the end might be thought of as a sense of retributive justice.

But that sense of retributive justice isn't quite what Moore has in mind. He wants to justify punishment, the intentional infliction of pain, not merely the feeling of resentment. In fact, he cannot rely on the feeling of resentment at all, for he rejects theories—like Stephen's—that attempt to justify punishment as the satisfaction or—like Joel Feinberg—as the expression of a sentiment, such as the urge to punish.[63] Moore

wants to be a pure retributivist, to punish for its own sake. Desires, like the urge to punish, thus can be no more than "heuristic guides to moral insight."[64] Retributive emotions are of exclusively "epistemic import":[65] they point the way to moral truths, but can justify nothing by themselves.

This isn't the place to engage in a discussion of the merits of pure retributivism or moral realism. Suffice it to say that Moore's use of the sense of justice as a guide to certain truths—of morality or of natural law—is familiar to us from our discussion of the natural law revival in Germany and, to a lesser extent, in the United States after World War II. The danger of such phenomenological attempts to divine true principles of this or that always lies in their inability to accommodate alternative visions of this or that. There is simply nothing left to talk about if one's realization of the principles of right isn't shared by another.

Take, for instance, Moore's response to those who do not experience the retributive emotions he feels in response to the following hypothetical:

> The small crowd that gathered outside the prison to protest the execution of Steven Judy softly sang "We Shall Overcome." . . .
>
> But it didn't seem quite the same hearing it sung out of concern for someone who, on finding a woman with a flat tire, raped and murdered her and drowned her three small children, then said that he hadn't been "losing any sleep" over his crimes. . . .
>
> I remember the grocer's wife. She was a plump, happy woman who enjoyed the long workday she shared with her husband in their ma-and-pa store. One evening, two young men came in and showed guns, and the grocer gave them everything in the cash register.
>
> For no reason, almost as an afterthought, one of the men shot the grocer in the face. The woman stood only a few feet from her husband when he was turned into a dead, bloody, mess.
>
> She was about 50 when it happened. In a few years her mind was almost gone, and she looked 80. They might as well have killed her too.
>
> Then there was the woman I got to know after her daughter was killed by a wolfpack gang during a motoring trip. The mother called me occasionally, but nothing that I said could ease her torment. It ended when she took her own life.
>
> A couple of years ago I spent a long evening with the husband, sister and parents of a fine young woman who had been forced into the trunk

> of a car in a hospital parking lot. The degenerate who kidnapped her kept her in the trunk, like an ant in a jar, until he got tired of the game. Then he killed her. [Reprinted by permission: Tribune Media Services]
>
> . . . Imagine that these same crimes are being done, but that there is no utilitarian or rehabilitative reason to punish. The murderer has truly found Christ, for example, so that he or she does not need to be reformed; he or she is not dangerous for the same reason; and the crime can go undetected so that general deterrence does not demand punishment. . . . In such a situation, should the criminal still be punished?[66]

As Moore sees it, "most of us still feel some inclination, no matter how tentative, to punish"[67] in these cases. More to the point, those who do not share this feeling are abnormal; they're "saints or moral lepers."[68] It's not that Moore is wrong to explore the phenomenology, and "moral worth," of his urge to punish. (In fact, his attempt to do so is praiseworthy and well worth careful study.) It's just that moral realism combined with phenomenological self-inspection finds tolerance of different viewpoints, and comprehension of different emotional responses, difficult.

For our purposes, the moral sentiment of resentment is of greater interest than the desire to inflict punitive pain. As Peter Strawson has shown, resentment is a moral sentiment insofar as it is what he calls an "inter-personal attitude" toward its object. We can only *resent* someone if we recognize her as a "morally responsible agent, as a term of moral relationships, as a member of the moral community."[69] But to say that someone is a morally responsible agent is but another way of saying that she has "moral sense," understood as a general capacity rather than a commitment to a particular moral code or ethical system.[70] In this sense, resentment is a manifestation of the sense of justice. It's what we feel when we, or another, have been treated unjustly, that is, as not a person with moral sense or the capacity for a sense of justice.

Resentment, as a manifestation of a moral sentiment, therefore differs from Nietzsche's *ressentiment,* which is no more than a self-protective reflex against a particular external threat. The difference between Nietzsche's *ressentiment* and Stephen's "feeling of hatred" lies in the nature of the threat, at most. In fact, Nietzsche's whole point was that the "desire of vengeance" felt by Stephen and other "healthily constituted minds" was nothing but *ressentiment* directed at those Siegfried

criminals who dared to flaunt the very fin de siècle conventions corseting the stunted spirits populating Stephen's Victorian England.

Ressentiment is but one manifestation of the herd instinct; hatred and disgust are others.[71] Freud groups all these phenomena under the heading of the death instinct.[72] At bottom, they are all characterized by a desire to annihilate, to extinguish. In the struggle between the ego and the id, myself and the other, I cannot afford to take risks. Self-preservation is not governed by the rules of fair play, or justice as fairness. That's why it is neither just nor unjust when I push you off the plank to save myself from death, even if you have done nothing to harm me, nor even plan to harm me in the future. Your mere existence is a threat to mine. That's enough to trigger my self-protective reflex. And your posing a threat to a fellow member of the group with which I identify, from which I derive my identity, triggers the same reflex. This has nothing to do with justice, however. To confuse justice with self-preservation, and the sense of justice with the death instinct, as Cahn did, is to give neither justice nor self-preservation its due.

Individual, Not Communal

One of the greatest impediments to more fully appreciating the function of the sense of justice is its persistence as a communal attribute. While Cahn chides Hand for invoking the community's sense of justice, he does not challenge the notion of a communal sense of justice itself. In fact, his critique of Hand assumes the opposite. Without a meaningful communal sense of justice, the problem that preoccupied Hand, Gray, and Cahn, namely, the conflict between the judge's sense of justice and the community's, couldn't arise.

What's wrong with Hand's position, however, isn't that he makes the wrong choice between his and the community's sense of justice, as Cahn claims, but that he doesn't dismiss the very concept of a communal sense of justice as hopelessly vague. If the sense of justice is to play any constructive role in modern law, it ought to be conceived of as an *individual* capacity, rather than as a communal construct.

The question of how to resolve conflicts between the judge's and the community's sense of justice doesn't have an answer because its premise, that the judge's sense of justice and that of the community *can* differ, is false. This is not so because the sense of justice of the community

has withered away (as Savigny would have it) or because the judge is the mouthpiece and interpreter of the community's sense of justice, or even because the individual's sense of justice is constructed entirely by its community. A judge's sense of justice and a community's cannot differ because the sense of justice is a capacity and a desire shared by all moral persons as such. It is universal and entirely formal in that it exists independently of the content of the principles of justice.

This also means that it is misleading to speak of a community's sense of justice, unless one is referring to a group of persons endowed with a sense of justice. The sense of justice is a personal capacity, even if it represents that aspect of personhood which makes life in a political community governed by principles of justice possible.

The community's sense of justice is all too easily, and all too often, confused with the moral code endorsed by a majority, or even the entirety, of its members. This usage of the term we have already discussed above.[73] A community may of course be governed by particular principles of justice, which would imply that its members possess a sense of justice and act according to it. But these principles shouldn't be mistaken for the community's sense of justice. The community cannot experience sentiments, moral or not. It has no sense (though it may have justice).

Occasionally one also finds the community's sense of justice used in the sense of "communal standards" or "public opinion." In this version, the community's sense of justice is seen as measurable or at least detectable in one way or another, perhaps by opinion polls or through elections or the observation of behavior patterns, customs, and rituals, or even through enacted legislation.[74] Jurors also are said to reflect their community's sense of justice in this way.[75] Most frequently, however, the community's sense of justice is simply invoked as a rhetorical device, without any attempt to substantiate it.

In all these cases, the mostly inarticulate assumption appears to be that the community's sense of justice places constraints on state authority, since "law in the last analysis must reflect the general community sense of justice,"[76] and "no law which violates this fundamental instinct can long endure."[77] These two declarations stem from Sayre's 1933 article on modern police—or "public welfare"—crimes, which we've already had occasion to mention.[78] There, Sayre attempted to impose limitations on the abandonment of mens rea while—paradoxically—

celebrating public welfare offenses for their abandonment of mens rea. As Sayre saw it, "the modern conception of criminality . . . seems to be shifting from a basis of individual guilt to one of social danger,"[79] a shift he applauded. Yet at the same time, Sayre was apprehensive about discarding the mens rea requirement outright. But since he didn't have any good reason for holding on to it, he was left with a barren appeal to the "sense of justice of the community."[80] It's troubling that a legal commentator would ask the community's sense of justice to bear his burden of justification, without elaboration of any kind. What's more, as we've seen, courts have invoked Sayre's rhetorical stop as dispositive authority.[81]

The idea of law as a straightforward manifestation of the community's sense of justice has a checkered history in modern legal thought. Under this view, any law that didn't reflect the communal sense of justice was presumptively illegitimate, if not logically impossible. Savigny, as we saw, first developed this theory in Germany, and pioneered the study of customary law at a time when many German intellectuals took to the streets, the woods, and the archives in search of manifestations of the *Volksgeist*. (The Brothers Grimm are but one example.) But so powerful was the idea of a communal origin of law that soon Savigny's school itself was accused of neglecting the people's law (*Volksrecht*) at the expense of the learned law of the jurists (*Juristenrecht*), Roman law, Savigny's area of expertise.[82] The notion of the people's sense of justice, now framed as the "healthy sentiment of the *Volk*" (*gesundes Volksempfinden*),[83] enjoyed a brief renaissance as the source of legal norms under the Nazis.[84]

American adaptations of this account of the intimate connection between the community's sense of justice and law tended to be more modest in scope and ambition. Carter's importation of Savigny's view of the people's sense of justice as the fountain of law was met with skepticism, and at any rate wasn't central to his project, particularly to his virulent opposition to codification. We already noted that early Legal Realists like John Chipman Gray bristled at Carter's Savignian talk, and so did others, including John Dickinson[85] and Jerome Frank.[86] Llewellyn likewise failed in his effort to find an institutional role for his German-inspired interest in customary law, and the customs of the merchant class in particular, in the form of merchant juries in the Uniform Commercial Code.[87] That's not to say, of course, that Llewellyn did not have

a significant impact on American legal sociologists. But our topic here is the normative significance of a community's sense of justice, not its explanatory power.

As a general matter, the greater reluctance among American jurisprudes—compared to their German colleagues—to celebrate the community's, and certainly the people's, sense of justice is a good thing. The concept of a communal sense of justice is too vague, and its limits as hazy as the borders of the community to which it is said to attach, to be of much use in public discourse. With its vagueness comes the temptation to use it as a convenient cover for other rationales, encouraging a certain hypocrisy that suppresses, rather than facilitates, the sort of public scrutiny of state action, including but not limited to judicial review, necessary for the legitimation of state power in a modern democratic society. All too often, the community's sense of justice serves as an empty trump card that makes all further discussion unnecessary, given that surely no one would dare go against what the community senses is just.

Still there remains in American law one institution that is often portrayed as giving a voice to the community's sense of justice: the jury. Particularly in criminal cases, the jury "serves as the conscience of the community and the embodiment of the common sense and feelings reflective of society as a whole," in the language of a recent state court opinion, which we already had occasion to quote at length above.[88] The most obvious example of "our accommodation of jurors' instincts" is the jury's power to nullify outright (by acquitting in the teeth of the law) or partially (by acquitting of some charges "when the rest of their verdict may clearly indicate guilt").[89]

It's not always clear exactly what is meant by endorsements of the jury as manifestation of the community's sense of justice. One generally is left wondering which community exactly is to have its sense of justice manifested in a particular jury, and talk of "the community" in this context easily slides into references to "society," and the community's sense evolves into "common sense" or the "collective conscience." It doesn't help that the jury itself constitutes a community, or at least a group, which may very well possess its very own sense of justice, thus raising the question of the relationship between the jury's sense of justice to that of the community, however broadly defined. Naturally, the "sense" in the community's sense of justice likewise remains foggy, vacillating between senses and feelings and even instincts.

While the notion of the jury—or is it individual jurors?—manifesting some common conscience, without knowing anything about what's common or what's conscientious about it, is of little use, the jury does play a role as a collection of persons who may be familiar with the customs or standards of behavior within a certain community, and the defendant's community in particular. This was the jury's original function when it was used first in France and then in England as the central authority's means of determining local customs.[90] Llewellyn's interest in merchant juries can be seen in this light—which is not to say that he didn't find the idea attractive for other, less mundane, reasons as well.

In contemporary American law, the jury performs this epistemic function in cases of negligence, civil and criminal. Someone's negligence assumes the failure to live up to some standard of conduct; what that standard of conduct is the law doesn't say in detail, deferring the definition to fellow members of "the community." This ensures flexibility in the application of negligence standards and prevents the imposition of liability on someone for violating standards foreign to him, or so the theory goes.[91] This safeguard is especially important in criminal cases, since it helps alleviate the general unease about punishing negligence at all. If we're going to punish negligence, let's at least make sure the defendant wasn't ignorant of the standard he failed to clear, or so the theory goes. This sensitivity to the possibility of ignorance of the norm is unusual in Anglo-American criminal law, which otherwise prides itself in strict adherence to the age-old maxim *ignorantia juris non excusat* (ignorance of the law is no excuse).[92]

However sensible this function of the jury as a local norm detector might be, it has precious little to do with the sense of justice. In fact, one might go so far as to say that this use of the jury is about everything but justice, since the standpoint of justice after all abstracts from the norms of a particular ethical community. Another way of putting the same idea is to point out that the localization of law invites unequal application of law throughout a given political community to persons entitled to equal treatment. What's negligent to one community, as sensed by one jury, may not be negligent to another community, as sensed by another jury, on another day, in another courtroom, and so on.

The legitimate core of the idea that the jury manifests the sense of justice of the community is that it represents not some community, but also the community of the *defendant*. The jury is a democratic institution, that is, an institution of self-government. Composed of the defen-

dant's peers, it speaks for the defendant and thereby makes possible a process of vicarious self-government, which respects the defendant's autonomy, or capacity for self-government, without forcing him to literally judge himself, as was the practice in inquisitorial systems, which employed torture for precisely this purpose.[93]

But the jury is an institution of justice only if it judges the defendant from the standpoint of justice. This means that a juror may not judge the defendant as a member of her community—which may or may not be the same community as that of all or any other jurors—or as a *nonmember* of her community, if the jury is not representative in this substantive sense, which tends to be the case in contemporary American law.

The challenge of the institution of the jury therefore is to ensure that it functions as a forum of justice—a discourse among moral persons as such—without disregarding its role as a mechanism for indirect, or vicarious, self-judgment. Justice discourse and vicarious self-judgment, however, are possible only if jurors act on their sense of justice. But they can only act on their sense of justice if they identify with one another, and with the defendant, as members of the—not a—moral community.

This is not enough, however. While the *legitimacy* of their judgment is made possible through mutual identification among jurors, and between jurors and defendant, the enterprise of judgment itself only makes sense if the jurors also identify with the *victim* as another fellow moral person.[94] Without that identification, they will not experience the empathy that motivates them to pass judgment on the offender in the first place; they will not feel the vicarious resentment that turns an otherwise private conflict into a matter of public justice, and therefore of law.[95]

Under this view of the connection between the jury and the sense of justice, it's not the jury's sense of justice, or some other community's, that matters, but the sense of justice of the individual jurors. The juror here appears as a representative moral person equipped with a sense of justice.[96] The role of the jury is to provide a forum for justice discourse among moral persons, an institutional place for deliberation from the standpoint of justice.[97]

The jury in this account is the paradigmatic community of justice. Here individuals motivated by their sense of justice discuss what principles of justice apply to a particular case and how they might be applied. The jury's verdict is the outcome of that discourse. It's binding on the

defendant—and the victim—because it represents the result they *would have* reached had they participated in the deliberation as moral persons, abstracting from accidental characteristics such as personal preferences and membership in substantive communities. The defendant—and the victim—feel themselves represented by the jury and its verdict, and accept the verdict as *just* insofar as they recognize the jury as fellow moral persons who recognized them as moral person in return.

Understood in this way, the jury can perform an important function in American law. It can help legitimate the state's exercise of its power to govern through law by publicly subjecting these laws, or at least the most intrusive among them, to scrutiny from the point of view of justice. It illustrates that the legitimacy of law doesn't depend only on the legitimacy of its creation, but also on the legitimacy of its administration. The jury after all considers not only the justice of a conviction under a particular statute, but—in the extreme case of jury nullification—the justice of the underlying statute itself.

The jury thus also shows the limits of legal doctrine. Rules of law can only go so far, no matter how expertly they are framed and interpreted by the professionals. In the end, recourse must often be had to principles of justice. The institution of the jury is a living reminder of that vital fact.

The jury, as guardian of justice, is designed to ensure that the standpoint of justice is never ignored. After all is said and done, after all doctrinal issues—all "questions of law"—have been settled, a conviction will only be had when a body of persons, assuming the standpoint of justice, have determined that the defendant's status as a moral person has been respected, that the conviction does not represent a denial of that status. Similarly, an acquittal will only be had if the jury has decided that it does not reflect disrespect for the victim as a moral person. Only after this justice check, this final test from the standpoint of justice, can the verdict occur, no matter what it might be.

An example of this deliberate use of the jury is the Model Penal Code drafters' decision to give up predetermining certain questions of legal causation, leaving them "to the jury's sense of justice"[98] instead. This move is perfectly sensible, as long as one keeps in mind that the *jury's* sense of justice really is each *juror's,* or in the words of Hart & Honoré's treatise on causation, "the plain man's sense of justice."[99] It should also not be forgotten that the jury conducts this justice check not only in cases specifically designated. Legal doctrine, including the Model

Penal Code, can only go so far in guiding the jurors' consultation of their sense of justice.

This then is what it means to use the jury as the representative of the sense of justice. The jury's job is to ensure that the outcome of the legal process reflects a judgment based on the sense of justice rather than on some other consideration, technical or ethical or simply arbitrary.

But that's all it means. The jury can't be used as the only repository of justice, and as the sole institutional manifestation of the sense of justice. To achieve and retain legitimacy, the entire legal system, both in its rules and in those who make and administer them, must strive to work out the demands of justice to the greatest possible detail. Code drafters, for instance, must resist the temptation simply to use the jury as a quick fix for tricky problems of codification or of legal doctrine. Otherwise the jury will do what James Thayer thought the courts would do if they were entrusted with broad authority to review the constitutionality of legislative acts: absolve everyone else from doing justice (or, in Thayer's case, from worrying about the constitution).[100] Why this reliance would be ill-advised becomes clear as soon as one considers the small percentage of cases, criminal or civil, that make it before a jury. A legal system composed of unjust rules administered by people not committed to the ideal of justice cannot depend on the jury for legitimacy.

Universal, Not Exclusive

The jury also reminds us that matters of justice are not matters of expertise. Neither the judge, nor the lay person, can claim expertise when it comes to assuming the standpoint of justice. As moral persons, both have equal rights to participate in justice discourse.

Judges are particularly prone to thinking of themselves as endowed with a special sense of justice. This conviction is especially strong among, but by no means limited to, judges who also firmly believe in the existence of truths of natural law. So in 1960 Hermann Weinkauff, after retiring from his post as president of the German Supreme Court, explained with refreshing and unusual bluntness how he had come to decide cases on the basis of the sense of justice: the "ultimate natural law order . . . can be grasped . . . with great intuitive certainty through an honest exercise of reason and conscience, especially of the reason

and conscience of a legally minded and experienced judge."[101] This ultimate order, according to Weinkauff, includes the principle of equality, the human rights of personhood, and the preexisting societal institutions, including family, Volk, state, church, and the community of people and states.[102] The authoritarian and exclusionary potential of this individualized value theory as a foundation for theories of justice is obvious enough. And indeed Weinkauff went on to condemn "the inability of large segments of our people and our jurists to grasp and to employ the natural law idea," an inability that combines "relativism, skepticism, scientific idolatry, and a defective sense of value."[103]

Recall that Cahn had faulted Judge Learned Hand for failing to display just the sort of healthy self-confidence in his judicial sense of justice that animated the judicial self-image of his German colleague. To Cahn it was a matter of course that the judge's sense of justice trumped that of the community. Otherwise, how could the judge perform his duties as a moral leader of the community?

The elitist idea that certain persons, and particular judges, are blessed with a sense of justice that is somehow superior to that of the community, or to any of its (other?) members, has come in various shapes and sizes. So one might claim that the judge—or a member of some other favored group, like that of the jurists, the jurisprudes, or "the bar"—alone possesses a sense of justice, and the ordinary person has none. Or one might accept that nonexperts have a sense of justice too, but that it is somehow inferior to that of the expert, for whatever reason—perhaps because the expert has a unique sensor for justice, or because he has refined his ordinary justice sensor through years of practice and concentrated effort, or because others' senses of justice have been stunted. Either way, it's not only the right, but the duty of the justice expert, the *Führer* (in Isay's term), to act according to her refined sense of justice. Under this view, the question of whether to go with the judge's or the community's sense of justice has as obvious an answer as Cahn thinks it does: of course, the judge's sense of justice should rule.

This exclusionary, undemocratic, and outright oppressive view of the sense of justice confuses it with a sense of law, a hunch, a *sensus iuridicus,* in Riezler's first sense,[104] which does require expertise in the positive law. Ironically, other exclusive theories of the sense of justice claim exactly the opposite, that it's the *lay person,* and not the expert, who has the superior sense of justice. And it's her very layness which

accounts for this superiority. Conversely, it's the expert's refined *sensus iuridicus* that stands between her and pure manifestations of her sense of justice.

German legal writers first began to invoke the individual's sense of justice, as opposed to a people's sense of justice propagated by Savigny and his followers, in the heated debate about the introduction of the Anglo-American jury into Germany, which lasted with varying levels of intensity throughout the first half of the nineteenth century. Proponents of the jury occasionally claimed that lay people enjoyed an unencumbered, natural access to norms of justice.[105] By contrast, the sense of justice of educated jurists, particularly government-controlled judges trained in the artificial conceptual constructs of Roman law, that is, the entire bench, had been irremediably polluted by syllogisms, analogies, and deductions.[106]

This argument in favor of the jury, however, rarely went beyond general (and often polemical) comments. Individual jurors more typically were portrayed and attracted attention as representatives of some more or less disembodied concept of the people.[107] For jury supporters who stressed the jurors' unencumbered sense of justice, that sense of justice often remained the sense of justice of the *Volk* manifested through the jurors' deliberations.

Similar celebrations of the lay person's common sense could be found in the United States as well. So Alschuler and Deiss tell of "a farmer justice of the New Hampshire Supreme Court" who "instructed a jury to use common sense rather than the common law, saying that '[a] clear head and an honest heart are [worth] more than all the law of the lawyers.' "[108]

The sense of justice, however, belongs to no one in particular; it is, instead, an essentially human capacity. This is nothing new. As Judith Shklar points out, already Rousseau claimed that "a sense of injustice was the one universal mark of our humanity and the natural core of our morality. It is our most basic claim to dignity."[109] It's his nascent sense of justice that allows Emile to identify with, and care about, his gardener's fate.[110] By the sense of injustice, Rousseau meant the capacity to experience vicarious resentment by placing oneself in the shoes of another, which presupposes certain cognitive and emotional competences. To understand the sense of justice is to better understand these competences.

And it's as this *universal* capacity shared by all persons that the sense

of justice can find a place in modern legal and political theory, which has abandoned any and all reliance on categorical distinctions among moral agents and regards all persons as equal in the sense of having equal competence.[111] It's the fundamental capacity for autonomy, that is, for self-government in all aspects of life, private and public, moral and political, that is necessary and sufficient for personhood, for all purposes, private and public, moral and political. Everyone capable of autonomy is entitled to membership in the *moral* community, in the sense of the community of all moral persons rather than in the sense of a particular moral, or rather ethical, community.[112]

While the capacity for autonomy is necessary and sufficient for moral personhood, it's not enough to make moral action possible. Without more, all we have is a number of autonomous individuals unconnected through bounds of solidarity, with everyone left to fend for herself. This is what Locke and others meant by the state of nature. What explains the distinction between the state of nature and the state of modern society under the government of a central authority, with opportunities for public assistance and redress of wrongs under law, is the sense of justice. As already the early Freudian criminologists Alexander and Staub noted, "[t]he sense of justice must be recognized as one of the foundations of social life,"[113] and we might add, of moral and legal life as well.

The sense of justice is not the only foundation of *social* life because it is merely a particular, though abstract, version of a more general phenomenon, empathy. Empathy occurs among members of substantive communities, most obviously in the family, but also in the groups that constitute civil society, such as trade organizations and schools. The sense of family, solidarity among striking auto workers, or school spirit, however, are forms of empathy, but they are not the sense of justice.

The sense of justice is empathy among moral persons as such, abstracted from incidental characteristics that define the person's membership in some group or other. It's the ability and the willingness among *persons* to place themselves in each other's shoes, to see things from each other's point of view.

Empathy isn't sympathy.[114] Empathy makes sympathy possible, but it doesn't necessarily entail it. By empathizing, I place myself in another's position, imagine myself in her stead. That's all. This role taking assumes that I can distinguish between her self and my self,[115] between her position and my own, that I am capable of abstracting from all characteristics other than her personhood (the capacity to assume the

standpoint of justice), that I recognize a certain point of identity between her and myself, allowing me to *identify* with her, and finally that I have the power of imagining myself in her position[116] and see things as she would see them.[117]

But once these capacities are in place and have been exercised, and I am empathizing with the other person, as a person, all I have done is set the stage for a justice judgment. I have not made the judgment. Whether I *sympathize* with the person, that is, experience resentment on her behalf (assuming I'm dealing with an interpersonal conflict as opposed to a natural disaster or an accident of some kind) toward another person, will depend on what that judgment turns out to be. And that judgment will consist of an application of certain principles of justice to the conflict in question, which in turn presumes the capacity to understand these principles, at least well enough to apply them.[118]

The sense of justice merely makes the justice judgment possible, it doesn't predetermine its outcome. But this is significant in and of itself, because a *justice* judgment differs from other judgments based on empathic identification, not among persons but, say, among family members. One way of seeing this point is to think about the connection between empathy and sympathy. In the case of familial empathy, for example, empathy and sympathy are closely connected. To identify with another family member is to experience her pain as one's own, and in conflicts with a nonmember to assume her position is also to take it, and to defend it against the outside threat. It's precisely this close connection between empathy (as a condition of judgment) and sympathy (as a form of judgment) that makes it necessary in matters of justice to abstract from membership in substantive communities like the family—and why family members of the accused, or the victim, don't sit on juries.

The modern democratic state under the rule of law is not based on the model of the family. As a matter of theory, disputes among citizens therefore are not disputes among family members. Moreover, disputes among citizens are, *as a matter of fact,* also often enough not disputes among family members or members of some other substantive community. And even if they were, we cannot assume that the person doing the judging will belong to the substantive community to which the conflicting parties belong.

The family model is inherently hierarchical, whereas the model of the political community is egalitarian. The paradigmatic relationship in

family governance is that between its head and its (other) members; its mode of governance is patriarchy. The interpersonal relationship that defines the modern political community is that between equal citizens; its mode of governance is autonomy. The paradigmatic ethical attitude among family members is love; the paradigmatic moral attitude among members of the modern state is respect.[119]

It's important to recognize that the difference between the family and the state is not necessarily a difference in treatment, but of relation, attendant attitudes, and motives. So the relationship between a father and his daughter is hierarchical, rather than egalitarian, his attitude one of love, rather than one of respect, and his motive for treating her in one way or another her welfare, rather than justice. If his treatment of her significantly deviates from the paradigm in any of these respects, he is no longer dealing with her in his capacity of father. In law, this traditionally has had the effect, in extreme cases, of depriving him of the general immunity granted parental, and quasi-parental, discipline upon proof of "malice," even at a time when that immunity was far more extensive than it is today.[120]

The distinction between the family and the state deserves more attention than it can receive here. The family model remains useful as a way of understanding much of the actual operation of the state even today. In particular, the family model underlies those state's actions which are said to fall under the "police power" over its constituents, including—among many other things—the criminal law.[121]

The problem with the family model, however, is that its analytic usefulness does not easily translate into normative power. In fact the state's exercise of a power analogous to the power of the *pater familias* over his household faces a strong presumption of illegitimacy, given that the attempt to legitimate the modern state was viewed as an assault on patriarchy, by Locke and Rousseau, among others.

Still, it's a mistake to confuse familialism with paternalism. There are other social relations within a family besides that between the father and his household. Already Aristotle carefully distinguished the relation of husband and wife from that between father and children (differentiating again between sons and daughters), and between father and slaves.[122] And Locke pointed out that the mother too exercises great authority over other household members, except of course her husband, assuming he is alive. (That's why he preferred to talk of parentalism rather than paternalism.)[123]

For our purposes most relevant is the relation among siblings, what the French revolutionaries called fraternity—and we can add sorority. The idea behind fraternity is to capture the power of intrafamilial empathy without the hierarchy of paternalism. This attempt, however, fails. To begin with, it fails on its own terms. As a matter of fact relations among siblings are not marked by equality. Siblings are integrated into the family hierarchy as any other family member. The difference in status and power among two siblings may be—but not need not be—smaller than that between each of them and their father, but a difference remains. This difference derives most immediately from age, and in this form can be found even among twins born minutes apart, where the "older" may assume the dominating role. Other factors can reinforce, and even reverse, age-based hierarchies. In general, familial hierarchies, once established, tend to remain in place, no matter what their basis.

What's more, intersibling relations are not even marked by the *ideal* of equality. Siblings recognize each other as fellow family members, but that's where the similarities implicit in their relationship end. They are equal as family members only. The best that can be said about their relationship is that it doesn't *presume* inequality (as does their relation with a parent), but merely permits it.

In the end, therefore, the sentiment siblings display toward each other still differs categorically from the sense of justice. Even at its best, it's not based on respect, but on fellow group membership. It is a form of benevolence (or malevolence), rather than a moral sentiment. It may give rise to a "familial obligation," but not to a requirement of justice among equal persons.

4

Rethinking the Sense of Justice

To recapitulate, using Edmond Cahn's work as a springboard, we addressed several misconceptions about the sense of justice. We began by differentiating the sense of justice from a sense of ethics, or a response to violations of a particular moral code. Next, we explored the dangers of conceiving of the sense of justice as a guide to substantive principles in general, and of natural law in particular. We also noted that the sense of justice, as a reflective sentiment, must be carefully distinguished from reflexes or instincts, such as that of self-preservation, either of the individual or as transferred onto a group with which the individual identifies herself. Finally, it became clear that, if the sense of justice is to play a role in modern legal and political theory, it must be as a universal capacity shared by all persons as such, rather than as a special skill or a mark of excellence.

As a formal capacity shared by all persons as such, rather than by some substantive community or other, 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's 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 life situations 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 prerequisite 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, our motorcycle gang, or even our nation, but because they are persons and therefore entitled to justice. The sense of justice makes

solidarity possible in a modern pluralistic society. This is why we need to identify with *victims*. Moreover, legal institutions are legitimate only insofar as those upon whom they act, their objects, are likewise treated as equal and rational persons. This is why we need to identify with *offenders*.

Furthermore, 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 a person equipped with the capacity to act according to *some* sense of justice, no matter what it might be in substance.

But what does this capacity consist of? How does it manifest itself, how does it come into play? What are we to do with individuals who lack it? And, most generally, how can it help us in constructing an account of law that meets the demands of legitimacy developed in political theory for a society under the conditions of pluralism?

After using Cahn to illustrate what the sense of justice isn't, or rather what it cannot be, it's only fair to recall a remark of Cahn's that nicely captures the essence of the sense of justice. At one point, Cahn speaks of the sense of justice as involving an "empathy or imaginative interchange," through which each member of a group "projects himself into the shoes of the other."[1] All we need to do is figure out how this happens, how it *can* happen, and what it means.

Moral Psychology: From Pity to Respect

These questions aren't exactly new. They belong to a long and distinguished, but understudied, tradition of inquiry that reaches back at least to the Scottish Enlightenment and crosses national as well as disciplinary boundaries to include work in moral and political philosophy, moral psychology, individual and social psychology, psychoanalysis, sociology, history, literature, and linguistics. We'll begin with 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."[2]

The work of Adam Smith is as good a place to start as any.[3] Smith argued that society is held together by mutual bonds of sympathy and a general sense of justice.[4] According to Smith, the sense of justice is the voice of the impartial spectator, "this great inmate,"[5] "the ideal man within the breast,"[6] "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."[7] The sense of justice is not only shared by all humans, or at least by all "commonly honest" humans, but is 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.[8]

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 early sociobiological 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 didn't have a theory of moral personhood. According to Smith, the sense of justice reflects nothing more specific than "the general fellow-feeling which we have with every man merely because he is our fellow-creature."[9] As we saw earlier, this view of the origin of the sense of justice may explain much altruistic behavior, particularly among family members, but can't 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 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."[10]

Much has been made of the question whether this imaginative identification maintains the distinction between self and other.[11] Not 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.[12] Moreover, empathy and sympathy couldn't be distinguished if we couldn't take another's position without becoming her. Similarly, it would be difficult to explain the fact that sadists and conmen appear to possess remarkable empathic abilities, without however collapsing the distinction between ego and id.[13] 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 the impartial spectator, which 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 which he could imaginatively identify with any number of 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 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."[14] 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."[15]

What remains unclear, however, is once again what this identity consists of, which makes it possible for one person imaginatively to cross the gap separating herself from another, and to see things from the other's point of view. Nussbaum has traced one answer to this question, namely, common vulnerability, in her study of the emotion of pity. Fol-

lowing 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.[16] 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,"[17] 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 physical pain."[18] (One dramatic variant of this general point is the claim, also by Rousseau, that we all share the inevitability of death.)[19]

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. 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 doesn'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.[20] Perhaps pity has something to do with this sort of calculus, but then pity isn't a moral sentiment, like the sense of justice, but an ethical sensation triggered by the observation of someone pitiable or even pitiful, that is, someone in a decidedly inferior position to ourselves, someone incapable of helping herself.[21]

We do seem to have a different emotional attitude toward objects capable of experiencing pain than toward those that aren't. If the object 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 to the sight of a tree being chopped down than we do to that of 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 proper objects of sympathy and caring,"[22] 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.[23]

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 isn't merely 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, that is, develop a personal identity, by exposing herself to interpersonal relations. She can create herself only through others.[24]

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."[25] The difference is that the notion of a "chronic fragility of personal identity"[26] 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.

To understand the sense of justice, and its identificatory basis, as a moral sentiment, and 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's 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 it. 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,[27] but also fought the emotionalists and sentimentalists of his time tooth and nail.[28]

Both these stories certainly bear more than a grain of truth. But 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" nonsensuous moral sense (*Moralgefühl*), which explains every human's, and more generally, every nonperfectly rational being's, heartfelt concern for and knowledge of the categorical imperative. 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.[29]

Upon closer inspection, Kant's most bitter polemics are not directed at those who assign emotion a place in moral theory. Kant's criticism focuses on those who, like Smith's revered teacher Francis Hutcheson, portrayed the moral sense as a unique perceptive faculty.[30] By the end of the eighteenth century, however, Scottish moral sense philosophy itself, in particular Adam Smith, had come to reject Hutcheson's version of the peculiar moral sense.[31]

But, as Schneewind has shown, 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. 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.

Yet Kantian respect is also a *moral sentiment*. Already in his early work, Kant recognized that, in Schneewind's words, "moral principles are . . . but the awareness of the feeling of the dignity of human nature."[32] The problem was that this feeling alone, without a proper understanding of its origin and operation, was neither universal nor sturdy enough to ground moral action. It's a feeling of intracommunal 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."[33] 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."[34]

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 man.[35]

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 as such. 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 the particular substantive characteristics of the person. Thereby he 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 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 the 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.*[36] He also pointed out that we speak of a *sense,* rather than a *sensation,* of justice or of self.[37]

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

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.[38] No matter what other identities they acquire as members of families or of other substantive communities, they will always remain identical in their personhood.[39] 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."[40] To *be* a person, however, is to manifest one's capacity for autonomy.[41] 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 treating another as a nonperson.[42]

Hegel's analysis of the significance of abstract identification doesn't add much to Kant's account. He does make 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. A 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, or pretend, 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. 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 role taking, through which the recognition of the sense of justice of another, and therefore mutual role taking and the sense of justice properly speaking, is 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 role taking possible. As we saw earlier, he speaks loosely of the inevitability of death as the sign of our common humanity.[43] To point out to the young 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. But there, unlike in *Emile,* he was primarily concerned with *political* legitimacy, that is, 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 political notion of the general will is in the end compatible with the idea of personal autonomy is at least an open question.

It's safe to say that 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 role taking with her. But then again, I may not. And if I don't, 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, I suppose, 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 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 spoken of 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."[44]

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. 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.[45] This is unfortunate. As we saw in chapter 1, invocations of the sense of justice are a fact of legal life, in the United States and elsewhere. And as we saw in chapters 2 and 3, recent attempts at developing an account of the sense of justice have been few and far between, and have met with mixed results.

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 personhood, and particularly 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. This connection lies at the heart of discourse ethics, for instance, which very consciously sets out to identify communicative competence as a presupposition of the communicative process which it regards as the only source of legitimation in modern pluralistic society.

Social Psychology: Identification

Before we focus on the specifically moral aspect of the identification that triggers the sense of justice as abstract empathy, let's take a closer look at the phenomenon of social identification in general. These two aspects of the problem are, after all, connected. For the sense of justice is also a social sentiment, not only a moral one.

As we'll see, that connection tends to emerge with particular clarity and frequency in the sociology and psychology of crime and punishment. The early French criminologist Raymond Saleilles went so far as to *define* his field of study as nothing but the "sociology of crime adapted to the sense of justice," which is, "of all the inherent human instincts, the deepest, the most tenacious, and the most distinctive," so much so that "it persists even among the criminal classes." Therefore, we might add, it marks an important point of identification between these "classes" and the class with which they tend to be contrasted, that of law-abiding citizens.[46]

Durkheim showed great interest in a particular version of the sense of justice, namely, the communal cry for vengeance. As we saw above, he portrayed punishment as expressing the "unanimous aversion that the crime does not fail to evoke."[47] In this respect, punishment performed a crucial function in a modern pluralistic society. It served to "maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour."[48] The point of punishment was to prevent anomie, the disintegration of a society without common substantive foundation. Punishment thus was the sign of a healthy society, for it

expressed a common self-reflective instinct, namely, vengeance, which presupposes the existence of a common consciousness. By manifesting this common consciousness, punishment also helps to maintain it. Insofar as punishment presupposes crime, and Durkheim assumed that it did, crime too revealed itself, paradoxically, as "a factor in public health, an integrative element in any healthy society."[49]

This sociological account obviously has no normative significance. Durkheim's communal vengeance constitutes neither a *sense* of justice, nor a sense of *justice*. Durkheim's account, however, is of great significance for the theory of societal integration. Punishment performs its integrative function because it brings into clear focus a point of identity among otherwise unconnected persons. Members of the group recognize themselves as fellow group members. It's as fellow group members that they unite in their desire for vengeance against "those of its members who have violated certain rules of conduct."[50] The norms constituting the community thus are literally honored in their breach.

Under the influence of Durkheim's work, the early-twentieth-century American sociologist George Herbert Mead developed a complex account of intracommunal discourse and identity formation through continuous mutual role taking. Mead portrayed the individual in modern society as belonging to groups of various sizes, into each of which she must integrate herself. Integration occurs through a process of mutual role taking, in which each member of the group imaginatively takes the role of any other. In this way, groups are viewed as cooperative enterprises, with all members as equal participants in the group's social life and the pursuit of its goals, whatever they may be.

In Mead's view, punishment plays an important part in this process of group identification. In fact, punishment "provides the most favorable condition for the sense of group solidarity because in the common attack upon the common enemy the individual differences are obliterated."[51] The obliteration of differences was of particular concern to Mead, because it prevented the public resolution of intracommunal conflict based on these differences. In particular, the treatment of crime as an external threat prevented its treatment as an internal problem reflecting intracommunal conflict. Mead, who taught at the University of Chicago, was a proponent of the juvenile court experiment launched in Chicago at that time, which he thought illustrated an inclusive, and more productive, approach to the problem of crime, or in this particular case, of juvenile delinquency.[52]

According to Mead, the urge to punish is a particularly intense form of the sense of hostility shared by all members of the group, directed at the "physical annihilat[ion]" of "those opposed to it, or even to those merely outside it."[53] In this common experience of hostility toward "the personal enemy, who is also the public enemy,"[54] members of the group recognize themselves as identical with the group and each other. "The revulsions against criminality reveal themselves in a sense of solidarity with the group, a sense of being a citizen which on the one hand excludes those who have transgressed the laws of the group and on the other inhibits tendencies to criminal acts in the citizen himself."[55] The institution of punishment, together with informal practices of social stigmatization, "at once identifies us with the whole community and excludes those who break its commandments."[56]

At around the same time, the French sociologist Gabriel Tarde also developed an account of the significance of identification in social life.[57] And once again, he illustrated its operation in the case of punishment. His analysis of punitive feelings, however, is more differentiated than Mead's and Durkheim's. In Tarde's view, the ascription of "moral and penal responsibility"[58] presupposed identification not only among the judges, as members of the community under attack, but also between judge and judged, including perpetrator and victim. "[O]ne indispensable condition for the arousing of the feeling of moral and penal responsibility," Tarde argued, "is that the perpetrator and the victim of a deed should be and should feel themselves to be more or less fellow-countrymen from a social standpoint, that they should present a sufficient number of resemblances, of social, that is to say, of imitative origin."[59] And again, "it is necessary that the perpetrator of the act which is blamed be judged to belong to the same society as his judges and that he recognize willingly or unwillingly this profound community."[60]

As Tarde pointed out, punitive feelings differ depending on the membership status of judge, perpetrator, and victim. He contrasted the "feeling of moral indignation and of virtuous hatred" triggered, on the one hand, by "a murder committed on a European by a savage of a newly discovered isle" and "a similar act carried out by one European on another, or by one islander on another."[61] At the same time, "someone who is insane," "an epileptic at the moment he is seized with a paroxysm," and "one addicted to alcoholism in certain cases" are not subject to punitive feelings because they "at the very moment when they have acted, have not belonged to the society of which they are reputed to be members."[62]

Tarde's contribution was twofold. First, he expanded the inquiry into identification, and therefore relevant similarity, beyond the relation among judges to that among judge and judged, and perpetrator and victim. Second, he distinguished between identification for different purposes, and not merely in the sense of identifications with members of different communities. "If the dissimilarity of one citizen, as compared with the mass of the nation, goes beyond a certain limit, he ceases, *in a moral sense,* to belong to that nation."[63] By focusing on the question of *moral responsibility,* Tarde at least recognized the distinction between group feelings and moral feelings, though he failed to work out that distinction, or that between moral feelings and moral sentiments, in any great detail. What it might mean for someone to belong to a given community, in a moral sense, remains yet to be seen.

Freud too tried to come to grips with the phenomenon of social integration through identification. To Freud, identification is a psychological process that is triggered by the perception of some, any, point of similarity between subject and object. This perception of *identity,* however partial, makes possible *identification* properly speaking, to the point where the distinction between subject and object is disregarded, and the subject views itself as if it were the object.[64]

Two aspects of Freud's account of identification are noteworthy. The first point is familiar. Identification should not be confused with sympathy. Identification is a necessary and sufficient prerequisite for empathy, because experiencing the world from another's point of view assumes imagining myself as that person, that is, identifying with him. But whether, having gained access to that person's feelings through my capacity for empathy (*Einfühlungsvermögen*), I actually make that person's feelings my own, and literally feel his pain, or at least feel *with* her rather than simply *as* her (*Mitgefühl*), is another question altogether.

Second, identification presumes identity, but shouldn't be confused with it. Identification is a process that begins, rather than ends, with the recognition, conscious or not, of some identity.

This means several things. There can be no identification, and therefore no empathy, without identity, or more precisely the perception of identity. This is the psychological locus of the "resemblance" that we have recognized as a precondition of moral judgment, and of the moral point of view in general. What distinguishes the sense of justice, or the moral sense, from other forms of empathy is the nature of the identity that gives rise to the identification.

Moreover, since it is the *recognition*—and in fact the perception—of identity that matters, rather than actual identity, the starting point for the process of identification is susceptible to manipulation or cognitive influence. We can, in other words, *learn* to recognize another as identical to us.

This is bad news in the case of nationalism or racism or any other exclusionary ideology that disregards all other points of identity as irrelevant, and therefore presents national identity, or race, or whatever, not as one characteristic among others, but as the only relevant one. But it's good news for justice. It opens up the possibility of moral education by teaching ourselves, and others, to recognize the firstness of morality, the priority of personhood. Moral education means learning, in matters of justice, to always take the moral point of view first, to proceed from the recognition of another as a fellow person. Priority here is conceptual priority, not temporal priority. It's a matter of fact that every day we recognize other points of similarity with others. To affirm the priority of the moral point of view, or the priority of justice, is to be willing to think of the other as a person whenever a question of justice arises. Since we are likely to recognize other points of identity, or difference, first, this also means a willingness to abstract from these characteristics and, upon reflection, return to the foundational standpoint of personhood, to begin with the perception of the other as identical in the category of personhood before exploring other points of identity on the way toward identification, empathy, and eventually judgment (and perhaps even sympathy).

In other words, since identification presumes *some* point of identity, but doesn't, as a psychological process, distinguish between types of identity, identity of personhood is possible. Since identity of personhood is among the candidates for the initial identity, and identity is subjective, there is room in the process of identification for reflection, and therefore also for morality. Identification and empathy may be entirely reflexive and unconscious, but they needn't be. Reflective empathy based on the recognition of the identity of personhood, that is, the sense of justice, is always possible, if not always easy.[65]

As did the social psychologists from Durkheim to Mead to Tarde, Freud too viewed the practice of punishment as providing the most dramatic illustration of this general phenomenon.[66] Freud too speculated about the group hostility toward criminals as the paradigmatic outside threat, and therefore as the most visible and visceral manifestation of

group identity. To him the urge to punish was a manifestation of the death instinct triggered by the identification with the threatened group. And like Mead, he recognized that the urge to punish ultimately sought the *annihilation* of its object. The struggle between the community and the criminal was simply the communal analogue to the individual struggle between ego and id. Nothing less than the survival of the ego was at stake.

The urge to punish therefore is, by its very nature, directed at an other, an outsider. And here the tension between the analysis of punishment as the maintenance of community identity through the annihilation of outsiders, familiar from Durkheim, Mead, and Freud, on one hand, and Tarde's account (followed by Saleilles) of punishment as intracommunal responsibility ascription, on the other, becomes quite clear.

This tension cannot be resolved simply by choosing one account over the other. Luckily it needn't be resolved at all. Both accounts capture an important aspect of the practice of punishment; we would be wrong to ignore either one. What we need instead is an account that makes room for both. Punishment is both a sociological and a moral phenomenon. What we need, in Saleilles's words, is a "sociology of crime adapted to the sense of justice."[67] But the moral aspect of punishment is not a matter for sociological, but for philosophical, analysis. This is the contribution of political theory, and John Rawls and Jürgen Habermas in particular.

Political Theory: Moral Competence

The sense of justice plays a central role in both of the two most ambitious political theories of our time. 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. As Habermas put it:

> Only 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 [1] natural law constructions and contract theories or [2] in the concepts of a transcendental philosophy or [3] a pragmatics of language or even [4] in the framework of a theory of the development of moral consciousness is secondary.[68]

The difference between Rawls and Habermas is that Rawls took the first route ("natural law constructions 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 Jean Piaget and Lawrence Kohlberg on moral competence in particular. And both 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. It's this point of common interest that will now receive our attention.

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 "communicative competence" in an effort to outformalize Rawls's formalism. While Rawls explored the preconditions for moral behavior, and thus for just behavior since justice is the political manifestation of morality, Habermas preferred to deal with 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, that is, "the features of human beings in virtue of which they are to be treated in accordance with the principles of justice."[69] By contrast, Habermas preferred to focus on a more abstract "interactive competence," that is, 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"[70] and "the ability of a speaker oriented to mutual understanding to embed a well-formed sentence in relation to reality."[71]

To make a long story short, the competence that Rawls and Habermas are looking for turns out to include the sense of justice. Rawls explains that to be entitled to equal justice, all we need is "the capacity

for moral personality."[72] Human beings are moral persons, that is, 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."[73]

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."[74] In short, the sense of justice, which Rawls alternately refers to as a "moral capacity"[75] or "power,"[76] a "mental capacity . . . involving the exercise of thought,"[77] and a "moral sentiment"[78] or "sensibility,"[79] is "an effective desire to apply and to act from the principles of justice and so from the point of view of justice."[80]

The sense of justice, thus, itself presupposes two capacities, one cognitive, the other volitional. To be *effective,* the sense of justice presupposes the ability to identify and understand principles of justice well enough to apply them to a particular case—this is the cognitive capacity. But that's not enough. The person, once she has understood and applied the principles properly, must be able to act according to them. The capacity to abide by them is the volitional capacity. Add the *willingness,* or desire, to do so, and one has a full-fledged sense of justice.

Rawls, especially later on in *A Theory of Justice,* stresses this last, motivational, aspect of the sense of justice, as opposed to the capacities that must be presupposed for its exercise. It's this motivational component, in Rawls's view, 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.*"[81]

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 is also 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."[82] But being good in such a well-ordered society, "in which institutions are just and this fact is publicly recognized," means nothing but "having an effective sense of justice."[83]

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 will consider, everything else being equal.[84] 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," which we encountered earlier on.[85]

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, Reason writ large. (Whether the sense of justice is, in the end, any less nebulous remains to be seen, though Rawls prefers to pin his hopes on moral and developmental psychology rather than Hegelian idealism.)

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 human beings entitled to equal justice. But Rawls ends up not all that far from Hegel. For rationality, though understood more narrowly as individual intellectual capacity,[86] turns out to be among the prerequisites for moral personhood.[87]

We'll see a little later on that the idea of a person seeing herself reflected in the institutions of the state is in fact crucial to the legitimacy of that state, though not so much as an inspiration for just action, Rawls's main focus, but as a more basic manifestation of the person's capacity for *self*-government, or autonomy. That capacity is presupposed in Rawls's social contract theory, as it is in any form of social

contract theory, as well as in any form of discourse theory generally speaking. And it's this manifestation of autonomy that renders a political system legitimate in the first place, rather than merely generating respect for—and compliance with—a system that already has been legitimated. The identification of the person with the state by itself is the basis for the state's legitimacy, rather than merely for its stability in the long term.

But even with his more limited focus on stability, Rawls must account for the origins of the sense of justice. For even if only the stability of existing institutions depends on the sense of justice, he must explain how the sense of justice originates and operates. And this he does, in some detail.

It is here, in his account of the emergence of the sense of justice, that we find a more extended discussion of the rational, or cognitive, capacities implicit in a sense of justice, in addition to its motivational aspect. Rawls's account of the motivational component of the sense of justice is straightforward, and illustrates the limited significance of this component for a theory of moral personhood. Essentially, we develop a desire —as opposed to a capacity—to act justly, that is, 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.[88] We come to like, if not love, our colleagues because they like us, and treat us accordingly.[89] 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 [that is, 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,"[90] that is, our family and our "associates."[91]

Now this tit-for-tat account well may be accurate. I am 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 does. It's a supplementary speculation about why we might be inclined to act according to our sense of 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, that is, as a person entitled to justice. We can't be motivated to exercise a capacity we do not have, or even if we

could, the motivation without the capacity wouldn't do much for stability since we wouldn't be able to act according to it—assuming the volitional capacity is deficient.

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 whose existence Rawls concedes 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 person with such a motivational deficit clearly is entitled to equal justice. He may lack a full-fledged sense of justice, that is, he may not have realized his capacity for a sense of justice, but he certainly had the requisite capacity. And, as Rawls stresses repeatedly, the capacity is enough 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.[92] 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.

Otherwise, we would exclude criminal offenders from the realm of justice. Criminal justice would become an oxymoron. The insanity defense does remove certain individuals from the scope of retributive justice. As Tarde pointed out, it is impossible to direct resentment—as a moral sentiment, or a sentiment of justice—at an insane person. This is so because an insane person lacks the rational 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. The cognitive and volitional prong of the insanity defense thus mirror the cognitive and volitional aspects of the conceptual capacity underlying the sense of justice. Criminal law operates with an implicit presumption of sanity, that is, of the actual possession of the rational capacities underlying the sense of justice. The insanity defense lays out the conditions for the rebuttal of that presumption.

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 definition 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 "morals" offenses which have nothing to do with justice or injustice, and in this sense are ajust.[93] Crime, by contrast, is an act of injustice, in that it consists of one person treating another as a nonperson.[94]

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 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.[95] The acquisition of one presumes the acquisition of the preceding sentiment, so that moral respect presumes associational affection, which in turn presumes familial love.[96] 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. The image of family life that Rawls paints, however, 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.[97]

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,[98] can be attributed to that person, whether it is her "*fault*."[99] 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, can't be a relevant criterion for determining moral status.

Rather than focus on origins, we might consider distinguishing between *levels* of desire, or motivation. Perhaps we commit crimes not because we have *no* desire to act justly, but merely an insufficiently strong desire, which can falter in the face of great temptation, that is, of some opportunity to advance our personal interest at the expense of another's, and therefore of justice.

One difficulty with this view is that the only evidence of the level of a person's moral motivation might consist of its insufficiency as evidenced in the criminal act. There is also 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.

Note that it's important here, once again, to distinguish the sense of justice, as a moral sentiment, from other senses of obligation, as ethical sentiments. Many criminal offenders identify very strongly with fellow members of certain substantive communities, including their family and extrafamilial 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. Unless they operate as loners (as serial killers tend to do), they also have shown some reflective capacity for non-natural identification. 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 would account 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. It's *necessary* for criminal liability (hence

the insanity defense), but not sufficient. For criminal liability, the person must actually have acted on that capacity, that is, she must have manifested her capacity for personhood in an act. Sanity is required, but so is voluntariness and culpability.[100]

Lacking the motivational aspects of the sense of justice, "the capacity for the natural attitudes of love and affection, faith and mutual trust,"[101] thus doesn't remove an individual from the realm of retributive justice. Un- or even undermotivated individuals with the rational capacity for a sense of justice can, in other words, still be punished. This conclusion is confirmed by the fact that the motivationally challenged remain "full subject[s] of rights"[102] in other contexts of justice as well. As a matter of *distributive* and of *restorative* justice (the flipside of retributive justice), too, someone without the desire to act justly is just as entitled to just treatment as anyone else.

The lack of a desire to comply with principles of justice 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, but we may not remove her from the realm of justice altogether. Nor would we punish her for her motivational deficit, but instead for her unjust treatment of another person entitled to just treatment. This wasn't always so. But, at least in theory, criminal offenders are no longer outlawed, stripped of their citizenship, attainted, or deprived entirely and permanently of their civil rights ("civil death").[103] In practice, of course, these exclusionary punitive practices have continued *sub rosa* in the persecution of the so-called War on Crime, a massive incapacitation campaign beyond the constraints of retributive justice.[104]

A disrespect for justice, and therefore for other persons, likewise doesn't deprive a person 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.[105] From the perspective of justice, a motivationally challenged murderer is as entitled to receive damages for breach of contract or tort feasance, or to have her murderer prosecuted, or to receive crime victim's compensation for a theft, as anyone else. That's not to say that actual state practice will follow suit: In Rawls's formulation, "the duty of justice is owed only to those who can complain of not being justly treated,"[106] and she most certainly

can *complain* about unjust treatment if she is being dealt with as anything other than an equal and rational person—whether her complaint will be heard is another question.

So far, we have noted cases in which a motivational deficit doesn't affect a person's right to make justice claims, or to "complain of not being justly treated." We owe a duty of justice to anyone who possesses the basic rational capacities, cognitive and volitional, necessary for an effective sense of justice.

Nonetheless, 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 matters of justice—affecting herself or others—for the simple reason that she is incapable of assuming the standpoint of justice. Put another way, anyone is precluded from justice decisions insofar as she cannot under any circumstances act according to her sense of justice, rather than personal interest.

All this seems obvious enough, even true by definition. As a practical matter, however, diagnosing a cognitive, volitional, or motivational incapacity for an effective sense of justice is tricky, to say the least. Everyone above a certain age is presumed to possess the requisite capacity, unless and until proved otherwise. Once proved to suffer from "mental incompetence" or "incapacity," however, an individual is deprived of the right to vote, along with other important participatory rights such as the right to sit on a jury and to serve in a legislative, judicial, or executive capacity (that is, the right to *be voted for*). Given the drastic consequences of a determination of "mental incompetence" for the individual's political rights (apart from her other rights, including—in extreme cases—the right to be free from physical confinement), an explicit finding that she is incapable of a sense of justice would be preferable, identifying the empathic capacity she is said to lack.[107]

More troubling, throughout the United States, conviction of certain crimes—felonies, mostly, or crimes of "moral turpitude," a category familiar from our discussion of Learned Hand's struggle with immigration statutes[108]—results in disenfranchisement, along with the deprivation of all other participatory political rights, without any finding of incompetence. What's more, the presumption of an offender's unspecified incapacity to participate in political decision making is often *irrebuttable,* thus permanently removing the individual from political life.[109] This practice is intolerable absent a specific finding of empathic incom-

petence that precludes the offender from ever developing, or exercising, the requisite capacities for a sense of justice.[110]

Now far more common than a complete *incapacity* for a sense of justice is the *inability,* or the unwillingness, to act according to one's capacity, especially in cases in which I am a party. It may turn out, for instance, that my sense of justice is insufficiently strong to overcome my concern (or instinct, if you prefer) for self-preservation.[111] These cases of situational inability are still more difficult to address than cases of complete incapacity since they are not susceptible to diagnosis in advance. Those with the requisite empathic capacity instead can only be encouraged—and, in the case of juries, "instructed"—to act upon it; moreover, as Rawls points out, the state's institutions must be designed in such a way that they reflect, and are seen to reflect, government from the standpoint of justice. In the end, one must rely on the strength of the sense of justice and provide everyone with the chance to reach beyond herself and look to the principles of justice. This is the educational function of participation in the institutions of self-government, including not only the franchise, but also jury service and participation in local self-government at the level of civil society, in factories, schools, and even in prisons, along the lines of Thomas Mott Osborne's famous but long defunct Mutual Welfare League in Sing Sing.[112]

The application of state norms to myself would seem to present a special case, however. Here I am entitled to participate in—though still not to dispose of—the justice process even if I should prove unable to regard my case from the standpoint of justice and even if I should lack the requisite empathic capacity altogether. Otherwise, the psychopathic defendant—who by hypothesis lacks the motivational capacity for a sense of justice, but has the requisite cognitive and volitional capacities—would be barred from participating in his own trial, resulting in an illegitimate judgment in violation of her right to be treated as a person capable of self-government.[113] The psychopath may deserve punishment, but he does not deserve to be disposed of as a mere object without any say in the proceedings against him.

Justice requires, then, that the defendant (and the putative victim, represented by the prosecutor or a victim's counsel) in a criminal case, as well as the defendant (and the plaintiff) in a civil case, no matter how incapable or unwilling to assume the standpoint of justice, be allowed to *participate* in the decision of their case, that is, in the application of the appropriate norms to their conflict.[114] But they 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, even if they possessed the requisite minimum capacity for a sense of justice.[115] 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 first inspection might appear as a direct *violation* of the fundamental principle of legitimacy in the modern state, namely, autonomy. 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.

Given the presumed inability (not incapacity) of the parties to decide their case from the standpoint of justice ("objectively" rather than "subjectively"), the disposition of their case is transferred to a third party: the judge or, ideally, the jury. This third ("impartial") party is the institutional manifestation of 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 role taking from the perspective of justice. The jury decides as the parties would decide, had they assumed the standpoint of justice, and in this way exercised their capacity for a sense of justice.

Ideally, of course, the parties would resolve their dispute through settlement or victim-offender mediation and the like, based on considerations of justice, without the need for a third party decision maker. The objection to this disposition is likewise prudential rather than principled. The problem is not merely that there is no guarantee that each, or even either, party will in fact draw on his sense of justice, but that even if both parties were to comply with this condition, justice dialogue would further require that they face each other (roughly) as equals. Otherwise, the resolution of their conflict may well reflect their power differential rather than some shared consensus on the just resolution of the case. 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 (and the stakes for the accused notoriously high(er)). This is the fundamental problem with plea bargaining, which as an unmediatedly autonomous process is not necessarily objectionable in principle.[116]

The distinction between participation and decision, or disposition, finds an institutional manifestation not only in the application of norms to myself in the legal process, but also in their legislative definition. (This is to be expected since general norms are potentially applicable to anyone, including myself.) Consider the distinction between elected representatives and the electorate, and between the right to be voted for and the right to vote (or the passive and active franchise): The public's act of voting does not require taking the standpoint of justice. Voters regularly do, and are expected to, manifest merely their personal self-interest, regardless of whether they vote on specific issues of policy (as in a referendum) or select a representative who in turn will vote on specific issues on their behalf.

This is not true in quite the same way of the persons they vote for. At least in some views of the political process, elected representatives are charged with deciding definitional matters of justice in general as their constituents would, *from the standpoint of justice,* that is, by imaginatively exercising their sense of justice, much like jurors decide applicatory questions of justice in particular cases.[117] In this way the legitimacy of the process, in this case of defining rather than applying norms, once again derives from both direct participation and indirect, vicarious, self-judgment.

Rawls developed the construct of the original position to capture what it means to take the standpoint of justice, and the sense of justice as empathic role taking plays a central role in his model. Persons in the original position, when they deliberate 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, an imaginative thought experiment that we can undertake at any time, we are acting on our sense of justice. That doesn't mean that we disregard our self-interest entirely.[118] It simply means that we regard our self-interest as the interest of someone who is nothing more—nor less—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 igno-

rance—that is, 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."[119]

In Rawls's scheme, thinking about justice thus requires two kinds of empathic identification, or imaginative role taking, enabled by the sense of justice. First, we must imagine ourselves as a party 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 these far more common situations, which include not only constitutional or legislative deliberations but also the everyday processes of norm application that constitute the criminal and civil justice systems, the veil of ignorance is partially lifted to reveal to us facts about our particular political community. But insofar as we take the standpoint of justice in these situations as well, our empathic role taking considers the objects of identification not only as having certain interests, but also always as being objects of justice, that is, as persons who can make justice claims.

Understood as a particular, moral, form of empathic role taking, the sense of justice thus represents a key, if ordinarily overlooked, component in Rawls's theory of justice, and not merely as a guarantor of the stability of a well-ordered society, which is the function of the sense of justice that Rawls himself has emphasized.[120]

The sense of justice, it turns out, plays a similar—and similarly central—role in Habermas's discourse theory. As Thomas McCarthy has pointed out, discourse participants are conceptualized as "moral agents" who are "trying to put themselves in each other's shoes."[121] 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."[122] Justice discourse, according to Habermas, thus is nothing but a continuous exercise of each participant's sense of justice, as the standpoint of justice is constituted through discourse rather than through each individual's imaginative assumption of the original position, as in Rawls's account.

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,"[123] 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. As Hans-Otto Apel put it, 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."[124] 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."[125]

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, that is, 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 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. They merely differ about 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); Habermas requires actual public discourse.

The relevant similarity between Habermas and Rawls 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 Jean Piaget and Lawrence Kohlberg, on the one hand, and of Noam Chomsky, on the other.

Linguistics: 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 one, interactive competence for the other) both Rawls and Habermas 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. Both Rawls and Habermas view their task as analyzing the sense of justice, which both take as 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 making visible these assumptions, these presuppositions, this prior knowledge.

Habermas is after 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."[126] This communicative competence presupposes certain cognitive skills that make it possible to recognize rules and to comply with them. 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 we know at least since Rousseau—requires the very same capacity for imaginative role taking. As Habermas puts it, 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."[127]

In other words, the sense of *justice* and the sense of *language* overlap. Rawls exposes the connection between the two senses, or competences, more explicitly still: "It is plausible to suppose that any being capable of language is capable of the intellectual performances to have a sense of justice."[128] The point here is not only that the intellectual capacities required for a sense of justice are widely shared, rather than limited to a lucky few; Rawls is making the more specific claim that the intellectual capacities required for a sense of justice and for a sense of language are so closely related that having them for one sense implies having them for the other. In fact, Rawls goes so far as to draw a general analogy

between political and moral theory and linguistic theory on the basis of their focus on the sense of justice and the sense of language, respectively. The former seeks to "describ[e] our sense of justice,"[129] the latter "the sense of grammaticalness."[130]

The precise relationship between the senses 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 a basic innate capacity, a sort of general intelligence. Under this account, the same intellectual capacity underlies both the sense of justice and the sense of language. By contrast, Chomsky postulated the existence of a special innate 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 differs from the capacity for a sense of language for the simple reason that the latter capacity is unique.[131]

Despite these differences, Rawls and Habermas both rely on Piaget and Kohlberg as well as on Chomsky.[132] They adopt Piaget's 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"[133]—the sense of language—in the moral and political sphere.[134] 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."[135] Just as Rawls tries to "characterize one (educated) person's sense of justice,"[136] 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."[137]

The resolution of the debate between Piaget and Chomsky about the nature of the sense of language is of secondary importance for Habermas and Rawls, and for us as well. What matters is that, as Habermas remarks, both theories attempt "to reconstruct the universal linguistic ability of adult 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.)"[138] And it's this general project that marks the point of convergence between moral, political, and linguistic theory, and the study of the senses of justice and of language.

The concept of a sense of language, or "what the Germans call *Sprachgefühl,*"[139] has been subject to many of the same misinterpretations as that of a sense of justice (or what the Germans call *Rechtsgefühl*). And it was once again in Germany that the concept received the greatest attention and underwent the most varied 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. Like the sense of justice, the sense of language was a communal attribute, a characteristic of the German *Volk*. According to Jacob Grimm, a *Volk* was but a community of people who speak the same language, or one might say, who share the same sense of language.[140] And as the sense of justice, so too the sense of language could be found in its pure form among the simple folk.[141]

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. It was the sense of language thus understood that the early dictionarian 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.[142] In analogy to the *sensus iuridicus* (or the "hunch" or "situation sense" of American Legal Realism), the sense of language was also a sense *for* language, a feel for the appropriate expression, the proper turn of phrase, a skill that could be acquired and perfected.[143]

Still, as in the tradition of the sense of justice, so too in that of the sense of language there's the beginning of a project that is worth continuing, buried 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. And once again it is enlightenment thought that set out a promising conception of the sense of language. 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.[144] In the case of the sense of language, this distinction 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 child's acquisition of basic grammatical competence within a short span of time and without extensive environmental guidance or actual language training.[145] (Humboldt may well have picked up the concept of a sense of language from Campe, the dictionarian, who was his private tutor as a child, and with whom he apparently stayed in touch throughout his life.)[146]

Chomsky has always acknowledged his debt to Humboldt.[147] 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."[148] So language is possible because we share a sense of language; likewise, 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."[149] As the child learns to navigate an ever wider social world, and to negotiate relationships with ever more, and more remote, persons, she develops both interactive competence and moral consciousness.[150]

In other words, the rational skills, the conceptual competence, required to communicate and to get along with others are identical in Piaget's account. 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 that have been recognized and applied. Cognitive competence, in other words, is not enough. Actual performance is crucial as

well. In linguistic terms, communication breaks down if the speaker commits basic 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 fundamental, monologic, rational capacities, an effective sense of language and of justice—as varieties of interactive competence—presuppose 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 simply a particular 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 role taking, is presupposed in communication of any kind. This we can see by following Habermas in considering discourse in general, rather than justice deliberation in particular.

The sense of justice differs from general communicative competence, and therefore the sense of language, in two regards. First, and most obvious, the rules involved are rules of justice, rather than rules of grammar, or more generally of communication. A participant in a justice discourse therefore will need to be able to comprehend rules of justice and to apply them to particular cases. It must also be presumed that she can do more than merely understand and apply the rules, but comply with them as well.

Second, and most important, the exercise of the sense of justice presupposes the abstraction (and therefore the requisite ability and the willingness to do so) from certain characteristics of its object. 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 mothers, sons, daughters, fathers, aunts, and so on.

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. Ideally 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*.

As we noted previously, however, recognizing another as a fellow moral person means regarding her as possessed of the capacity for autonomy. As Kant realized, following Rousseau, 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 presupposes the same conceptual capacities as do the sense of justice and the sense of language. Like the senses of justice and of language, the capacity for autonomy presumes the cognitive capacity to recognize and apply norms, as well as the ability to adhere to them. Unlike the senses of justice and of language, however, the capacity for autonomy does not appear upon first inspection to be a social, or communicative, sentiment: Autonomy is not simply government by norms, it is *self*-government by norms. 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.

The sense of justice is triggered 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 role taking, 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,[151] and the universalizability of moral norms in Kant.[152]

The sense of justice thus is closely related to the capacity for autonomy: Through mutual role taking the distinction between respect for others and respect for oneself collapses, or rather becomes morally irrelevant, along with the distinction between other and self. Put another way, the sense of justice is the other-regarding aspect of the capacity for autonomy; the sense of justice exposes the social and therefore moral component, or potential, 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 role taking, 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 rather than the bedrock of moral personhood.

5

The Sense of Justice in Penal Law

We now turn to an exploration of the role of the sense of justice in American penal law, drawing together into a comprehensive view comments scattered throughout previous chapters and complementing them with additional illustrations. The "criminal justice system" recommends itself as a point of focus because it is more explicitly—and self-consciously—concerned with matters of *justice* than are other areas of law and, for that reason, provides more opportunities for consulting and invoking the *sense* of justice. As we have seen, the sense of justice also appears in contracts cases, tort cases, family law cases, housing discrimination cases, even in tax and insurance cases; yet nowhere do courts and commentators feel compelled to cite the sense of justice more frequently than in matters of penal law.

For analytic purposes, it's useful to distinguish between three aspects of penal law, namely, definition, imposition, and infliction. First, *substantive criminal law,* in its "general part," sets out the general principles of criminal liability, including various formal prerequisites such as jurisdiction and legality, as well as substantive requirements like actus reus and mens rea, and the various defenses, including self-defense, necessity, insanity, and so on; in its "special part," the substantive criminal law defines and systematizes the various types of criminal offenses, including offenses against the state (for example, treason), offenses against the person (for example, homicide), offenses against property (for example, theft), and offenses against public order (for example, disorderly conduct). Second, *procedural criminal law* covers the application of the norms of substantive criminal law by various procedural means, including trials and plea agreements. Finally, the *law of punishment execution* (also often referred to, somewhat misleadingly, as prison law or correction law) applies to the infliction of criminal sanctions, including imprisonment and various forms of noncarceral supervision (probation, parole, house arrest, "execution," and so on).[1]

The account of the sense of justice developed in this book is primarily a procedural one, highlighting the function of the sense of justice in rendering judgments of justice. For that reason, we would expect the sense of justice to figure prominently in procedural criminal law. This is indeed the case; a central procedural institution, the jury, is specifically designed to reflect "the community's" sense of justice. As we'll see, however, substantive criminal law and, to a lesser extent, the law of punishment execution draw on the sense of justice as well.

Definition: Why and What to Punish

We'll begin by considering how the sense of justice might help us address the fundamental question of why the state should be justified in punishing its constituents in the first place. Next up is the significance of the sense of justice for the set of formal constraints on the state's exercise of its power to punish, however justified, that are ordinarily grouped under the heading of the principle of legality (*nulla poena sine lege*). We then turn to the role of the sense of justice in the general principles of criminal liability and, finally, in the definition of specific criminal offenses.

Rationales for Punishment

Punishment theory—which concerns itself with the various justifications for, and functions of, criminal punishment—is often thought to have a great deal to do with the sense of justice. In fact, there is an entire justification for punishment that claims to build on the sense of justice: Vengeance theorists, who are often mistaken for—and mistake themselves for—retributivists, justify punishment on the ground that it manifests an instinctual reflex to the threat (to myself, to my community?) posed by the offender through his criminal act. That reflex, however, must be carefully distinguished from a sense of justice. As we've seen earlier, it is neither a *sense* nor is it a sense of *justice*.[2] It is instead an instinct of self-preservation and as such falls outside the realm of justice. While this instinct cannot be denied, and in fact must figure in any sociology or social psychology of punishment, it has no legitimating force. Just because "we" feel like lashing out at a "criminal" doesn't make it right.

That's not to say, however, that the sense of justice doesn't figure in the theory of punishment in other ways. To begin with, there is no need for a theory of punishment unless there is such a thing as a crime. Without a sense of justice, the infliction of harm by one person upon another would not be a political, and certainly not a moral, issue. We might instinctively protect the herd against external attack, as an animal might. But we would have no reason to care about the harm suffered by someone outside our immediate social group, and we would not see the need to assess *guilt* and then to impose and inflict punishment in return. Without a sense of justice, crime would not be recognized as an injustice that called for establishing and setting in motion a criminal *justice* system—as opposed to a system of human risk disposal[3] or of "telishment."[4] Without identifying with the "victim" of "crime," we would not be motivated to right the injustice she suffered at the hands of the "offender."

At the same time, however, the sense of justice also helps us to recognize the offender as a person entitled to justice, even if justice may require his punishment—again, as opposed to his disposal, discipline, or even "correction" or "treatment."[5] The sense of justice thus both grounds and constrains punishment at the same time: Just as it gives us access to the particular injury that the victim suffered to her dignity as a person, so it also allows us to identify with the (suspected, alleged, charged, and even the convicted) offender as a person and for that reason to recognize the need to maintain his dignity as a person. If the sufferer of harm lies beyond our sense of justice, we see no need for punishment; if the inflicter of harm lies beyond our sense of justice, we see no need for *limits on* punishment.

In practice, identification with offenders tends to be less likely than identification with victims. In fact, identification with the latter tends to be seen as incompatible with identification with the former. On the contrary, identification with both is required for a just resolution of any criminal case. The ideology of the American War on Crime, and the "victims' rights movement" within it, turns on this pernicious, and widespread, misperception.[6] The harsher treatment of offenders thus appears as a victims' rights issue. Being tough on crime is good for victims because it reflects "our"—and policymakers'—commitment to distance ourselves from offenders ("them") and instead to identify, and identify exclusively, with (fellow) victims.

The frenzied celebration of identification with victims of crime, how-

ever, should not obscure the fact that this identification is highly selective. Murderers are less likely to face capital punishment if their victim is black than if she is white.[7] Victims of crime in urban minority neighborhoods are less likely to see their rights vindicated through a vigorous prosecution than victimized residents of affluent white neighborhoods. Offenders or prison inmates, the poor, drug addicts, are less likely to arouse the sense of justice of criminal justice officials than others when they fall victim to crime. Female victims of domestic violence may find it difficult to trigger the sense of justice of police officers or prosecutors. And so on.

By contrast, nothing is as likely to attract the attention of state officials as the homicide of a fellow official, which is among the standard aggravating factors that elevate an ordinary murder to one that exposes its perpetrator to the death penalty. "Cop killers" are so vigorously pursued, in fact, that the system's punitive response may well leave the bounds of justice behind and instead amount to an instinctive act of communal self-preservation.[8] In that case, of course, the identification would not involve the sense of justice at all.

The tendency to identify with victims, and certainly the tendency *not* to identify with offenders, is not a recent phenomenon. Already Bentham noted that "legislators and men in general are naturally inclined" to excessive punitiveness, since "antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity."[9] In Bentham's utilitarian view, excessive punitiveness didn't mean unjust, or ajust, punishment but *wasteful* punishment, punishment in excess of what was required to deter the conduct in question. He set up the principle of "parsimony" in punishment to counteract this tendency. He would have had no use for a concept like the sense of justice insofar as it relied on notions of dignity, respect, and personal autonomy. Yet even the strict utilitarian cannot do without the conceptual tool of identification or role taking that allows the utility calculator to keep vicarious tabs on the pain or pleasure experienced by everyone affected by a particular policy or course of action, in this case the offender.[10]

It's important to see this connection between Bentham—and other utilitarians, notably the great penal reformer Cesare Beccaria, whose principle of greatest happiness for the greatest number Bentham took as the inspiration for his life's work—and other Enlightenment figures. The commonalities between utilitarians and Kantians, Hegelians, and

moral sense philosophers are easily overlooked if one loses sight of the fact that each school struggled to define itself in contrast to the others. At bottom, they were all Enlightenment reformers, motivated by the same basic urge for a fundamental rethinking of old assumptions and practices. They all shared the sense that the common man no longer was to be pitied for his unfortunate plight. Instead, Enlightened gentlemen and reformers strove to empathize with the ordinary person—identify with him—precisely because he was identical to them in some fundamental sense.

That sense of similarity differed from one Enlightenment theory to another, but the identity remained central. So Bentham insisted that every member of the utility community was like any other because every member's pain and joy equally affected the utilitarian calculus and thus the common good.[11] Contractarians like Beccaria (and Fichte)[12] portrayed all citizens as identical insofar as they were all signatories to the social contract, a contract grounded in the shared rationality of its signatories who surrendered some of their external freedom to pursue their life plans protected from the chaos of the law of nature. And Kant and Hegel stressed the common capacity for rational deliberation shared by all humans as rational beings.[13]

The widespread effort to rethink state punishment, exemplified by Beccaria's *Of Crimes and Punishments,* was merely one manifestation of the general Enlightened urge for critical analysis and reform in light of its results.[14] And the identification between judged and judge, between reformer, legislator, citizen, on the one hand, and criminal offender, on the other, was central to every criminal law reform program of the Enlightenment. It was the discovery of this identity that gave rise to the need for reform in the first place.

In fact, every penal law reform effort can be seen as an attempt to counteract the natural tendency of antipathy toward the offender. Without identification, reform was impossible; with it, reform was inevitable.[15] Take William Bradford's well-known 1793 *Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania,* for instance:

> [O]n no subject has government, in different parts of the world, discovered more indolence and inattention than in the construction or reform of the penal code. Legislators feel themselves elevated above the commission of crimes which the laws proscribe, and they have too little personal interest in a system of punishments to be critically exact in

> restraining its severity. The degraded class of men, who are the victims of the laws, are thrown at a distance which obscures their sufferings and blunts the sensibility of the Legislator.[16]

William Roscoe put it most eloquently in 1819, with considerable psychological acuity:

> We . . . continue to indulge, with little or no restraint, those sentiments of *anger* and *resentment,* which are excited by any violations of the laws which we have ourselves prescribed. These feelings gratify our pride, because they seem to be the result of our superior virtue. We consider ourselves for a moment as raised above the frailties of humanity, and our sympathy with it is destroyed. The assumption of perfect rectitude in ourselves, and the imputation of guilt to others, give rise to our vindictive feelings; and the spirit of cruelty and persecution is awakened, which is sometimes carried to such an extreme, as perhaps to be scarcely less criminal than the offence which it is intended to avenge.[17]

Without identification, not even a systematic treatment of the subject of criminal law was necessary. What was the point of developing a complex doctrine of criminal law (as opposed to a maximally efficient system for the disposition of undesirables) if its provisions would come to bear only on "dangerous and vile" individuals? So one finds even venerable treatise writers proclaiming—with suspicious pathos—that the criminal law, of all areas of law, deserves the legislator's (and judge's) greatest attention because he too may one day find himself within its grasp, while at the same time complaining that it is the most neglected of all areas of law (and therefore most desperately in need of their systematizing hand). As Blackstone remarked in his venerable *Commentaries on the Laws of England,* a work that, as a whole, exerted tremendous influence in the United States throughout the eighteenth and nineteenth centuries:

> The knowledge of [criminal law] is of the utmost importance to every individual in the state. For . . . no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human

> affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobedience may expose us, is a matter of universal concern. . . . And yet . . . it hath happened that the criminal law is in every country of Europe more rude and imperfect than the civil.[18]

Imploring passages of this kind reflect the fragility of the identification between onlooker and offender. To regard the offender as a person who is entitled to make justice claims, and whose suffering we should experience vicariously via our sense of justice, is a constant struggle. All too easily do we slip into the comfortable notion that offenders are fundamentally different from us and that our infliction of punitive pain on them should not raise concerns of justice because they are no more entitled to just treatment than other dangerous nuisances, such as rabid dogs, overhanging trees, or natural disasters.

Often enough, these exclusionary impulses manifest themselves in brutal, if not sadistic, excesses of punishment. More interesting (and troubling), however, they may also underlie benign efforts to *prevent* the arational maltreatment of offenders. Consider the punishment theory of rehabilitationism, or treatmentism,[19] which rose to prominence in the nineteenth century and by the middle of the twentieth century had become the dominant theory of punishment in the United States.

With the emergence of imprisonment as the dominant mode of punishment during the late eighteenth and early nineteenth centuries, the problem of punishment became the problem of imprisonment. Rehabilitationists were the first to address themselves to this novel form of punishment in any detail. They developed a range of options for the penocorrectional treatment of the abnormality that revealed itself in criminal conduct. In the words of a leading nineteenth-century rehabilitationist, criminal punishment was "rational supplementary education" of those persons who "by illegal word or deed" had proved themselves so morally diseased as to be incapable of rational self-determination.[20] Punitive treatment was to focus on the "inner man," so that it may generate and foster good thoughts, feelings, and resolutions that in turn would determine good, that is, noncriminal, behavior.[21] Punishment was "effective but bitter medicine."[22]

Despite its progressive rhetoric that railed against the barbaric ex-

cesses of the pre-Enlightened penality of bodily pain, however, rehabilitationism at bottom was itself incompatible with the Enlightenment's moral and political project of expanding the empathic circle to include all persons as such. By reconceiving punishment in medical and pedagogic terms, rehabilitationism implied difference, not identity, distancing, not identification.[23] In addition to redefining punishment as healing, the rehabilitationists were fond of treating adult offenders as juveniles and obliterating the distinction between adult and juvenile punishment along the way. Characteristic of this medico-pedagogic turn was the derivation of the principles of adult punishment from those of familial discipline[24] and an accompanying reconception of the infantilized criminal offender as inadequate and deviant.[25] Punishment was a benefit, not a potentially illegitimate and uniquely intrusive form of state intervention, because the offender suffered from a debilitating condition, revealed by his crime, which marked him not only as different from, but also as inferior to, his judge. To question the legitimacy of punishment was to misunderstand the nature of punishment; punishment as treatment was unquestionably legitimate. Rehabilitationism addressed the Enlightenment's legitimacy challenge of punishment by defining it away.

Drawing on the new behavioral sciences that had sprung up since the early nineteenth century the rehabilitationists assembled an ever lengthier list of criminal pathologies and of corresponding criminal types. Treatmentism—which from the beginning included rehabilitation and incapacitation in its arsenal of disciplinary strategies—thereby reframed the normative problem of punishment as a technocratic (or, more charitably, a scientific) project of classification; as the influential American criminologist Sheldon Glueck put it in 1928, punishment became a matter of "separating the sheep from the goats"[26] according to a taxonomy of criminal deviance.

To classify an offender, however, one had to diagnose and interpret indicators of deviance. The most obvious indicator of criminal deviance was the criminal act itself. But as punishment turned out to be just one more benevolent state activity along the medico-pedagogic continuum from the cradle to the grave[27] under the state's all-encompassing quasi-patriarchal police power,[28] so crime became only one among many indicators of the need for punishment. Psychological markers were joined by physical markers, as Lombroso discovered Criminal Man.[29] Since then, posture, left-handedness, chromosomes, and hormones, not to

mention skull shape, have joined the usual psychological suspects as criminal indicators.[30]

Not only did the diagnostic methods multiply, but so did the diagnostic tasks. It was no longer sufficient to distinguish offenders from nonoffenders; soon one began differentiating among different classes of offenders, each with its exclusive characteristic. This in turn called for a distinction among different classes of penological treatment. Franz von Liszt, the scholar who in the late nineteenth century established and cemented the dominance of rehabilitation over the infliction of punishment in Germany, famously distinguished between three classes of offenders and of corresponding treatments: the occasional minor criminal would receive a warning (which could come in the shape of a brief prison sentence), the offender who suffered from a more serious, yet still treatable, criminal pathology would be sent to prison for his rehabilitation, and the serious hardened offender, upon whom rehabilitative efforts would be wasted, was to be incapacitated indefinitely, until his condition had, contrary to expectations, improved so dramatically as to "indicate" his release.[31]

By the 1930s, the correctional sciences had developed to the point where rehabilitationists could call for scientific experts to diagnose each offender's criminological deficiency. As the American author of a much-cited 1936 article on criminal law reform explained, once a person "had been determined to be a criminal" in court, these experts were to prescribe the proper "incapacitative and reformative"[32] or "disabling and curative" "treatment," depending on "whether the conduct showed the accused to have such a disposition or trait as to require treatment."[33] Eventually this treatmentist ideology was literally codified in the American Law Institute's Model Penal Code of 1962, which exerted considerable influence on subsequent criminal code revisions throughout the United States.[34]

Today, punitive strategy has shifted from rehabilitation to incapacitation. The repressive War on Crime of the past thirty-odd years, which has resulted in record prison populations and imprisonment rates in the United States, was a protracted campaign of incapacitation. Any residual faith in the possibility of psychological manipulation has been eradicated by the "nothing works" assault on rehabilitationism, so much so that the criminological marker search has begun to rediscover the offender's body.[35]

Given that rehabilitation and incapacitation have been joined at the hip since Plato,[36] the move from the former to the latter is not a change of punitive paradigms but a shift along the treatmentist continuum. Incapacitation replaced rehabilitation as the proportion of curable offenders evaporated. Incapacitation is rehabilitation without the possibility of manipulation and, therefore, of reform.

Both varieties of treatmentism—rehabilitation and incapacitation—thus fail as theories of penal justice; both proceed from an assumption of difference between onlooker and offender and thereby bar the identification that is a prerequisite for engaging the sense of justice. In this respect, they do not differ from the vengeance theories their exponents so relentlessly attacked. Vengeance theory and treatmentism differ only in the nature of the offender's inferiority; where vengeance theory sees a moral deficiency, treatmentism sees a psychological one, even if it is one that is to be "corrected," except in hopeless cases fit only for incapacitation.

Any rationale of punishment that rests on offenders' difference and inferiority faces the same objection. Punishment as deterrence, for instance, can be seen as inconsistent not only with the sense of justice of the punisher, but also with that of the punished, insofar as it operates through threats of physical violence designed to cower potential offenders into compliance as one might a disobedient dog, rather than through appeals to their sense of justice. More recently, a modern version of deterrence theory (relabeled "positive general prevention") has been developed, which attempts to address these concerns by focusing on punishment's effect of reaffirming the populace's "loyalty to the law," rather than threatening those whose loyalty may prove deficient.[37]

Similarly, modern theories of punishment as retribution (relabeled "just deserts") strive to distance themselves from crude vengeance rationales. To the extent that they rely on the claim that the offender's *character* is deficient, and punishment responds to this deficiency in some way (though, presumably without seeking to cure it, as this would reveal them as treatmentist, not retributivist, rationales), these neo-retributive theories don't address the problem of differentiation between punisher and punished that prevents engagement of the sense of justice. *Act*-based varieties may be more promising, at least insofar as they attempt to justify punishment as a direct consequence of the offender's choice to engage in the conduct in question, provided that choice is not said to reflect the absence of a capacity for sense of justice on the offender's part, but

rather a failure to act according to that capacity in a particular instance. This lapse is quite a common occurrence in daily life even for those who do not commit criminal acts, and therefore hardly constitutes a fundamental deficiency that differentiates the offender from other persons.[38]

Having considered various rationales for punishment in light of the sense of justice, let us now take a closer look at some basic elements of the doctrine of substantive criminal law, beginning with the principle of legality.

Legality Principle

The principle of legality, or *nulla poena sine lege,* encompasses the most important formal constraints on the state's power to punish; it seeks to bring the criminal law under the rule of law. Its basic concern is the control of official discretion in the penal process, including the legislative definition, the executive enforcement, and the judicial interpretation of penal norms.

Arguably the central aspect of the principle of legality in modern criminal law is the principle of legislativity, which grants the legislature the monopoly over the definition of criminal conduct. Since in Anglo-American law crimes historically were defined primarily by courts as a matter of common law, legislativity is also known as the prohibition of common law crimes or—especially in civil law countries—as the prohibition of interpretation by analogy, which is meant to prevent courts from unduly stretching existing statutes to cover conduct they do not reach on their face.[39]

The principle of legislativity rejects the traditional notion that conduct offensive to the community's sense of justice, or perhaps even a particular judge's sense of justice, can be punished even if it is not proscribed by statute. In a well-known Pennsylvania case from 1964, *Commonwealth v. Keller,*[40] a trial judge convicted a woman who had hidden two dead babies from an extramarital affair in her house, of the newly minted common law misdemeanor "indecent disposition of a dead body," despite his failure to identify a Pennsylvania statute, or even a previous Pennsylvania cases, defining this offense. In his opinion, the judge explained that

> The essential characteristic of the common law . . . is its flexibility. Under the common law, we are not powerless to cope with novel situa-

> tions not comprehended or contemplated by the legislators. In his work on the common law, Justice Holmes noted that, "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong."

A decision such as this would fly in the face of the principle of legislativity, which today has been adopted in jurisdictions throughout the United States.[41] The arguments for the rejection of common law crimes tended to emphasize the need to control judicial discretion in a code-based system of criminal law and noted the general trend toward the statutory definition of criminal offenses, occasionally noting the representative nature of the legislature. They generally did not focus on the troubling elusiveness of the underlying concept of a communal sense of justice itself.[42] At any rate, one might view the preference for a legislative definition of criminal offenses as an attempt to shift criminal law-making power to a larger body comprised of elected representatives who may be better suited to probe "the actual feelings and demands of the community" than a lone trial judge, or even a panel of judges. The insensitivity to the community's sense of justice of the U.S. Supreme Court (with its nine Justices) in particular has been noted, including by members of the Court. Recall that Justice Scalia successfully argued for reversal of a recent Supreme Court decision barring victim impact statements from capital sentencing hearings on the ground that it "conflict[ed] with a public sense of justice."[43]

The principle of specificity, or the prohibition of vague criminal statutes, likewise serves to control official discretion, though it is aimed mainly at the executive branch of government rather than the judiciary. Vague criminal statutes are thought to pose two problems: they don't give sufficient notice as to what is and isn't proscribed *de jure* and, relatedly, they give too much power to enforcement officials to decide on the spot what is and isn't proscribed *de facto*. On the notice question, a federal appellate court recently remarked that "a penal statute must speak for itself so that a lay person can understand the prohibition," adding that "[i]t is not enough to say that judges can intuit the scope of the prohibition if [the defendant] could not."[44] (At issue in the case, *United States v. Handakas,* was the notoriously vague federal "honest services" mail fraud statute, which makes it a federal felony to deprive another—in this case the New York City School Construction Authority—of "the intangible right of honest services.")[45] Of course, very

much the same might be said about police officers' intuiting the scope of a criminal prohibition in the field while "engaged in the often competitive enterprise of ferreting out crime."[46]

Here reference is made not to the sense of justice as supposed communal attribute, but to the sense of justice as individual hunch (*sensus iuridicus* or *Judiz,* in Riezler's taxonomy).[47] When it comes to criminal statutes, neither a judicial hunch nor an executive one can cure legislative vagueness.[48] If the lay person's uneducated sense of justice—which finds its most notable institutional manifestation in the jury—cannot divine the meaning of a criminal statute (what is an "intangible right of honest services," after all?), then the judge's hunch, however refined, cannot save the statute from being declared void for vagueness.

In 1999 an attempt was made to defend criminal statutes against constitutional vagueness attacks by connecting the police officer's hunch to the sense of justice of the community where the conduct occurred. In *Chicago v. Morales,*[49] the Supreme Court struck down a Chicago gang loitering ordinance on vagueness grounds despite the fact that the police had developed guidelines for the enforcement of the facially vague ordinance in collaboration with community organizations, including local church groups.[50] While the guidelines added specificity, they did not function as elements of the offense to be proved and for that reason lacked teeth; the guidelines were discretionary insofar as the prosecution did not have to prove compliance as part of its case, even though failure to comply might have disciplinary repercussions for the police officer in question. Moreover, since the guidelines were not made publicly available, they provided no more notice to potential offenders than did the admittedly vague statute itself. (There was no requirement that the offender be a member of the community whose representatives helped the police to set the guidelines.) The Supreme Court in *Morales* made clear that a foundation in "the community's" sense of justice was not sufficient for criminal liability, nor could it cure a statute's vagueness problems any better than a police officer's, or a judge's, intuition could.

Another aspect of the principle of legality, the rule of lenity (or strict construction), is closely related to the principle of specificity. As we noted earlier, it provides that courts interpret criminal statutes narrowly (or "strictly") and, if a statute is susceptible to several reasonable interpretations, to choose that interpretation which favors the defendant. Analogous to the principle of specificity as interpreted in *Handakas,* the

rule of lenity as a rule of statutory interpretation instructs courts to *ignore* their sense of justice in the interpretation of criminal statutes—as a judicial hunch about the proper, or even the intended, scope of a given offense definition—and to stick to the statutory text instead.[51]

In the end, the principle of legality, a doctrine designed to constrain official discretion, is in its various aspects concerned with limiting the influence of amorphous references to the sense of justice, communal and individual, rather than providing an affirmative account of the role of the sense of justice in the penal process. The principle of legality, after all, does not concern itself with the actual judgment of criminal liability, which would draw on the concept of the sense of justice as laid out in the present book, but helps to set the formal framework for making that judgment.

Assuming these formal requirements have been met, the assessment of criminal liability requires the definition of certain substantive prerequisites of liability which are then applied to the defendant's (or suspect's) conduct. We now turn to the role of the sense of justice in making this assessment.

Principles of Criminal Liability

Criminal liability requires proof of a causal link between the defendant's conduct and the harm whenever the offense in question is defined in terms of a criminal result, such as in the case of homicide: causing the death of another person. The question of causation is not limited to criminal law. Tort law likewise requires proof of causation, though by a lower standard of proof (preponderance of the evidence rather than beyond a reasonable doubt). Modern criminal law doctrine distinguishes between two aspects of the causation issue: factual and legal (or proximate) cause, both of which are required for proof of causation.[52]

The defendant's conduct is the factual cause of the proscribed result (death, in the case of homicide), if the result would not have occurred but for the conduct in question (hence factual cause is also often called "but-for cause," or *sine qua non* cause). Legal cause tends to be the more difficult question. If I trip you at school with the intention of having you tumble to the ground and skin your knee, my tripping you was the but-for cause of your skinning your knee. (Let's say intentionally causing a skinned knee would amount to an assault.) But is it also the legal cause of your skinning your knee if, instead of falling on your knee

you at the last second skip over my foot, turn around to shoot me an angry look, bump into a door that has suddenly closed in front of you, fall backwards, are caught at the last second by your friend Billy, who in breaking your fall drops the textbooks he was carrying, scattering them all over the floor, so that Katie trips over them, knocking you off balance and onto the floor, knees first?

Traditional Anglo-American criminal law tackled questions of this sort with the help of a varied doctrinal toolbox that included concepts such as supervening causes, superseding causes, intervening causes, concurrent causes, and proximate causes, among others. The drafters of the Model Penal Code preferred to admit the uncomfortable truth only imperfectly hidden by these doctrines—the inability of criminal law doctrine definitively to resolve the issue of legal cause. They also took the further, and quite unusual, step of "putting the issue squarely to the jury's sense of justice,"[53] by permitting the jury to find that a factual cause doesn't constitute a legal cause whenever the actual result is "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."[54]

We will discuss the jury's role as the institutional manifestation of a communal sense of justice in greater detail when we turn our attention to procedural criminal law. For now, let us focus on the substantive question of how the sense of justice might help an onlooker approach the difficult question of legal causation.

The Model Penal Code's reliance on the sense of justice in the analysis of causation is consistent with its framing of the causation as a normative question. Traditionally, criminal law had portrayed causation as a purely objective inquiry, with no need to consider the defendant's attitude toward, or awareness of, the details of the causal connection between her conduct and the result. The Code drafters instead argued that the causation question always had been, and should be, also a question of attributing responsibility that included both objective and normative elements. Certain results were too remote to be fairly attributable to the defendant because she did not have the requisite state of mind, or culpability, with respect to the result. Your skinned knee wouldn't be attributable to me, for instance, because I didn't intend to skin your knee through the convoluted sequence of events that took place, or because I didn't know that the sequence would unfold as it did, or because I didn't suspect that it would, or—most important—*shouldn't have* suspected that it might.

Many jurisdictions that adopted the Code's general insight into the normative aspect of the causation question rejected its highly differentiated scheme of causal states of mind (intent, knowledge, recklessness, negligence), with different definitions of causation corresponding to the different modes of culpability that attach to the result element of an offense. They instead settled on a single state of mind that sufficed for legal cause—foreseeability.[55] A defendant's conduct thus caused the proscribed result if she could or should have foreseen it, as opposed to requiring that she did in fact foresee it, or knew that it would come about, or intended that it would. The question of foreseeability, however, was at bottom a question of *reasonableness*. The result was foreseeable—as opposed to foreseen—if a reasonable person in the defendant's position would have foreseen it.

An inquiry into reasonableness, however, is an exercise in imaginative role taking and therefore ultimately also engages the sense of justice. Modern criminal law (as well as modern tort law) is littered with references to reasonableness. Most important, at the level of offenses, criminal liability may attach to negligent conduct, where negligence is measured in terms of risks that a reasonable person in the actor's situation would have recognized, even if the actor himself did not. (In fact, it's his very failure to recognize the risk that is said to give rise to his criminal liability.)[56] At the level of defenses, reasonableness matters both in assessing justifications (like self-defense, necessity, public duty, law enforcement, and consent) and excuses (such as duress and provocation).[57] Virtually every defense is defined in terms of the actor's "reasonable belief" regarding the presence of its elements (did the defendant reasonably believe that he was under attack when he drew the knife? did she reasonably believe that she was about to starve when she broke into a mountain cabin to search for food? could a reasonable person have resisted the threats that coerced the defendant into committing fraud?).[58]

Negligence liability draws on the sense of justice in three ways. First, and least useful, conduct is said to be criminally negligent only if, in the words of the Model Penal Code drafters, "the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong."[59] Here "the community's" sense of justice is used both to ground criminal liability for negligent conduct and to limit it. Note, however, that the limitation does not apply to those who do *not* share the community's sense of justice; they

presumably would be liable even if the criminality of their behavior came as a total surprise to them.

Second, negligence liability is said to attach precisely because the actor was unaware of the risk of harm his conduct created. This unawareness, however, is taken as symptomatic of *the actor's* deficient sense of justice: Negligent conduct is punishable insofar as the actor's inadvertence in turn reveals that "the actor is insensitive to the interests and claims of other persons in society."[60]

Now it is one thing to hold that certain deficiencies in the sense of justice—particularly motivational ones—should not bar criminal liability, but it is quite another to base criminal liability on that very deficiency. In one case, we disregard motivational incapacity when making a justice judgment, treating the actor as though he were a moral person with a fully effective sense of justice; in the other, we focus on that very incapacity, and punish him for it. This would appear to be punishment based on character rather than on conduct, and—more troubling still—punishment based on deviance, akin to the treatmentist program of meting out sanctions tailored to diagnoses of abnormality. To ground criminal liability in difference, once again, undermines the identification between onlooker and actor required to trigger the sense of justice—and therefore make a justice judgment possible—even (and especially) if the difference consists in the actor's deficiencies in her sense of justice, where the sense of justice is thought to be central to a person's moral status.

The idea of using negligence as a proxy for punishment based on a diagnosis of a defective sense of justice can be extended to all types of mens rea. In this way, the degree of deficiency increases with the level of culpability—from least (but still marginally) deficient in the case of negligence to highly deficient in the case of purpose, with recklessness and knowledge filling up the gap in between. This conception of mental states as reflecting various degrees of deviance has a long history in Anglo-American criminal law. The original undifferentiated common law concept of mens rea, literally "evil mind" (to match the "evil act," or actus reus) captured a general moral depravity or malice shared to a greater or smaller extent by all criminal offenders. It was this moral abnormality—or character deficiency—that gave rise to criminal liability in the first place: *non est reus, nisi mens sit rea,* as the much-quoted saying went (and still goes, in many court opinions, and treatises).[61]

The treatmentist shift in modern penal thought replaced the notion

of a moral depravity, with that of psychological abnormality. Abnormality remained the distinguishing feature of all criminal offenders, but —as discussed above—the abnormality was differentiated more carefully and systematically into types. This differentiation was to be performed in its most sophisticated, and scientifically rigorous, form by penological experts who specified the broad sanction ranges imposed by courts upon a finding of guilt. This prescription of peno-correctional treatment was then to be reviewed on a regular basis (in its crudest and most common version, by a parole board) to reflect any progress the offender might have made toward rehabilitation, that is, the peno-correctional treatment of his abnormal dangerousness. At trial, the jury or judge merely undertook a rough preliminary classification by levels of dangerousness, which underlay the hierarchy of mental states set out in the Model Penal Code—negligence, recklessness, knowledge, purpose —which reflected ascending levels of dangerousness (with the negligent offender being the least abnormal, and the purposeful one the most deviant).[62]

Third, the negligence assessment itself requires an inquiry into reasonableness, which here as elsewhere involves empathic role taking characteristic of the sense of justice as moral sentiment. Onlookers "mentally place themselves in defendant's circumstances when judging reasonableness" and "judge[] the situation from the point of view of defendant as though they were actually in his place."[63] The reasonable person in this account is the impartial spectator in Smith's theory of moral sentiments and the moral person who assumes the standpoint of justice in Rawls's theory of justice.[64] The reasonable person in the defendant's position is the defendant who regards the situation from the standpoint of justice as a moral person equipped with an effective sense of justice. If such a person had foreseen that her conduct might result in the proscribed result and gone ahead with it anyway, then the result is fairly attributable to her.

This thought experiment of placing oneself in the defendant's shoes occurs any time the reasonableness of a behavior is judged, including notably in the case of defenses of justification and excuse. In a case of self-defense, for instance, it is not enough that the defendant in fact believed herself to be justified in using force to prevent an unlawful attack; her belief must have been reasonable as well. The question thus becomes whether a reasonable person in the defendant's situation would have held the requisite belief, where the reasonable (or "law-abiding")

person is thought to be motivated by her sense of justice, rather than some consideration of self-interest. In other words, the onlooker would judge whether a moral person would have believed that justice required, or at least permitted, the use of force in self-defense under the relevant circumstances, whether—in short—the defendant's conduct was *justified*. (The same account applies to other justification defenses—necessity, law enforcement, and so on.)

Perhaps less obvious, reasonableness also figures into the analysis of excuses, that is, defenses that are not based on a claim of justification or compliance with principles of justice. Duress, for instance, is a defense only if the defendant was coerced to commit an offense "by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."[65] The idea here is that it would be "ineffective in the deepest sense, indeed . . . hypocritical" to hold the defendant to a higher standard than that with which "normal members of the community will be able to comply."[66] The reference to reasonable *firmness* thus should not be confused with the general reference to reasonableness, or reasonable persons, in the case of justification defenses, or of negligence offenses. In the case of an excuse such as duress, the onlooker is to imagine himself in the actor's position and to assess whether a person of reasonable firmness would have been able to act differently under the circumstances, even though it is undeniable that a reasonable person—that is, a person acting on an effective sense of justice—would in fact have behaved differently. For purposes of the inquiry into the availability of an excuse defense, the failure to act on one's sense of justice thus is assumed and the defense instead turns on the question whether that failure was unavoidable—and therefore excusable, though not justifiable—given the triggering event (in the case of duress, a threat, and in the case of entrapment, an official inducement). In this direct role taking exercise, onlookers are to ensure that they "not impose[] on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise."[67] It is shared human fallibility that makes the excuse, not the choice of the just course (or even the one perceived, rightly or wrongly, to be just under the circumstances).

Excused behavior thus is unreasonable insofar as it was not—and not perceived to be—motivated by the sense of justice. It is not unreasonable

only in the limited sense that no "person of reasonable firmness" would have been able to act on his sense of justice. The concern here is with equal treatment: the judges should apply the same standard to the defendant that they would apply to themselves (and certainly not a higher one). The reference to reasonable firmness adds little, if anything, to this account, except perhaps to prevent judges of less than reasonable firmness from accepting excuses from similarly infirm defendants.

There is some debate over what factors are to be taken into account when defining the "defendant's situation" for purposes of the role taking exercise in justification and excuse defenses alike. What characteristics of the *defendant* and what characteristics of the *situation,* as perceived by the defendant, are relevant for purposes of assessing reasonableness (and therefore, ultimately, criminal liability)? The relevant characteristics of the defendant and other persons who constitute "the situation" (suitably defined) are to include "physical attributes," "stark, tangible factors [like] size or strength or age or health," as well as "any prior experiences" the defendant had that would account for his perception of the situation, including the behavior or dangerousness of others (such as his attacker, in a self-defense case, or the source of the threat, in a duress case).[68] By contrast, "matters of temperament" as well as morally offensive beliefs (notably racism) are said to be irrelevant for purposes of the role taking exercise. So ideally an unusually jumpy or paranoid or fearful person wouldn't have a duress defense unless a less unusually jumpy or paranoid or fearful person would have been sufficiently fearful of an attack as well; likewise, Bernard Goetz, the infamous 1980s New York "Subway Vigilante," shouldn't be able to claim self-defense if his expectation of an impending robbery by a group of black youths on the New York subway was based on his racist beliefs.[69]

These questions regarding the definition of the defendant's situation relate to the determination of what was about to happen, how another person was about to behave, what actions she would have to take to avoid the perceived harm, and so on. Based upon that factual determination, the defendant claims to have chosen the just course of action (justification)—that is, to act on her sense of justice—or to have been understandably unable to do so (excuse). The onlooker's normative judgment of the defendant's choice or nonchoice under these circumstances turns on her ability and willingness to draw on her sense of justice in two respects, by recognizing the defendant as a fellow person with a capacity for a sense of justice and by then placing herself imagi-

natively in the defendant's position as best she can given the information available to her in order to determine whether the defendant exercised that capacity (in the case of a justification), or couldn't fairly have been expected to exercise it (in the case of an excuse).

It's also worth noting that the sense of justice figures in the duress defense, at least in its modern version, in yet another way, aside from the mentioned reliance on role taking and on the concept of a reasonable person (or impartial spectator): It is triggered by threats against "the person of another."[70] Originally the defense was limited to threats against the defendant himself or against members of his household. Today, the scope of the defense is defined by the abstract sense of justice, which is shared by all persons as such rather than by the communal sentiments experienced by members of substantive communities, most notably the family. The sense of justice provides the relevant exculpating impetus, not the sense of family; for purposes of justification, the empathic circle has been expanded to include all persons.

Duress here follows a general trend in modern criminal law. The defense of vicarious self-defense, or defense of another, likewise has been extended from household members to "the person of another."[71] Under the Model Penal Code, for instance, I am justified in using force to protect the person of another against a third person's unlawful attack provided that I, putting myself in the other's place, would have been justified in using defensive force.[72]

A similar move from instinctual identification among group members to abstract role taking among persons, roughly paralleling the expansion of empathic circles described in moral psychology (and adopted by Rawls), can be observed at the level of offenses (as opposed to defenses), though to a considerably more limited extent. While in the clear majority of American jurisdictions, omission liability still only attaches to particular relationships that generate a duty to aid, including membership in the same household (parent-child) or quasi-household (captain-crew, teacher-student),[73] some jurisdictions now recognize a duty to aid any other person under certain circumstances (most notably no danger to the aider).[74] Note, however, that the recognition of broad duties to aid in criminal law does not necessarily reflect an attempt to recognize abstract relationships among persons, rather than among substantive community members, in omission liability. The German omission liability statute, often cited as a model for American criminal law, was added to the German Penal Code in 1935 under National Socialism

and, in its original version, based liability on a duty to aid among members of the German *Volk* community as a matter of the *Volk's* sense of justice.[75]

The greater reluctance in criminal law to expand omission liability to better reflect the standpoint of justice may well reflect the difference between recognizing interpersonal duties to aid as the basis for blocking criminal liability (as a defense), on the one hand, and basing criminal liability on the failure to act on these duties (as an offense). Here omission liability often slips into an undifferentiated condemnation of the actor's character deficiencies.[76] Clearly a person who fails to act on the sense of justice in the face of another's suffering, even if he is not responsible for creating the suffering, is worthy of moral disapproval. Whether he also deserves condemnation in the realm of law through state punishment is, however, another question.

The sense of justice also plays a central role in the doctrine of incapacity defenses, including insanity and infancy.[77] Here, the defendant argues that she should be excused from criminal liability because she lacked some requisite capacity altogether, rather than having her ability to exercise that capacity compromised, say, through the threats of another person, as in the case of duress, which may be classified as an inability defense.[78]

Exploring the role of the sense of justice in incapacity leads to an inquiry into the minimum requirements for the actor's personal responsibility, or blameworthiness, the third, and final, prerequisite for criminal liability, besides the criminality and unlawfulness of the act.[79] The modern doctrine of insanity recognizes two incapacities, one cognitive, the other volitional, either of which is sufficient to bar criminal responsibility: The Model Penal Code provides that a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[80] The earlier *M'Naghten* test, which remains in force in many American jurisdictions, limits the insanity to cognitive incapacity, that is, incapacity to tell right from wrong.[81] Note that the requisite incapacity by itself does not make out a defense; it must be attributable to a "mental disease or defect," which has been defined—not particularly helpfully—as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[82]

Insofar as the sense of justice involves judgments of justice, it presupposes certain basic *cognitive* capacities, including (a) the capacity to grasp the distinction between self and other while at the same time recognizing the basic identity between self and other as moral persons entitled to respect, thus making empathic role taking possible,[83] as well as (b) the capacity to appreciate and formulate interpersonal norms and to apply them in the abstract and to particular life situations. To *act* on our sense of justice, however, we also must possess some basic *volitional* capacity to conform our conduct to what we, cognitively, appreciate as right and just. Finally, in order to have what Rawls calls an effective sense of justice, we must have the requisite *motivational* capacity, that is, we must *want* to act on our sense of justice.[84]

Lacking the requisite cognitive capacity for a sense of justice would bar criminal responsibility under any insanity test (Model Penal Code or *M'Naghten*). Lacking the volitional capacity for a sense of justice would make out an insanity defense only under the Model Penal Code test. And the absence of the motivational capacity for an *effective* sense of justice would suffice under neither test, leaving notably psychopaths —who appear to have the requisite cognitive and volitional capacities, but lack the requisite motivational (or affective) capacity[85]—without an insanity defense.[86]

In fact, lack of the requisite motivational capacity may not only fail to excuse the actor from criminal liability, but may itself give rise to criminal liability. More generally, the very characteristics that mitigate liability may also aggravate it; the very abnormality, or "defect," that may excuse the actor may inculpate her. For a particularly dramatic illustration, consider capital murder cases, where both the state and the defense traditionally have seized on evidence of the defendant's mental deficiencies, one to establish his abnormal dangerousness that requires execution rather than life imprisonment, the other to plead for mercy in punishment, even if the level of mental abnormality was insufficient to preclude criminal liability altogether.[87]

Upon closer inspection, it turns out that a significant part of the law of homicide is devoted to capturing a particularly egregious type of deficiency in the sense of justice. The distinguishing feature of the "depraved indifference murder" is, to quote from a recent New York opinion (*People v. Sanchez*),[88] that it "manifests" the perpetrator's "malignant heart,"[89] that is, a "deficien[cy] in a moral sense of concern."[90] In a twist that should by now be familiar, the sense of justice appears in

the law of depraved indifference murder in another capacity as well: not only as that which the offender is missing, but also that which is offended in the onlooker, who therefore must be presumed to possess it.[91] The onlooker's sense of justice, in other words, is offended by the fact that the offender lacks a sense of justice.

Here—as in the case of the general approach to mens rea as a proxy for deviance, moral or otherwise—the danger arises that, in the revulsion triggered by certain acts of cruelty committed by one person upon another, the onlooker (the judge, the jury, the public, "the community") will deny the perpetrator's capacity for a sense of justice altogether and thereby his personhood, insofar as the capacity for a sense of justice is a distinguishing feature of persons. Judicial opinions struggling to explain the vague concept of depraved indifference not uncommonly give these exclusionary and dehumanizing emotions free reign, waxing eloquent about the depth of the offender's malignancy. And so, in *Sanchez,* one also finds the "definition" of depravity as "a mental state so appalling that we ascribe to it a moral deficiency tantamount to barbarity."[92]

In the end, this approach to the assessment of criminal liability is as illegitimate and self-contradictory as any view of state punishment grounded in the denial of identity between punisher and punished. The denial of personhood may gratify exclusionary urges but in the end removes the perpetrator from the realm of criminal punishment. Depersonalized he may be treated like an animal, but animals aren't tried and punished.[93]

Imposition and Infliction: Whom and How to Punish

Today substantive criminal law is largely a legislative concern. While Anglo-American courts for centuries drew on their common law powers to create new offenses, this practice recently has come to an end, with legislatures now holding the exclusive power to make criminal law.[94] Doctrines of substantive criminal law, although they in fact are often motivated by real cases,[95] are abstract rules drawn up by legislatures in advance[96] of any conduct to which they may apply and without regard to whom they may be applied.[97] In theory at least, rules of substantive criminal law therefore provide those who deliberate on them considerable freedom to adopt the standpoint of justice and, through imaginary role taking with various persons to whom the rules might

apply—including the deliberators themselves!—in various ways at various times.

The task of assuming the standpoint of justice, so crucial for the legitimation of the entire criminal justice system, becomes increasingly more challenging as we move from the definition of norms (in substantive criminal law) to their imposition (in criminal procedure) and, eventually, the infliction of sanctions for their violation (prison law). With each step along the process the object of judgment is in greater danger of being denied the status of equal person and thus of being removed from the community of justice.[98] It is no accident that in American penal law, principled protections peak at the beginning of the criminal process and then fade away as the person is transformed from a suspect to the defendant to the convict to the inmate, who exists in a realm virtually empty of legal rights warehoused under apersonal conditions appropriate for the storage of hazardous objects, and eventually to the executed, who is "eliminated" as a public health matter, by lethal injection, like "an injured horse."[99]

Unlike substantive criminal law, which operates—or is carefully constructed to operate—at a high level of abstraction, the law of criminal procedure guides and constrains the judgment whether a *particular* person is liable under the general norms set out prospectively by the legislature in substantive criminal law. Paradoxically, the presence of a single object of judgment both facilitates empathic role taking and, at the same time, complicates it. Focusing one's empathic attention on a particular person provides not only opportunities for identification and feeling-with (*Mitgefühl*), but also may interfere with the recognition of similarities between judge and judged as facts about the charged offense as well as about the suspect/defendant/convict's character emerge.[100] To understand everything is *not* to excuse everything.

Criminal Procedure

In the realm of criminal procedure, the sense of justice is most closely associated with the jury, one of the central institutions of the American criminal process, in rhetoric if not in practice.[101] Often loosely said to reflect "the community's sense of justice," the jury can be seen as that institution which represents the standpoint of justice in the criminal trial. In a criminal case, the jury identifies—at least in theory—with both the defendant and the victim considered, abstractly, as fellow

moral persons and assesses their conflicting justice claims. By placing themselves in the shoes of the *victim,* jurors appreciate the injury he has suffered to his person which gives rise to his demand for justice. By assuming the *defendant's* position, they assess her conduct as she would assess it herself were she to rise above the understandable inclination toward self-preservation and self-justification and assume the standpoint of justice.

In this way, the jury's verdict can amount to an act of vicarious, or constructive, self-judgment, and thereby legitimize the proceedings even in the absence of an act of actual self-judgment (confession, acceptance of guilt) on the part of the defendant. Prosecutors and judges who, notably in capital sentencing hearings through the use of so-called "antisympathy instructions," discourage jurors in the name of zealous advocacy from empathizing with the defendant, thus compromise the legitimacy of the jury's decision.[102] In fact, the entire system of capital punishment in the United States can be seen as a system for the suspension of empathy, in which each decision maker is denied the opportunity for identification with the defendant, thus masking the enormity of the sentence of death and relieving all of responsibility for its infliction.[103]

As various aspects of the jury's role as institutional manifestation of the sense of justice have been explored previously,[104] let us focus here on the most notorious illustration of this role: the phenomenon of jury nullification. Here the jury ignores the law it has been instructed to apply by the judge because it finds that the application of the law in the particular case, or perhaps even the law in general, violates its sense of justice.

Jury nullification may be nothing new;[105] it is certainly controversial.[106] Defense requests to inform jurors of their nullification power are routinely denied. There is even a "Fully Informed Jury Association" whose members occasionally hand out leaflets in courthouses with information about "the independent jury's secret power."[107] Attempts by referendum or legislation to require judges to instruct jurors on their power to nullify have failed.[108]

Some judges go even further and actively dissuade juries from exercising their acknowledged power to nullify. Take the notorious recent federal case in Oakland against Ed Rosenthal for various marijuana offenses. The jury convicted the fifty-eight-year-old Rosenthal, author of an "Ask Ed" web column for cannabis growers, after the judge had de-

cided to exclude evidence regarding both California's medical marijuana initiative (Proposition 215) and "Rosenthal's intent to grow marijuana for patients at a San Francisco dispensary . . . and his relationship with the city of Oakland, which deputized him as an agent to supply a now-closed medical marijuana cooperative."[109] Of particular interest to us, the judge admonished the jurors that they

> "are not to consider the purpose for which marijuana is grown." . . . At another point, when [Rosenthal's attorney] urged jurors to use their "common sense of justice," [the judge] cut him off and said, "You cannot substitute your sense of justice, whatever that is, for your duty to follow the law."[110]

And the law required conviction, given the supposed irrelevance of Rosenthal's defense that he was justified either because the harm he caused by growing marijuana was outweighed by the drug's medical benefit (necessity) or because he acted in an official capacity under lawful authority (execution of public duty).[111] When jurors learned of the excluded evidence and the defense it was meant to support after having rendered their verdict, several expressed outrage and remorse.[112] One called her decision to convict "the most horrible mistake I've ever made in my entire life."[113]

Not surprisingly, the criminal justice system has difficulty formally accommodating the jury's power to nullify, and professional participants in the system—notably judges and prosecutors—resist it, particularly if it is perceived as the lay jurors' last-ditch effort to constrain prosecutors' virtually unfettered discretion (which otherwise, and likewise, is by its very nature beyond the reach of formal limits). The jury, however, clearly possesses the *de facto* power to nullify the law in the name of its—or the community's—sense of justice, for the simple reason that juries render general verdicts (guilty or not guilty) and need not justify their decision in any shape or form (though they may decide to answer questions by process participants or the media after they have been discharged).

Apart from the contentious question of nullification, it's important to recall that the jury, in its role as reflector of the community's sense of justice, also has found a more mundane place not only in American legal theory and constitutional law, but in criminal law doctrine as well.

Crucial questions of criminal liability, including causation, omission, negligence, and insanity, are—as we've seen—left to the jury's sense of justice. The idea here is that doctrinal rules can only go so far and that, at some point, recourse must be had to basic principles of justice. And these questions of justice are left to the jury as representatives of the community that is presumably governed by these principles.

The jury here functions as an institutional locus for, and an important symbol of, a representative discourse based on principles of justice. To that end, jurors must be perceived, must perceive themselves, and—perhaps most important—must perceive the objects of their judgment, the defendant as well as the victim, not as members of this or that substantive community, but as members of a community of justice, that is, a political community governed by principles of justice.

It's in this sense that the jury's representativeness and impartiality are crucial. Each juror must be representative in the sense that she must share, and be conscious of sharing, with the offender and the victim those characteristics that mark all three as subjects and objects of justice judgments. From this point of view, representativeness and impartiality coincide; representativeness implies the juror's conscious possession of the relevant similarity (namely, membership in the community of justice), while impartiality implies the juror's ability to disregard all other, irrelevant, similarities (such as membership in the same college sorority, or race, or membership in the Ku Klux Klan, and so on).[114] At bottom, it's each individual juror's sense of justice that matters—not "the jury's" sense of justice, nor the community's sense of justice that the jury's sense of justice is said to reflect, whatever that might mean.

It is important not to focus exclusively on the *jury's* representativeness and its legitimating function in general, for the simple reason that the jury plays no part in the vast bulk of criminal proceedings in the United States. Over 90 percent of criminal cases are resolved through some form of plea agreement; of the remaining cases, some are adjudicated by a judge sitting without a jury in a so-called bench trial.[115] The legitimacy of the criminal justice system cannot rest on the jury alone, no matter how significant its symbolic role might be. Judges, and especially prosecutors, who see no need to draw on the sense of justice in their official functions, perhaps in the mistaken belief that the institutional significance of the sense of justice is restricted to—and at the same time ensured by—the jury, thus pose a serious threat to the legitimacy of the American criminal process.

Punishment Execution

The sense of justice was central to the early prison reform movement in the United States, and thus to the origins of the law of punishment execution, which concerns itself primarily with matters of prison administration and discipline. At the time concern for the plight of convicts was thought to indicate a highly refined power of empathy, precisely because identification with those who were not only suspected and charged, but ultimately found guilty of criminal conduct proved so difficult. The challenge of empathy increases in difficulty as the object of one's identification moves along the criminal process, until at the very end, she is confined to an isolated institution, surrounded by wires and hidden from public view; surely then no one showed a greater capacity for empathy, a highly prized sensibility at the time, than prison reformers like "the benevolent [John] Howard" who "greatly sympathized with the wretched prisoner"[116] as he tirelessly, and famously, documented prison conditions throughout Britain and Europe.[117]

The prison reform movement originated at a time in the late eighteenth century when empathic identification was widely considered the foundation of moral attitudes and behavior.[118] The capacity for empathic identification was thought to distinguish man from beast and a particular sensitivity to empathic experience was considered the mark of an educated gentleman. Reformers recoiled at the horror of the prisoner's "seclusion from his friends and connections,"[119] which precluded empathic identification with others or of others with oneself.[120] When Caleb Lownes wanted to criticize attitudes toward crime and criminals in late-eighteenth-century Philadelphia, he spoke of the public's "insensibility." By contrast, the establishment of the Philadelphia Society for Alleviating the Miseries of Public Prisons he attributed to the "minds of the citizens" having been "variously affected" by the sorry sight of the "wheelbarrow men"[121] in the streets of Philadelphia.

This affective response, however, presupposed an identity between the onlooker and the object of his moral curiosity. As Adam Smith and other moralists of the Scottish Enlightenment taught, feeling empathy for another person meant placing oneself in that person's shoes and experiencing his pain as though it were one's own;[122] interest in the other's suffering and willingness to take that person's role required that I recognize the other person as identical to myself in some way.[123] As Lownes put it, "the prisoner is a rational being, *of like feelings and passions*

with ourselves."[124] The task of the prison reformer was to overcome the resistance of those who "seem to forget" this fact.[125]

Upon closer inspection, however, the empathic relationship between prison reformers and convicts already carried the seeds of distinction that blossomed into that denial of identity of offender and observer that was to plague full-blown treatmentism as a theory of punishment (or rather, of "peno-correctional treatment"), which—as we've noted previously—proceeded from the assumption of the offender's deviance rather than his identity.[126] Although the early prison reformers might have been affected by the suffering of all inmates, *debtors* tended to attract the lion's share of their empathy.[127] This may well have reflected the fact that the visitors were better able, and presumably more willing, to place themselves in the shoes of imprisoned debtors than in those of other, more serious, offenders. Prison reformers simply might have found it easier—or more pleasant—to imagine themselves as "worthy characters . . . reduced by misfortune" to the debtor's prison than as "wretches who are a disgrace to human nature,"[128] especially if the distinction between the two groups of prisoners also roughly coincided with distinctions of social class, with the debtors' (former) social class more closely resembling that of the reformers.[129]

Unlike debtors who had fallen on hard times, violent offenders were perceived as radically different and thus precluded from empathic identification. As a "disgrace to human nature," they quite literally lacked the fundamental characteristics of humanity that make identification and therefore empathy possible.[130] They were therefore not owed a mutual moral duty of interpersonal empathy; whatever good deeds prison reformers might bestow upon them reflected unilateral and supererogatory feelings of pity or benevolence, which generally had some religious basis.[131]

Religious, not moral or political, identification was, in the end, the driving force behind prison reform in the United States. References to Beccaria or Magna Carta might appear in general calls for criminal law reform, but the main engine behind the construction of prisons, the most visible change in American criminal law after the Revolution, was Christian benevolence, *not* a sense of justice. The central institution in the reform of American criminal law in the late eighteenth century was not the government (state or federal), but the Philadelphia Society for Alleviating the Miseries of Public Prisons. The main proponents of re-

form were not republicans (or federalists), nor Whigs (or Tories)—they were Quakers (and members of a smattering of other Christian denominations, including Unitarians and Methodists); they were not affiliated with political parties but with churches.[132]

Offenders attracted the attention of religious reformers not as fellow members of a particular denomination or church, but more generally as fellow children of God. "There but for the grace of God go I" was the driving sentiment, reflecting a sense of equality not based on equal political rights, but on common fallibility in general, and susceptibility to sin in particular. Consider the 1787 "constitution" of the Quaker-dominated Philadelphia Society for Alleviating the Miseries of Public Prisons, the most successful of the early American crime charities:

> When we consider that the obligations of benevolence, which are founded on the precepts and example of the author of Christianity, are not cancelled by the follies of crimes of our fellow-creatures; and, when we reflect upon the miseries which penury, hunger, cold, unnecessary severity, unwholsome apartments, and guilt, (the usual attendants of prisons) involve with them, it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries.[133]

This Christian "benevolence" and "compassion" toward "fellow-creatures" was private rather than public; discretionary rather than obligatory; and religious rather than political or moral. The Christian reformer identifies with the offender—he regards him as a "fellow-creature," or more precisely as fellow child of God. But he does not identify with him as a fellow citizen, a fellow person, or a fellow holder of (equal) rights. The offender has no political or legal claim to the Christian reformer's attention; he is but the happy beneficiary of her charity.[134]

This faith-based charity is entirely private and entirely discretionary. As such, it can dissipate at any moment. It may not only be temporary and fickle, but it may also be arbitrary or discriminatory. Recall that the Philadelphia reformers' zeal waned fairly quickly after the objects of their most intense compassion, debtors, were first housed separately from other inmates and then freed of criminal sanctions altogether.[135]

Empathizing with the objects of criminal punishment today presents no less of a challenge to punishment execution in particular—and to the penal law in general—than it did two centuries ago. Criminal offenders

still are routinely denied the status of persons with equal rights, including most notably to right to vote.[136] Modern treatmentist penology, instead of recognizing the observer's identity not only with the "worthy characters" but also with the "wretches," moved to empty its progressive correctional facilities of the former. In the end, no immediate objects of unconsidered empathy remained in prison. Today, class and race differences further block empathic identification between wardens, prison guards, and the general public on the one hand, and inmates on the other.[137]

As a result, no comprehensive American law of punishment execution has ever emerged. Unlike substantive criminal law, the law of punishment execution in the United States has never undergone a widespread reform resulting in comprehensive and systematic codes, which —as they do in other countries[138]—lay out in some detail the legal framework for the infliction of various types of state sanction, most notably incarceration. The legal regime governing the execution of punishment in the United States instead consists of a meager patchwork of constitutional guidelines based loosely on those developed in the law of criminal procedure.[139] The constitutional law of punishment execution is at best a stripped down version of the increasingly narrow constitutional law of punishment imposition: the two million prison and jail inmates in the United States enjoy a small subset of the criminal procedural protections granted "ordinary citizens," suspects, or even defendants, subject to the necessities of running a correctional institution as assessed with virtually unfettered discretion by those who run it. While the four million parolees and probationers under extracarceral penal supervision are not subject to the discretionary authority of prison officials, they tend to sign waivers as a condition of their release, which include blanket consent to warrantless and suspicionless searches anywhere "anytime of the day or night by any peace officer."[140] (Similar waivers of constitutional rights have even been imposed on *pretrial* releasees, grouped with probationers, parolees, and presentence releasees as "individuals with diminished liberty interests.")[141]

Punishment execution today is not so much under the rule of law as it is governed by considerations of efficient management.[142] Largely relieved of concern regarding inmates' legal or constitutional rights, the state is free to delegate the management and disposal of human hazards to private entities,[143] just as it may delegate the management and dis-

posal of nonhuman ones (including "hazardous waste" and dangerous animals). As the last step in a penal process designed to identify and incapacitate human hazards, the "War on Crime,"[144] punishment execution falls as far outside the realm of law and justice as human hazards lie beyond the reach of the sense of justice.

Conclusion

Law's Empathy

References to the sense of justice in legal discourse should be taken with a grain of salt. For decades, if not centuries, the sense of justice has been much abused by justice officials[1] and jurisprudes alike;[2] it's long overdue for a conceptual makeover.

To start with, it's important to get clear on just what ails the sense of justice. It would be a serious mistake to dismiss the sense of justice solely on account of an unspecified distrust of emotional inroads into what is perceived as a body of rational legal rules. This position would reflect both a false dichotomy between emotion and rationality and an excessive confidence in the rationality of law.

The basic problem with the sense of justice is that it repeatedly has been invoked to end, and even to suppress, dialogue about justice rather than to advance it. Judicial opinions are littered with bald assertions that this or that resolution of a particular case, or even this or that principle, violates the, our, the people's, Americans', or some other sense of justice.

The individual version of the sense of justice has often been unhelpfully associated with theories of natural law based loosely on ontology or value philosophy or both. In it, (some) people, through introspection, can detect certain truths about justice. Those who don't have access to these truths—either because they can't sense any at all or because they sense different ones—are dismissed as deficient. For that reason, their opinions on matters of justice can be safely disregarded.

In its communal version, the sense of justice as conversation stopper invokes the sense of justice of some community or other, rather than that of the invoker herself. The most troubling and explicit illustration of this variety appeared in German law: the German people's sense of justice in Nazi law.[3] The "healthy" sense of justice of the German *Volk* was, at least according to some Nazi ideologues, the ultimate arbiter of

all legal questions. In penal law, this communal sense of justice trumped the legality principle in its various components, including specificity and prospectivity, as well as the prohibition of double jeopardy.[4] References to a communal sense of justice—including the (or "an," or of course "our") American or even "the people's" sense of justice—also have appeared in American court opinions. But, unlike in Germany, these invocations in general have not been backed up by a particular political ideology, nor have they been accorded the same power to unhinge basic rights. The sense of justice of "the community" also regularly has appeared in legal commentary on the more or less explicit ground that law must reflect, or at least cannot fly in the face of, that sense of justice.[5] A more sophisticated version of this point plays a central role in John Rawls's theory of justice, where the community's sense of justice, now understood as the sense of justice of its members rather than the sense of justice of the collectivity as a whole, is portrayed as crucial to the stability, if not the legitimacy, of a set of communal institutions.[6]

In American law, references to some communal—rather than the referrer's—sense of justice have been dismissed as attempts to mask judicial oppression of the people and its duly elected representatives through the imposition of the judge's (or judges') personal beliefs.[7] Later on, epistemological difficulties appeared, especially in cases where the—presumably legitimate—legislature had specifically instructed a judge to consult the community's sense of justice. How after all, was one to measure that sense? As Judge Learned Hand's prolonged, and unusually public, struggles with the concepts of "good moral character" and "moral turpitude" in immigration cases illustrated, progressive self-aware judges were caught between a rock and a hard place.[8] On the one hand, they couldn't consult their own sense of justice since that was considered undemocratic. On the other, they couldn't turn to the community's sense of justice (or "common conscience") since they couldn't figure out what it was, at least not in ways that matched their newly heightened epistemological standards for pseudo–social scientific research from the bench.

The communal sense of justice even has been construed as a typically American, or at least essentially democratic, idea. In this sense, the community's sense of justice appears as the ultimate foundation of American law, and certainly as its ultimate test. Not only are American legislators expected to manifest the people's sense of justice, but American judges are to consult the people's sense of justice when fulfilling their obligation not only to apply and to interpret legislative enactments, but also

to check the legislature's power should it ever fail to live up to these expectations.[9]

Last, but not least, there is that most quintessential of American legal institutions, the jury, which can bring the community's sense of justice to bear on particular cases even if judges and other justice officials, notably prosecutors, do not. The jury is thought to fulfill this function to this day, even as the sense of justice has faded from judicial opinions —or at least from U.S. Supreme Court opinions—and, to a lesser extent, from legislative discourse.

In addition to invocations of individual and communal senses of justice, we have also encountered references to a free-floating sense of justice unconnected to anyone who might be sensing it. So courts and commentators have been known to announce, with increasing degrees of confidence, the dictates of "a sense of justice," "the sense of justice," and even "the universal sense of justice."[10] In these references to a disembodied sense of justice, the "sense" in sense of justice has no role to play; they merely point in the general direction of principles of justice, without specifying what these principles might be.

In the end, the trouble with the sense of justice is not that it is irrationally emotional but that—like any ill-defined legal concept said to have dispositive power—it can be, and has been, put to oppressive use in various guises by various lawmakers, -appliers, and -enforcers. The remedy, however, is not to excise the sense of justice from the vocabulary of American law but to come up with a better definition.

The account of the sense of justice laid out in this book stresses its critical role in the normative judgments about justice that occur every day at every level of the legal system.[11] The sense of justice, understood as a basic capacity for empathic interpersonal role taking, is the prerequisite for recognizing and for adjudicating justice claims. Without a sense of justice, we cannot appreciate the physical injury suffered by a crime victim as a matter of justice (that is, a violation of her rights), nor can we formulate the legal system's just response to that injury (that is, a vindication of her rights without a violation of the offender's rights).[12]

The system of penal law in particular makes frequent reference to the sense of justice, both to limit its abuses (for instance, the enforcement of vague criminal statutes through police "hunches") and to explore its role in the definition and assessment of criminal liability (for instance, the criminal responsibility of those who lack an effective sense of justice or jurors' empathic identification with offender and victim alike)

and the execution of assigned sanctions (for instance, the importance of regarding even convicted offenders as proper objects of one's sense of justice).[13]

The sense of justice, construed as a widely shared personal capacity rather than a special skill or a brute fact accessible to the lucky (or empowered) few, thus facilitates dialogue about justice, rather than cutting it short or privileging one person's, or group's, sense of justice over another's. The sense of justice encompasses those capacities that permit and motivate moral and political discourse among equal persons who recognize one another as such; like the sense of language, or grammar, the sense of justice thus is an essentially social and communicative and deeply egalitarian sentiment.

Perhaps the critical analysis of the varieties of the sense of justice and its role in law talk presented in this book will induce legal decision makers and commentators to reconsider their use of this rhetorical device, and do away with it if they can't use it for anything other than handwaving. After getting a closer look at the myriad manifestations of the sense of justice, some may decide to abandon the sense of justice entirely, even in its more specific forms. That would be unfortunate, however, as the concept, properly understood and carefully defined, can do good and important work not only in theory, but also in the practice of law and legal decision making.

Notes

NOTES TO THE INTRODUCTION

1. The fifth amendment to the U.S. Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This provision, however, is subject to the so-called dual sovereign exception. The state of Mississippi and the United States are considered separate sovereigns, each of which is entitled to punish violations of its penal laws (or rather its "peace and dignity"). See, e.g., Heath v. Alabama, 474 U.S. 82 (1985). Thus, if a single act offends against both state and federal law, two "offenses" have occurred, which may be punished independently without amounting to double jeopardy "for the same offense." On the state-centered theory of crime underlying this doctrine (which regards the state as the primary victim of crime, rather than persons), see Markus Dirk Dubber, Toward a Constitutional Law of Crime and Punishment, 55 Hastings L.J. 509 (2004).

2. Rick Bragg, Former Klansman Is Found Guilty of 1966 Killing, N.Y. Times, Mar. 1, 2003; Matt Volz, Trial Opens in Slaying Linked to MLK Plot, Wash. Post, Feb. 24, 2003.

3. Accused of Qaeda Financing, Head of Charity Pleads to Racketeering, N.Y. Times, Feb. 10, 2003. In the end, Arnaout received a sentence of eleven years and four months.

4. Or in Oklahoma City. Timothy McVeigh professed to have had "no sympathy" for the child victims of his 1995 bombing of the Federal Building in Oklahoma City. Jo Thomas, "No Sympathy" for Dead Children, McVeigh Says, N.Y. Times, Mar. 29, 2001, at A12, col. 4.

5. Johan Arne Vetlesen, Perception, Empathy, and Judgment 85–152 (1994). On Eichmann, see Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963).

6. For a detailed exploration of the emotional dynamic of the victims' rights movement in the United States, see Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights (2002).

7. Martha Grace Duncan, Romantic Outlaws, Beloved Prisons: The Unconscious Meanings of Crime and Punishment (1996).

8. In fact, the story is a little more complicated because Avants's 1967 jury

was biracial. Matt Volz, Trial Opens in Slaying Linked to MLK Plot, Wash. Post, Feb. 24, 2003. It's not hard to imagine, though, that the black members of the jury at that time might well have felt a strong need to suppress their empathy for White in the face of overwhelming empathy for his killer.

9. This is not to say that they couldn't have identified with both. To the contrary, a proper judgment from the standpoint of justice would have *required* identification with both defendant and victim. Empathy does not imply sympathy. See infra pp. 71–72.

10. See Randall L. Kennedy, McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388 (1988). For a sample of empirical studies on victim bias in capital cases, see Stephen P. Klein & John Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics 33 (1991); Michael Radelet and Glenn Pierce, Choosing Those Who Will Die: Race and the Death Penalty in Florida, 43 Fla. L. Rev. 1 (1991); Glenn Pierce & Michael Radelet, Race, Region, and Death-Sentencing in Illinois, 1988–1997, 81 Ore. L. Rev. 39 (2002); Mary Ziemba-Davis & Brent L. Myers, The Application of Indiana's Capital Sentencing Law: A Report to Governor Frank O'Bannon and the Indiana General Assembly (Jan. 10, 2002); Thomas Keil & Gennaro F. Vito, Race and the Death Penalty in Kentucky Murder Trials: 1971–91, 17 Advocate 5 (1995); David C. Baldus & George Woodworth, Race-of-Victim and Race-of-Defendant Disparities in the Administration of Maryland's Capital Charging and Sentencing System (1978–1999): Preliminary Findings (2001) (Maryland); David C. Baldus et al., Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999), 81 Neb. L. Rev. 486 (2003); Isaac Unah & John C. Boger, Race and the Death Penalty in North Carolina—An Empirical Analysis: 1993–1997 (2001); David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia, 83 Cornell L. Rev. 1683 (1998); David McCord, A Year in the Life of Death: Murders and Capital Sentences in South Carolina, 53 S.C.L. Rev. 249 (2002); Dean Brock, Nigel Cohen, & Jonathan Sorensen, Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender, 43 Am. J. Crim. L. 28 (2000).

11. See Dubber, Victims in the War on Crime, 206–07; see generally Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U. Chi. L. Rev. 361 (1996); Austin Sarat, Speaking of Death: Narratives of Violence in Capital Trials, 27 Law & Soc'y Rev. 19 (1993). On the use of narrative to induce *victim* empathy in Supreme Court opinions upholding death sentences, see Robin West, Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term, 1 Md. J. Contemp. Legal Issues 161 (1990).

12. Chitra Raghavan, Will Our Sense of Justice Be a Second Casualty of

War? U.S. News & World Rep., Nov. 26, 2001, at 22; cf. Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001); see also Markus Dirk Dubber, The New Police Science and the Police Power Model of the Criminal Process, in The New Police Science: The Police Power in Domestic and International Governance (Markus D. Dubber & Mariana Valverde eds., forthcoming 2006); see generally David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism (2003).

13. Saffle v. Parks, 494 U.S. 484, 485 (1990); see also California v. Brown, 479 U.S. 538 (1987).

14. See Markus Dirk Dubber, Regulating the Tender Heart When the Axe Is Ready to Strike, 41 Buff. L. Rev. 85 (1993). For an excellent exploration of the distinction between moral and amoral emotions in the law and practice of punishment, see Samuel H. Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 Cornell L. Rev. 655 (1989).

15. Wayne A. Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 Ariz. L. Rev. 143, 166 (1999) (citing Willingham v. State, 947 P.2d 1074, 1085–86 (Okla. Crim. App. 1997)); see also Joseph E. Kennedy, Monstrous Offenders and the Search for Solidarity through Modern Punishment. 51 Hastings L.J. 829 (2000); Bernard E. Harcourt, Imagery and Adjudication in the Criminal Law, 61 Brooklyn L. Rev. 1165 (1995).

16. Batson v. Kentucky, 476 U.S. 79 (1986); J. E. B. v. Alabama, 511 U.S. 127 (1994) (gender).

17. Justices Side with Death Row Inmate on Jury Bias, N.Y. Times, Feb. 25, 2003.

18. Miller-El v. Dretke, 125 S. Ct. 2317 (2005).

19. Howard Garfinkel, Conditions of Successful Degradation Ceremonies, 61 Am. J. Sociology 420, 421 (1956).

20. E.g., Mackubin v. Whetcroft, 4 H. & McH. 135 (Md. Gen. 1798) (Chase, J.) ("every man's sense of justice").

21. E.g., Oliver Wendell Holmes, Jr., The Common Law 43 (1881) (deterrence theory of punishment "said to conflict with the sense of justice").

22. E.g., Erwin Riezler, Das Rechtsgefühl: Rechtspsychologische Betrachtungen (1923) (sense of justice as psychological phenomenon); Jerome Frank, Law and the Modern Mind (1963) (1930) (Freud-inspired account of judicial hunches).

23. E.g., Model Penal Code § 2.03, cmt. at 261 n.17 (1985) (causation inquiry turns on "jury's sense of justice"); Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (prior decision precluding victim impact statements conflicted with "public sense of justice"); Richard Delgado, Rodrigo's Eleventh Chronicle: Empathy and False Empathy, 84 Calif. L. Rev. 61 (1996).

24. Cf. Martin L. Hoffman, Empathy and Moral Development: Implications for Caring and Justice 3 (2000) ("empathy is the spark of human concern for others, the glue that makes social life possible"). Here it might be useful to distinguish between the sense of justice's epistemological and motivational roles. Both are necessary preconditions for the life of the law. See Justin D'Arms, Empathy and Evaluative Inquiry, 74 Chicago-Kent L. Rev. 1467 (2000).

25. For a recent attempt, see Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal. Educ. 518 (1986).

26. For a fairly random sample of some of the more commonly cited communal senses of justice, beginning with the least specific one, "ours," see, e.g., 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 (2002) ("our sense of justice"); Daniel C. Esty, Revitalizing Environmental Federalism, 95 Mich. L. Rev. 570, 576 (1996) (same); Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y. 1918) (same); Judith Welch Wegner, Imagining the World Anew, 3 Wash. U. J.L. & Pol'y 741, 757 (2000) ("civic 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"); Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) ("public sense of justice"); Harris v. Alabama, 513 U.S. 504, 515, 522 (1995) ("community's sense of justice") (Stevens, J., dissenting); Gary J. Simson, Jury Nullification in the American System: A Skeptical View, 54 Tex. L. Rev. 488, 512 (1976) ("people's sense of justice").

27. See generally Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987).

28. For a recent extended exploration of this issue, see Martha Nussbaum, Upheavals of Thought (2001).

29. See 3 G. W. F. Hegel, Enzyklopädie der philosophischen Wissenschaften § 402 (1830). Hegel draws an analogous distinction between sense of self (*Selbstgefühl*) and sensation of self (*Selbstempfindung*).

30. For an example of an aggressively *irrational* sense of justice, see the concept of *Volksempfinden* in Nazi ideology. See generally Markus Dirk Dubber, The German Jury and the Metaphysical *Volk:* From Romantic Idealism to Nazi Ideology, 43 Am. J. Comp. L. 227 (1995).

31. Cf. Edward F. McClennen, Justice and the Problem of Stability, 14 Phil. & Pub. Affairs 3, 9 (1985). I'm not interested here in the extent to which Rawls himself has followed his critics in shifting his attention away from the sense of justice to other components of his theory, nor am I interested in the connection between the sense of justice and stability.

32. See John Rawls, A Theory of Justice ch. 8 (1971); see also John Rawls, The Sense of Justice, 72 Phil. Rev. 281 (1963).

33. Adam Smith, The Theory of Moral Sentiments (1759).

34. Edmond Cahn, The Sense of Injustice (1949).

35. Riezler, Das Rechtsgefühl.

36. State v. Maldonado, 137 N.J. 536, 645 A.2d 1165 (1994) ("sense of justice is clearly involved in many criminal cases"). For a nice summary of various tort theories, see Jules Coleman, Theories of Tort Law, in Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/tort-theories/.

NOTES TO CHAPTER 1

1. See the examples discussed in this chapter.

2. See, e.g., A Moment of Grace, N.Y. Times, Aug. 17, 2005, at A18, col. 1; Bob Herbert, An Empty Apology, N.Y. Times, July 18, 2005, at A19, col. 5.

3. See, e.g., John Kaplan, Robert Weisberg, & Guyora Binder, Criminal Law: Cases and Materials 524, 530 (3d ed. 1996) (inquiring into the felony-murder rule's accordance with "our sense of justice" and "your sense of justice," respectively; under the felony-murder rule, even accidental deaths caused in the commission of certain felonies are punished as murders).

4. See infra ch. 2.

5. See James Q. Wilson, The Moral Sense (1993). Cousin, not twin. The sense of justice shouldn't be confused with the moral sense if the latter is viewed as springing from the violation of principles of a particular morality, as opposed to principles of justice, which are agnostic with respect to particular moralities, or conceptions of the good. Wilson's book itself begins by discussing the moral sense in the abstract, but then confuses this discussion with a naturalistic argument for the superiority of his personal conservative moral code, which leads him to despair in the face of America's moral decline, evidenced by such phenomena as "the bikini, nude beaches, and modern rock dances," and such conduct as that of "one young man [who] attended my son's formal wedding dressed in gym shorts and sneakers." Id. at 84–85.

6. See infra ch. 4 (Edmond Cahn's *The Sense of Injustice* (1949)).

7. United States v. Percheman, 32 U.S. 51 (1833) (Marshall, C.J.).

8. Blackburn v. Alabama, 361 U.S. 199 (1960).

9. Betts v. Brady, 316 U.S. 455, 462 (1942).

10. See, e.g., People v. Isaacson, 44 N.Y.2d 511, 521 (1978); People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907).

11. Brown v. Mississippi, 297 U.S. 278, 286 (1936).

12. Powell v. Bowen, 279 Mo. 280 (1919) (dissent) ("nauseating to a sense of right doing, and shocking to a keen sense of justice").

13. Cahn, The Sense of Injustice.

14. Rochin v. California, 342 U.S. 165 (1952); Breithaupt v. Adams, 352 U.S. 432 (1957); Fisher v. United States, 425 U.S. 391 (1976).

15. United States v. Russell, 411 U.S. 423, 431–32 (1973) ("The law

enforcement conduct here stops far short of violating that 'fundamental fairness, shocking, to the universal sense of justice,' mandated by the Due Process Clauses of the Fifth Amendment." (quoting Kinsella v. United States, 361 U.S. 234, 246 (1960)); United States v. Archer, 486 F.2d 670 (2d Cir. 1973); see also People v. Isaacson, 44 N.Y.2d 511, 521 (1978); People v. Peppars, 140 Cal. App. 3d 677, 189 Cal. Rptr. 879 (1983).

16. See Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting). That's not to say that Black didn't have other reasons for objecting to this test. The Court in fact had used the sense of justice formula to shield state action from meaningful due process review, by treating it as a supplemental hurdle ostensibly justified on federalist grounds. State action violated the *fourteenth* amendment only if it failed the more demanding sense of justice test, even if the same conduct, if engaged in by the federal government, would have violated the *fifth* amendment's due process clause. See id.

17. Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

18. Furman v. Georgia, 408 U.S. 238, 369 (1972) (Marshall, J., dissenting).

19. On the persistence of attacks on the legitimacy of "judicial review" (meaning, by and the large, the federal constitutional review of state legislation by the U.S. Supreme Court), see, e.g., Barry Friedman, The History of the Countermajoritarian Difficulty, Part Four: Law's Politics, 148 U. Pa. L. Rev. 971 (2000).

20. United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952) (Frank, J.) (Julius & Ethel Rosenberg) ("the conscience and sense of justice of the people"); People v. Morris, 80 Mich. 634, 639, 45 N.W. 591, 592 (1890) ("the moral sense of the people"); Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir.) (1957) ("the sense of justice"); see also United States v. Washington, 578 F.2d 256 (9th Cir. 1978).

21. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984); Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981).

22. United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1975).

23. Hoefker v. United States, 86-1 U.S.T.C. P 9360 (E.D. Ky 1985).

24. Energy Resources Group, Inc. v. Energy Resources Corp., 297 F. Supp. 232 (S.D. Tex. 1969) ("impinges upon [the] court's sense of justice as well as its sense of practicality").

25. Vladikavkazsky R. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934) ("shocking to our sense of justice and equity"); see generally Modern Status of the Act of State Doctrine, 12 A.L.R. Fed. 707 (2000).

26. Yarnall v. Yorkshire Worsted Mills, 370 Pa. 93, 97 (1952) ("It is repugnant to every sense of justice and fair dealing that a principal shall avail himself of the benefits of an agent's act, and at the same time repudiate his authority.").

27. Lesh v. Ill. Steel Co., 163 Wisc. 124 (1916).

28. Hanson v. Hanson, 738 S.W.2d 429 (Mo. 1987).

29. Cianci v. Burwell, 299 Pa. Super. 387 (1982).

30. People v. Flowers, 51 Ill. 2d 25 (1972) (offending the "right sense of justice").

31. McKeigue v. Chicago & N.W. RR Co., 130 Wisc. 543 (1907) (shocking "every natural sense of justice").

32. People v. Rosaro, 43 App. Div. 2d 916, 352 N.Y.S. 2d 11 (1974).

33. M. v. M., 313 S.W.2d 209 (Mo. App. 1958).

34. Wolfe v. Wolfe, 55 Ohio Ops 465 (1954).

35. People v. Beardsley, 150 Mich. 205, 113 N.W. 1128 (1907).

36. Territory v. Lynch, 18 N.M. 15, 133 P. 405 (1913) ("violat[ing] our American sense of justice").

37. Madison v. San Francisco, 106 Cal. App. 2d 253, 236 P.2d 141 (1951) (Carter, J., dissenting) (shocking "the intelligence, as well as the sense of justice, of those who believe in the American way of life").

38. Berry v. Superior Court, 208 Cal. App. 3d 783, 792 (1989) (quoting People v. Love, 111 Cal. App. 3d 98, 168 Cal. Rptr. 407 (1980)).

39. Morrow v. Superior Court, 36 Cal. Rptr. 2d 210, 218 (Cal. App. 1995) (citing Rochin v. California, 342 U.S. 165 (1952)).

40. Home Steam Laundry Co. v. Smith, 8 Ohio NP NS 402, 19 Ohio Dec. 460 (1909).

41. People v. Lettrich, 413 Ill. 172 (1952).

42. Lucchesi v. Lucchesi, 330 Ill. App. 506 (1947).

43. Laycock v. Parker, 103 Wisc. 161 (1899) ("based upon the sense of justice of the business community").

44. Bielski v. Schulze, 16 Wisc. 2d 1 (1962) ("on a layman's sense of justice or on natural justice").

45. Terrell v. Washington, 158 N.C. 281 (1912).

46. Watson v. State, 9 Tex. App. 237 (1880).

47. People v. Miller, 42 Misc. 2d 794, 248 N.Y.S.2d 1018 (1964).

48. United States v. Brawner, 471 F.2d 969, 988 (D.C. Cir. 1972) (en banc).

49. Id. That's why "flexible" insanity tests, like the Model Penal Code's, are preferable to not-so-flexible ones: they give the jury "sufficient latitude so that, without disregarding the instruction, it can provide that application of the instruction which harmonizes with its sense of justice." Id. at 988–89.

50. Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945) (Arnold, J.).

51. 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) (Wharton's views on moral insanity); Joel Peter Eigen, "An Inducement to Morbid Minds": Politics and Madness in the Victorian Courtroom, in Modern Histories of Crime and Punishment (Markus Dirk Dubber & Lindsay

Farmer eds., forthcoming 2006); see also Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 4.10 n.30 (1986). On the evolution in nineteenth-century criminology of moral insanity from a defect of the "moral sense" to "congenital ethical insensitivity," see Richard F. Wetzell, Inventing the Criminal: A History of German Criminology, 1880–1945, at 19–20, 59–60 (2000). In modern psychology, lack of the relevant affective capacities is taken to be the mark of the "sociopath." See, e.g., Henry Gleitman, Psychology 680–81 (1986); cf. Shaun Nichols, How Psychopaths Threaten Moral Rationalism, or Is It Irrational to Be Amoral? 85 The Monist 285 (2002) (distinguishing between cognitive and affective deficits in psychopaths). In American criminal law, moral insanity was invoked in support of extending the insanity defense to those who lacked not cognitive, but volitional, capacities, and more specifically to supplement the traditional (cognitive) *M'Naghten* insanity standard with the "irresistible impulse" test. More interestingly, the concept suggested a set of affective capacities distinct from cognition and volition.

52. Seawell v. MacWhitney, 2 N.J. Super. 255, 63 A.2d 542 (1949).

53. State v. Johnson, 399 A.2d 469 (R.I. 1979)

54. Hall v. Everett Motors, Inc., 340 Mass. 430 (1969).

55. Commonwealth ex rel. Leider v. Leider, 434 Pa. 293 (1969) (Roberts, J., concurring).

56. Woodson v. Foster, 182 Kan. 315 (1958); see generally 42 A.L.R. 3d 1116.

57. Lavieri v. Ulysses, 149 Conn. 396, 180 A.2d 632 (1962).

58. Drake v. Gilmore, 52 N.Y. 389 (1873).

59. See, e.g., Redewill v. Gillen, 12 P. 872 (N.M. 1887).

60. Henthorne v. Hopwood, 218 Ore. 336 (1959) (O'Connell, J., concurring)

61. White v. Tiffen, 1 Ga. App. 569, 57 S.E. 1038 (1907).

62. United States v. Dooley, 364 F. Supp. 75, 79 (E.D. Pa. 1975).

63. Hall v. Everett Motors, Inc., 340 Mass. 430, 432 (1960).

64. Id.

65. Benjamin Cardozo, The Nature of the Judicial Process 150 (1921); see also DPP v. Camplin, [1978] AC 705 (Lord Glaisdale) (precedent's "implications constitute affronts to common sense and any sense of justice").

66. Flood v. Kuhn 407 U.S. 258, 293, n.4 (1972) (Marshall, J., dissenting) (quoting Peter L. Szanton, Stare Decisis: A Dissenting View, 10 Hastings L.J. 394, 397 (1959)); see also Woods v. Lancet, 303 N.Y. 349 (1951).

67. Payne v. Tennessee, 501 U.S. 808 (1991). For a critical analyis of that sense of justice, see Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights (2002).

68. Sam Sparks, Tribute to the Honorable Homer Thornberry, 74 Texas L. Rev. 949, 949–50 (1996) ("a strong sense of what was 'right' and what was

'wrong.' "); Gerald Bard Tjoflat, Frank Minis Johnson, Jr., as a Colleague, 51 Ala. L. Rev. 1414, 1415 (2000) ("A sense of justice—inborn in Judge Johnson—permeated everything he did."); J. Michael Luttig, Tribute to Warren Burger, 109 Harv. L. Rev. 1, 3 (1995) ("a man with a fierce sense of justice"); Ruth Bader Ginsburg, A Tribute to Justice Harry A. Blackmun, 108 Harv. L. Rev. 4, 5 (1994) ("join[ing] the legions who applaud Harry A. Blackmun for 'his integrity, his high sense of justice' "); Richard W. Benka, Remembrances of William O. Douglas on the 50th Anniversary of His Appointment to the Supreme Court, Supreme Court Historical Society 1990 Yearbook ("decisions were profoundly governed by his sense of justice and human need"), http://www.supremecourthistory.org/04_library/subs_volumes/04_c12_0.html; Richard A. Posner, Cardozo: A Study in Reputation 143 (1990), at 127 ("The second most important factor in Cardozo's eminence may well be his judicial program . . . of bringing law closer to the (informed) non-lawyer's sense of justice."); see also Kathryn Abrams & Ronald Wright, Judge Frank Johnson in the Long Run, 51 Ala. L. Rev. 1381 (2000) (Judge Johnson's "situation sense"). On the situation sense, see infra pp. 28–31.

69. National Press Club Interview, Nat'l Public Radio, Jul. 23, 2000; cf. Letter from Frank E. Todaro, President, Ohio Academy of Trial Lawyers, to Sen. Patrick Leahy, Chair, Senate Judiciary Committee, Sept. 3, 2002) (appointee to 6th Circuit "lacks a proper judicial temperament and a meaningful sense of justice").

70. Blonder-Tongue Labs, Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) (collateral estoppel; reliance on district court's "sense of justice and equity" to determine if prior chance to litigate issue).

71. Dan M. Kahan, Some Realism about Retroactive Criminal Lawmaking, 3 Roger Williams U. L. Rev. 95, 96 (1997). ("Situation sense" is occasionally used instead of "sense of justice" by those who wish to avoid the natural law connotations of the latter term. On situation sense and sense of justice in American Legal Realism, see infra pp. 28–31.) Kahan interprets the situation sense as an instance of the general cognitive phenomenon of "pattern recognition," which he describes as "a rapid, pre-verbal cycling process whereby the case at hand is compared, contrasted, and ultimately conformed to a wide range of mentally inventoried prototypes." Id. at 113. According to Kahan, judges are better at pattern recognition than are legislators, and therefore should be exempt from the general proscription against retroactive criminal lawmaking. Id. at 112–17.

72. State v. Accardo, 129 La. 666, 56 So. 631 (1911) (refusal to testify on issue of guilt).

73. Hays v. McFarlan, 32 Ga. 699, 79 Am. Dec. 317 (1861) (validity of promise to support illegitimate child made under threat of legal action).

74. Key v. Harris, 116 Tenn. 161, 92 S.W. 235 (1905) (mentally incompetent sister lacked "an ordinary sense of justice").

75. See supra pp. 14–15.

76. Cramer v. Burlington, 42 Iowa 315 (1875).

77. United States v. Arnett, 342 F. Supp. 1255, 1261 (D. Mass. 1970) (quoting S. Rep. No. 891, 90th Cong., 1st Sess. Improved Judicial Machinery for the Selection of Federal Juries, p. 22; H. Rep. No. 1076, 90th Cong., 2nd Sess. Federal Jury Selection Act, p. 6.).

78. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 4.2 (1986) (quoting Joseph M. Livermore & Paul E. Meehl, The Virtues of M'Naghten, 51 Minn. L. Rev. 789, 855 (1967)). The *M'Naghten* test takes its name from a nineteenth-century English advisory opinion, M'Naghten's Case, 1 C. & K. 130 (House of Lords 1843), which held that "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused as labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." When the *M'Naghten* insanity test is said to be in keeping with "the community sense of justice" it is ordinarily contrasted with the broader test set out in the American Law Institute's Model Penal Code of 1962. The ALI test expands the definition of insanity to include someone who cannot "conform his conduct to the requirements of law," even if she knows it is wrong. § 4.01. This test is said to result in acquittals that offend the aforementioned "community sense of justice." In fact, the U.S. Congress, along with many other jurisdictions throughout the country, rejected the ALI test in favor of the *M'Naghten* test in the wake of John Hinckley's insanity acquittal. For an interesting study of the Hinckley case in light of the various insanity tests, see Richard J. Bonnie, Peter W. Low, & John C. Jeffries, Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr. (2d ed. 2000).

79. Model Penal Code § 2.02 cmt. (1985); see, e.g., People v. Abbott, 84 A.D.2d 11, 14 (N.Y. App. Div. 1981) (upholding conviction of negligent homicide because "significance of this conduct [drag racing] should be apparent to anyone 'who shares the community's general sense of right and wrong' ") (quoting People v. Haney, 30 N.Y.2d 328, 335 (1972)); see also Shirah v. State, 555 So. 2d 807, 811 (Ala. Crim. App. 1989); State v. Etzweiler, 125 N.H. 57, 70 (1984); State v. Hansen, 638 P.2d 108, 111 (Wash. App. 1981).

80. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.12 (1986) (quoting Model Penal Code § 2.03(2)(b) & (3)(b), citing Model Penal Code § 2.03, Comment at 262 (1985)).

81. Id. (quoting Model Penal Code § 2.03, cmt. at 261 n. 17 (1985)).

82. Id. (quoting H. L. A. Hart & Tony Honoré, Causation and the Law 355 (1959)).

83. Id. (quoting Model Penal Code § 2.03, cmt. (Tent. Draft No. 4, 1955)).

84. State v. Maldonado, 137 N.J. 536, 645 A.2d 1165 (1994); see also Com. v. Rementer, 410 Pa. Super. 9, 23 (1991) (interpreting analogous provision in

the Pa. Crimes Code; "if the fatal result was an unnatural or obscure consequence of the defendant's actions, our sense of justice would prevent us from allowing the result to impact on the defendant's guilt").

85. Maldonado, 137 N.J. at 565–70, 645 A.2d at 1179–82 (quoting, among other sources, Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933)).

NOTES TO CHAPTER 2

1. State v. Maldonado, 137 N.J. 536, 645 A.2d 1165 (1994).

2. Less dramatically, consistency with the sense of justice is occasionally said to buttress other support for a given proposition. See, e.g., Franklin E. Zimring & James Zuehl, Victim Injury and Death in Urban Robbery: A Chicago Study, 15 J. Legal Studies 1 (1986) ("A sense of justice and statistics on relative death risk convergently argue for narrowing the [felony murder] rule.").

3. Oliver Wendell Holmes, Jr., The Common Law 1 (1881) (emphasis added).

4. Id. at 43.

5. Id. at 48.

6. Id. at 50.

7. Id. at 54 (emphasis added).

8. Id. at 96.

9. Maldonado, 137 N.J. at 570, 645 A.2d at 1182 (quoting Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933)).

10. Sayre, Public Welfare Offenses, 70. Sayre's prediction proved incorrect: American criminal law today is littered with statutes that attach serious punishment, including life imprisonment without the possibility of parole, to strict liability offenses. See Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights ch. 3 (2002); Markus Dirk Dubber, The Police Power: Patriarchy and the Foundations of American Government 164–79 (2005).

11. Sayre, Public Welfare Offenses, 70.

12. Id. at 72.

13. Model Penal Code § 2.03, cmt. at 261 n. 17 (1985).

14. On those underpinnings, see Markus D. Dubber, Criminal Law: Model Penal Code 6–22 (2002); Markus D. Dubber & Mark G. Kelman, American Criminal Law: Cases, Statutes, and Comments ch. 3 (2005).

15. See Dubber, Criminal Law: Model Penal Code, § 5.2.

16. Model Penal Code art. 5, intro. at 294 (1985).

17. Id.

18. David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 Sup. Ct. Rev. 271, 327–28 (emphasis added).

19. Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 54 (2000) (citations omitted) (emphasis added).

20. See, e.g., Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law xv (1995). Robinson's and Darley's main concern, however, was that evokers of the community's sense of justice tended to be *wrong* about what that sense of justice was. Hence their attempt to measure it.

21. The hermeneutic tradition, with its interest in shared life worlds and communities of meaning, too can be seen as trying to come to grips with the notion of a communal sense. The significance of the hermeneutic approach to a theory of justice and, more specifically, to an account of a communal sense of *justice,* however, is unclear, or at least unclear enough to justify excluding it from the current project.

22. For recent attempts at a more balanced appreciation of Langdell's work, see Bruce A. Kimball, The Langdell Problem: Historicizing the Century of Historiography, 1906–2000, 22 Law & Hist. Rev. 277 (2004); Bruce A. Kimball, "Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870–1883, 17 Law & Hist. Rev. 57 (1999); see also Bruce A. Kimball & R. Blake Brown, "The Highest Legal Ability in the Nation": Langdell on Wall Street, 1855–1870, 29 Law & Soc. Inquiry 39 (2004) (Langdell as lawyer); Lewis A. Grossman, James Coolidge Carter and Mugwump Jurisprudence, 20 Law & Hist. Rev. 577 (2002).

23. See Daniel A. Farber, The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law, 45 Vand. L. Rev. 533, 545 (1988).

24. Karl N. Llewellyn, Jurisprudence: Realism in Theory and Practice 222 (1962) ("Jurisprudence").

25. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 59–61, 121–57, 206–08 (1960); Karl N. Llewellyn, The Case Law System in America § 56, at 78–80 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989).

26. See Manfred Rehbinder, Rechtsgefühl, Institutionen und Ganzheitspsychologie bei Karl N. Llewellyn, in Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht: Karl Llewellyn und seine Bedeutung heute 175 (Ulrich Drobing & Manfred Rehbinder eds., 1994).

27. See James Q. Whitman, Commercial Law and the American *Volk:* A Note on Llewellyn's German Sources for the Uniform Commercial Code, 97 Yale L.J. 156, 168 (1987).

28. Karl N. Llewellyn, What Price Contract? 40 Yale L.J. 704, 729 n.54 (1931); see also id. at 707 n.9, 706 n.6, 720 n.43 (citing R. Ehrenberg, M. Weber, E. Ehrlich, H. Isay).

29. See Karl Llewellyn, On the Good, the True, the Beautiful, in Law, 9 U. Chi. L. Rev. 224, 250–65 (1942); Llewellyn, The Common Law Tradition, 59–

61; see generally William Twining, Karl Llewellyn and the Realist Movement 186–88, 441 n.68 (1973).

30. Whitman, Commercial Law and the American *Volk,* 174 (emphasis added).

31. Herman Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71, 75 (1928).

32. Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 Cornell L.Q. 274, 285 (1929).

33. Id. at 278 (quoting Rabelais).

34. Jerome Frank, Law and the Modern Mind (1963) (1930). Though frequently derided as a piece of simple-minded, pseudo-psychoanalysis, Frank's book was republished over thirty years later, long after Legal Realism had faded away.

35. Id. at 112.

36. Id. at 112 n.3.

37. See, e.g., Gnaeus Flavius (Hermann Kantorowicz), Der Kampf um die Rechtswissenschaft (1906); Ernst Fuchs, Schreibjustiz und Richterkönigtum: Ein Mahnruf zur Schul- und Justizreform (1907).

38. Frank, Law and the Modern Mind, 302 (discussing Gmelin as a representative Free Lawyer).

39. Hermann Kantorowicz, Some Rationalism about Realism, 43 Yale L.J. 1240 (1934).

40. Hermann Isay, Rechtsnorm und Entscheidung (1929).

41. Literally, "Rechtsgefühl" translates as feeling of (or for) *Recht,* with its familiar ambiguity between law, right, and justice.

42. Erwin Riezler, Das Rechtsgefühl: Rechtspsychologische Betrachtungen 6–8 (1923). For a more differentiated, but not necessarily more useful, taxonomy, see Christoph Meier, Zur Diskussion über das Rechtsgefühl: Themenvielfalt—Ergebnistrends—neue Forschungsperspektiven (1986) (listing fourteen varieties of the sense of justice).

43. Id.

44. Hutcheson, The Judgment Intuitive; Frank, Law and the Modern Mind, 111–12, 156.

45. Riezler, Das Rechtsgefühl, 7; John Rawls, A Theory of Justice 312 (1971).

46. See Rawls, A Theory of Justice, ch. 8; see also John Rawls, The Sense of Justice, 72 Phil. Rev. 281 (1963).

47. See infra pp. 93–94.

48. Llewellyn, The Common Law Tradition, 122.

49. P. J. A. Feuerbach, Kritik des natürlichen Rechts 83 (1796). He was also the father of Ludwig Feuerbach.

50. For recent commentary on the novella, including an overview of previous commentaries, see Wolfgang Naucke, Kommentar I, in Heinrich von Kleist,

Michael Kohlhaas (1810)—Mit Kommentaren von Wolfgang Naucke und Joachim Linder 111 (2001).

51. Heinrich von Kleist, Michael Kohlhaas, in The Marquise of O—and Other Stories 114, 114 (David Luke & Nigel Reeves trans. 1978).

52. Id. at 212.

53. James C. Carter, The Proposed Codification of Our Common Law (1884).

54. For a less *Volk*-centered view, and earlier, of the relation between law and language, see Adam Smith, who argued that rules of justice resembled rules of grammar in that they were unambiguous, in contrast to rules of other virtues, which instead resembled rules of style. Adam Smith, 1 The Theory of Moral Sentiments 365 (9th ed. 1801). In fact, beginning with the second edition of 1761, Smith's Theory of Moral Sentiments contained, in an appendix, "A Dissertation on the Origin of Languages."

55. Joachim Heinrich Campe, Wörterbuch der deutschen Sprache (1810), preface, at xvi.

56. Id.

57. Id. at xvii.

58. See infra ch. 4.

59. Hans-Martin Gauger & Wulf Oesterreicher, Sprachgefühl und Sprachsinn, in Sprachgefühl: Vier Antworten auf eine Preisfrage 9, 13 (Deutsche Akademie ed., 1980).

60. For a recent reappraisal of Carter's work, see Lewis A. Grossman, James Coolidge Carter and Mugwump Jurisprudence, 20 Law & Hist. Rev. 577 (2002).

61. James C. Carter, The Ideal and the Actual in the Law, Annual Address, Report of the Thirteenth Annual Meeting of the American Bar Association, Saratoga Springs, New York, Aug. 20–22, 1890, at 217, 223 (1890).

62. Id. at 224.

63. Cf. Munroe Smith, Jurisprudence, a Lecture Delivered at Columbia University in the Series on Science, Philosophy and Art, February 19, 1908, at 21 (1909) ("lawfinding experts" seek to "give to the *social sense of justice* articulate expression in rules and in principles") (emphasis added; quoted in Benjamin Cardozo, The Nature of the Judicial Process 23 (1921)).

64. See Whitman, Commercial Law and the American *Volk,* 156.

65. Eugen Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft, in Recht und Leben: Gesammelte Schriften zur Rechtstatsachenforschung und zur Freirechtslehre 170, 196 (Manfred Rehbinder ed., 1967) (1903); Eugen Ehrlich, Die richterliche Rechtsfindung auf Grund des Rechtssatzes, in id. at 203, 226.

66. Eugen Ehrlich, Die richterliche Rechtsfindung, 212.

67. Isay, Rechtsnorm und Entscheidung, 85–86, 115–16. Despite the obvious similarities between Savigny's and Isay's view of the judge's role, Isay distanced himself from the historical school's *Volksgeist* theory. Id. at 113.

68. Edmond N. Cahn, Authority and Responsibility, 51 Colum. L. Rev. 838 (1951).

69. United States ex rel. Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929).

70. Recently, Paul Robinson and John Darley set out to find an empirical answer to questions on matters of criminal liability, leaving aside the nebulousness of the matter. Robinson & Darley, Justice, Liability, and Blame.

71. Cahn, Authority and Responsibility.

72. Edmond Cahn, The Moral Decision: Right and Wrong in the Light of American Law 300, 302 (1955) (quoting John Chipman Gray, The Nature and Sources of the Law 271 (1916)).

73. Id.

74. Id. at 300, 305.

75. See, e.g., Robert Cover, Justice Accused (1975); David Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy 151 (1991); Edwin Cameron, Legal Chauvinism, Executive-Mindedness and Justice—L. C. Steyn's Impact on South African Law, 99 S. Afr. L.J. 39, 59–60 (1982); Markus Dirk Dubber, The Pain of Punishment, 44 Buff. L. Rev. 545 (1996).

76. See Markus Dirk Dubber, Judicial Positivism and Hitler's Injustice, 93 Colum. L. Rev. 1807 (1993) (role of positivism in Nazi Germany).

77. Cf. Bruce S. Ledewitz, Edmond Cahn's Sense of Injustice: A Contemporary Reintroduction, 3 J.L. & Rel. 277 (1985).

NOTES TO CHAPTER 3

1. I'm invoking here the familiar distinction between morality ("the moral"), as the study of the abstract precepts of personhood, and ethics, as the study of substantive normative systems ("morals").

2. That's why Robinson's and Darley's attempt to measure the sense of justice begs the question. See Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law xv (1995).

3. Edmond N. Cahn, Authority and Responsibility, 51 Colum. L. Rev. 838, 844 (1951).

4. Id. at 841.

5. Id. at 844.

6. Id. at 851.

7. Id. at 844, 845.

8. See Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights pt. 1 (2002); Markus Dirk Dubber, The Police Power: Patriarchy and the Foundations of American Government (2005).

9. See, e.g., James Q. Wilson, The Moral Sense (1993).

10. Cahn, Authority and Responsibility, 841.

11. Cf. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding sodomy statute); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down sodomy statute).

12. See Lawrence, 539 U.S. at 558; see also Commonwealth v. Bonadio, 490 Pa. 91 (1980); Powell v. State, 270 Ga. 327 (1998); Markus Dirk Dubber, Toward a Constitutional Law of Crime and Punishment, 55 Hastings L.J. 509 (2004).

13. This sentiment underlies American courts' exercise of their common law crime-making power, by defining so-called "common law misdemeanors" which criminalized anything they considered "contra bonos mores." See, e.g., Commonwealth v. McHale, 97 Pa. 397 (1881).

14. See Wilson, The Moral Sense.

15. See Bruce S. Ledewitz, Edmond Cahn's Sense of Injustice: A Contemporary Reintroduction, 3 J.L. & Rel. 277 (1985).

16. See already John Locke, Second Treatise of Government § 147 (1690) (executive and federative prerogative).

17. Constitutional Law, 16A Am. Jur. 2d § 317; see generally Dubber, The Police Power.

18. See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1983).

19. United States v. Hing Quong Chow, 53 F. 233, 234 (E.D. La. 1892).

20. New York v. Miln, 36 U.S. 102, 142–43 (1837).

21. In 2001, the Supreme Court held that the INS may not indefinitely detain illegal immigrants. Zadvydas v. Davis, 533 U.S. 678 (2001). The implementation of that decision, however, has been slow and spotty. Cf. Rosales-Garcia v. Holland, 322 F.3d 386, 390–91 (6th Cir. 2003) (indefinite detention of "excludable aliens" after *Zadvydas*).

22. See Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001); see generally David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism (2003).

23. Korematsu v. United States, 323 U.S. 214 (1944).

24. Edmond Cahn, The Sense of Injustice 22 (1949).

25. Id. at 13–14.

26. Id. at 23.

27. Id.

28. See Helmut Coing, Grundzüge der Rechtsphilosophie (1st ed. 1950); Helmut Coing, Die obersten Grundsätze des Rechts: Ein Versuch zur Neugründung des Naturrechts (1947).

29. See Rawls's discussion of intuitionism in chapter 1 of *A Theory of Justice* (1971).

30. Cahn, The Sense of Injustice, 12.

31. See infra pp. 68–69.

32. Cahn, The Sense of Injustice, 12.

33. Id. at 15.

34. Id. at 17.

35. Id. at 20.

36. Id. at 23.

37. Id. at 24 (emphasis added).

38. For a collection of essays exploring the sociobiology of the sense of justice, see The Sense of Justice: Biological Foundations of Law (Roger D. Masters & Margaret Gruter eds., 1992).

39. See Adam Smith, The Theory of Moral Sentiments (1759).

40. As a form of empathy, the sense of justice thus always retains a reflexive aspect, namely, the emotion triggered by the recognition of identity. Cf. Martin L. Hoffman, Toward a Theory of Empathic Arousal and Development, in The Development of Affect 227, 236 (Michael Lewis & Leonard A. Rosenblum eds., 1978), who distinguishes between two components of "empathic arousal": a "relatively involuntary component, based mainly on conditioning and possibly mimicry" and a "more reflective" one, "based mainly on the tendency to imagine oneself in the other's place."

41. For such an account, see John Rawls, A Theory of Justice, 462–79 (1971).

42. Cahn, The Sense of Injustice, 24.

43. See Rawls, A Theory of Justice, ch. 8.

44. See 3 G. W. F. Hegel, Enzyklopädie der philosophischen Wissenschaften §§ 399–412 (1830); see also G. W. F. Hegel, Elements of the Philosophy of Right § 4A (Allen W. Wood ed., H. B. Nisbet trans., 1991).

45. J. B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy (1998).

46. See infra ch. 4.

47. Cahn, The Sense of Injustice, 12, 13.

48. Id. at 25.

49. See Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. Crim. L. & Criminology 1 (2001).

50. See Dubber, Victims in the War on Crime, pt. I; see also Markus Dirk Dubber, Recidivist Statutes as Arational Punishment, 43 Buff. L. Rev. 689 (1995).

51. Spalding v. Preston, 21 Vt. 9, 13 (1848). See Dubber, The Police Power, 115–19.

52. 2 James Fitzjames Stephen, A History of the Criminal Law in England 81 (1883).

53. Id. at 82.

54. Emile Durkheim, Crime and Punishment, in Durkheim and the Law 59, 60 (Steven Lukes & Andrew Scull eds., 1984) (translation of Emile Durkheim,

De la division du travail social (1893)) ("The interest for revenge is . . . merely a heightened instinct of self-preservation in the face of danger.").

55. Id. at 61.

56. Stephen came close to doing just that, though he described the relevant instinct as "the feeling of hatred . . . which the contemplation of such conduct excites in *healthily constituted* minds," including presumably his own. James Fitzjames Stephen, Liberty, Equality, Fraternity 152 (1967) (emphasis added).

57. See, e.g., George H. Mead, The Psychology of Punitive Justice, 28 Am. J. Sociology 577 (1918). On the War on Crime as a war—and as a police action—see Markus D. Dubber, The New Police Science and the Police Power Model of the Criminal Process, in in The New Police Science: The Police Power in Domestic and International Governance (Markus D. Dubber & Mariana Valverde eds., forthcoming 2006).

58. Moore distances himself from Stephen's own attempt to justify punishment as desire gratification. Michael S. Moore, The Moral Worth of Retribution, in Responsibility, Character, and the Emotions 179, 180 (Ferdinand Schoeman ed., 1987).

59. Friedrich Nietzsche, The Dawn § 202 (quoted in Friedrich Nietzsche, On the Genealogy of Morals 73 n.2 (Walter Kaufmann trans., 1967)).

60. Moore, The Moral Worth of Retribution, 209.

61. Rawls, A Theory of Justice, 462–79.

62. For an argument even contempt can qualify as a moral sentiment under certain conditions. See Michelle Mason, Contempt as a Moral Attitude, 113 Ethics 234 (2003).

63. Joel Feinberg, The Expressive Function of Punishment, in Doing and Deserving: Essays in the Theory of Responsibility 95 (1970).

64. Moore, The Moral Worth of Retribution, 201.

65. Id. at 199.

66. Id. at 183–85.

67. Id. at 185.

68. Id.

69. P. F. Strawson, Freedom and Resentment, in Freedom and Resentment 1, 17 (1974).

70. Id. at 16.

71. For an interesting discussion of the moral and legal significance of disgust, compare Dan M. Kahan, The Progressive Appropriation of Disgust, in The Passions of Law (Susan Bandes ed., 1999), at 63, with Martha C. Nussbaum, "Secret Sewers of Vice": Disgust, Bodies, and the Law, in id. at 19, and Toni M. Massaro, Show (Some) Emotion, in id. at 80; see also William Ian Miller, The Anatomy of Disgust (1997).

72. See Sigmund Freud, Civilization and Its Discontents (Joan Riviere & James Strachey trans., James Strachey ed., 1963) (1930).

73. See supra pp. 43–53.

74. See Robinson & Darley, Justice, Liability, and Blame.

75. See, e.g., Gregg v. Georgia, 428 U.S. 153, 179–82 (1976) (legislators', prosecutors', and juries' behavior as evidence of communal sense of justice regarding capital punishment).

76. Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933).

77. Id. at 72.

78. See supra pp. 24–25.

79. Francis B. Sayre, Public Welfare Offenses, 55.

80. Id. at 72.

81. State v. Maldonado, 137 N.J. 536, 570, 645 A.2d 1165, 1182 (1994) ("[A]nd law in the last analysis must reflect the general community sense of justice.") (quoting Sayre, Public Welfare Offenses, 70).

82. Georg Beseler, Volksrecht und Juristenrecht (1843).

83. For a discussion of the relation between the notion of *gesundes Volksempfinden* and the *Volksgeist* concept of the historical school, see Joachim Rückert, Das "gesunde Volksempfinden"—eine Erbschaft Savignys? 103 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung) 199, 236 (1986).

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

85. John Dickinson, The Law behind Law, 29 Colum. L. Rev. 113, 116 (1929); John Dickinson, The Law behind Law: II, 29 Colum. L. Rev. 285, 318 (1929).

86. Jerome Frank, Law and the Modern Mind 284, 289 (1963) (1930) (discussing Dickinson); John Chipman Gray, The Nature and Sources of the Law 87–90, 283 (1916) (discussing Savigny).

87. See James Q. Whitman, Commercial Law and the American *Volk:* A Note on Llewellyn's German Sources for the Uniform Commercial Code, 97 Yale L.J. 156, 156 (1987).

88. State v. Maldonado, 137 N.J. 536, 565–70, 645 A.2d 1165, 1179 (1994). See supra pp. 20–22.

89. Id. at 1182.

90. 1 Frederick Pollock & Frederic William Maitland, The History of English Law before the Time of Edward I, at 140 (2d ed., 1898; reissued 1968); see also Marianne Constable, The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge (1994).

91. Model Penal Code § 2.02 cmt. (1985).

92. See, e.g., Oliver Wendell Holmes, The Common Law 48 (1881) ("It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to

encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."); People v. Marrero, 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987);.

93. See Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stan. L. Rev. 547, 592 (1997); Markus Dirk Dubber, The Criminal Trial and the Legitimation of Punishment, in The Trial on Trial 85 (R. A. Duff et al. eds., 2004).

94. See Dubber, Victims in the War on Crime, pt. 2.

95. Markus Dirk Dubber, Toward a Constitutional Law of Crime and Punishment, 55 Hastings L.J. 509 (2004).

96. See Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945) (Arnold, J.) ("sense of justice of ordinary men").

97. See infra pp. 137–40.

98. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.12 (1986) (quoting Model Penal Code § 2.03, cmt. at 261 n.17 (1985)).

99. Id. (quoting H. L. A. Hart & Tony Honoré, Causation and the Law 355 (1959)).

100. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 155–56 n.1 (1893).

101. Hermann Weinkauff, Der Naturrechtsgedanke in der Rechtsprechung des Bundesgerichtshofes, 1960 NJW 1689, 1690.

102. Id.

103. Id. at 1696; see also Ernst-Wolfgang Böckenförde, Zur Kritik der Wertbegründung des Rechts, in Rechtspositivismus und Wertbezug des Rechts 33, 43–44 (Ralf Dreier ed., 1990); Michael Bihler, Rechtsgefühl, System und Wertung: Ein Beitrag zur Psychologie der Rechtsgewinnung (1979) (commenting on authoritarian potential of phenomenological approach to sense of justice as developed by Hermann Isay and, later, Heinrich Hubmann).

104. For Riezler's taxonomy, see supra pp. 32–33.

105. As jurors were said to possess an unspoiled sense of justice, so women were said to possess an unspoiled sense of language. Jacob Grimm, Vorwort, in 1 Jacob & Wilhelm Grimm, Deutsches Wörterbuch (1991) (1854).

106. See, e.g., Ludwig Frey, Das Geschwornengericht aus historischen, straf- und staatsrechtlichen Gesichtspunkten betrachtet 39–40 (1835) (quoted in Whitman, Commercial Law and the American *Volk,* 161); cf. Georg Beseler, Volksrecht und Juristenrecht 258, 261, 267 (1843).

107. See generally Dubber, The German Jury and the Metaphysical *Volk*.

108. Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 906 (1994) (citing Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 115 (1971)).

109. Judith N. Shklar, The Faces of Injustice 89 (1990). Cf. Thomas Jefferson's comments on the innate sense of justice of "aborigines": "Their only controuls are their manners, and that moral sense of right and wrong, which, like the sense of tasting and feeling, in every man makes a part of his nature." Thomas Jefferson, Query XI, in Notes on the State of Virginia (1787).

110. Jean-Jacques Rousseau, Emile: or, On Education 222 (Allan Bloom trans., 1979).

111. See Schneewind, The Invention of Autonomy, 6.

112. Whether basic competence is also not *necessary* is a more difficult question. While place of birth is technically sufficient for U.S. citizenship, for instance, full membership in the U.S. political community surely requires more (consider, e.g., disenfranchised felons, infants, and mental incompetents, none of whom has the right to vote).

113. Franz Alexander & Hugo Staub, The Criminal, the Judge, and the Public 13 (1956) (German original 1929).

114. For an excellent discussion of empathy as "imaginative experiencing of the situation of another" and its role in Supreme Court jurisprudence and legal discourse more generally, to which I am deeply indebted, see Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987). Toni Massaro critically assesses what she considers the polemical invocation of a vague concept of empathy by "critical legal studies, feminist, and 'law and literature' writers." Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds, 87 Mich. L. Rev. 2099 (1989); see also Cynthia V. Ward, A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature, 61 U. Chi. L. Rev. 929 (1994). In this book empathy is not employed as an ill-defined label used to express one's frustration with others' fetishistic infatuation with legal rules as rules. On the contrary, it seeks to work out an account of the sense of justice that has enough content to do real analytical and normative work. This book also doesn't concern itself with the relevance of an offender's emotions for assessing her criminal liability. For recent treatments of this subject, see Victoria Nourse, Passion's Progress: Modern Law Reform and the Provocation Defense, 106 Yale L.J. 1331 (1997) (provocation); Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269 (1996) (criminal law generally).

115. On the development of this capacity in young children, see, e.g., Hoffman, Toward a Theory of Empathic Arousal and Development, 239.

116. See, e.g., id.

117. See, e.g., Lawrence Blum, Compassion, in Explaining Emotions 507, 510 (Amelie Oksenberg Rorty ed., 1980).

118. Claire Armon-Jones, The Thesis of Constructionism, in The Social Construction of Emotions 32, 35 (Rom Harré ed., 1986).

119. See Dubber, The Police Power, ch. 1.

120. See id. at 183–89.

121. See id. at ch. 1; Markus Dirk Dubber, Polizei-Recht-Strafrecht, in Festschrift für Klaus Lüderssen zum 70. Geburtstag 179 (Cornelius Prittwitz et al. eds., 2002).

122. Aristotle, Politics bk. I.

123. John Locke, Second Treatise of Government § 170 (1690).

NOTES TO CHAPTER 4

1. Edmond Cahn, The Sense of Injustice 24 (1949).

2. Martha C. Nussbaum, Poetic Justice: The Literary Imagination and Public Life 66 (1995); see also Martha C. Nussbaum, Upheavals of Thought: The Intelligence of Emotions pt. II (2001).

3. For an excellent recent overview of Smith's theory of empathy, see Stephen Darwall, Sympathetic Liberalism: Recent Work on Adam Smith, 28 Phil. & Pub. Affairs 139 (1999).

4. See, e.g., 1 Adam Smith, The Theory of Moral Sentiments 308 (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. 85 (1993).

5. 1 Smith, The Theory of Moral Sentiments, 296.

6. Id. at 301.

7. Id. at 277.

8. Id. at 279–80.

9. Id. pt. ii, § ii, ch. iii ("Of the utility of this constitution of Nature").

10. Id. at 9. For an interesting recent exploration of the role of the imagination in the process of "stepp[ing] beyond our egocentric perspectives" through empathetic role taking, see Nancy Sherman, Empathy and Imagination, 22 Midwest Studies in Philosophy 82 (1998).

11. Cf. 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) (distinction retained).

12. See, e.g., Lawrence Blum, Compassion, in Explaining Emotions 507, 509 (Amelie Oksenberg Rorty ed., 1980) (identity confusion).

13. See, e.g., id. at 511.

14. Annette Baier, Master Passions, in Explaining Emotions 403, 420–21 (Amelie Oksenberg Rorty ed., 1980).

15. David Hume, A Treatise of Human Nature bk. ii, pt. i, § xi, at 318 (1739); see also id. at 322, 359, 608.

16. Nussbaum, Poetic Justice, 65; Nussbaum, Upheavals of Thought, 316 (discussing compassion).

17. Jean-Jacques Rousseau, Emile: or, On Education 224 (Allan Bloom trans., 1979).

18. Nussbaum, Upheavals of Thought, 319.

19. Rousseau, Emile, 222.

20. 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 indirectly renders probability estimates of this sort irrelevant, not by declaring them so, but by making them impossible due to the ignorance of the deliberator.

21. See Blum, Compassion, 512 (contrasting pity with compassion).

22. John Sabini & Maury Silver, Emotions, Responsibility, and Character, in Responsibility, Character, and the Emotions 165, 170 (Ferdinand Schoeman ed., 1987).

23. Some animal rights advocates may disagree, of course. Even they, however, presumably would recognize the need for a human advocate who could assert the dog's rights in its stead, much as an infant would require the intervention of an adult with full moral status.

24. 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 Nicholsen trans. 1990).

25. Id. at 199.

26. Id.

27. See his critiques of F. H. Jacobi and Schleiermacher. See generally Markus Dirk Dubber, Rediscovering Hegel's Theory of Crime and Punishment, 92 Mich. L. Rev. 1577, 1593–97 (1994).

28. See his assault on Jacob Fries in the Preface to the *Philosophy of Right*. Id.

29. Immanel Kant, Grounding for the Metaphysics of Morals 59 (Ak. 460); Kritik der praktischen Vernunft 46, 86–95 (Ak. 38, 73–81); Metaphysik der Sitten (Tugendlehre) 530–31 (A35–37) (Wilhelm Weischedel ed., 8th ed. 1989). Every moral being possesses this *Moralgefühl,* which should be cultivated and strengthened. Kant, Metaphysik der Sitten, 530–31 (A36); Kritik der praktischen Vernunft, 46 (Ak. 38). 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 (1969).

30. Kant, Grounding for the Metaphysics of Morals, 46 & n.30, 59 (Ak. 442 & n.30, 460); Kritik der praktischen Vernunft, 45–46 (Ak. 38); Metaphysik der Sitten, 530–31 (A36–37). This also applies to Hegel's comments on emotion and morality in the Philosophy of Right. See Dubber, Rediscovering

Hegel's Theory of Crime and Punishment, 1596. On Hutcheson, see Francis Hutcheson, An Essay on the Nature and Conduct of the Passions and Affections with Illustrations on the Moral Sense (1728); see also W. L. Taylor, Francis Hutcheson and David Hume as Predecessors of Adam Smith (1965).

31. 2 Adam Smith, The Theory of Moral Sentiments 293–305 (1759).

32. J. B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy 502 (1998).

33. Immanuel Kant, Observations on the Feelings of the Beautiful and Sublime 58 (John T. Goldthwait trans., 1991); Schneewind, The Invention of Autonomy, 502; see also David Hume, A Treatise of Human Nature bk. iii, pt. i, § ii, at 481–83 (1739).

34. Hume, A Treatise of Human Nature, bk. iii, pt. i, § ii, at 491.

35. Schneewind, The Invention of Autonomy, 489. On the connection between a sense of honor and a sense of justice, see Johann Michael Franz Birnbaum, Ueber das Erfordeniß einer Rechtsverletzung zum Begriffe des Verbrechens, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung, Archiv des Criminalrechts (Neue Folge) 149, 189 (1834).

36. 3 G. W. F. Hegel, Enzyklopädie der philosophischen Wissenschaften §§ 399–412 (1830); see also G. W. F. Hegel, Elements of the Philosophy of Right § 4A (Allen W. Wood ed., H. B. Nisbet trans., 1991).

37. 3 Hegel, Enzyklopädie, § 402 (1830) (*Rechts-* or *Selbst*gefühl, instead of *Recht-* or *Selbst*empfindung).

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

39. These other aspects of personal existence are discussed in the third part, Ethical Life.

40. Hegel, Philosophy of Right, § 36.

41. G. W. F. Hegel, Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse Z35 (1986); id. at 89 (Hegel's Bemerkung zu § 33) (1986) ("I have Right because I am free.")

42. Id. at 182 (Hegel's Bemerkung zu § 95) (1986).

43. Rousseau, Emile, 222.

44. Blum, Compassion, 511.

45. What's more, Rawls himself appears to have abandoned it. See John Rawls, Political Liberalism (1996); Edward F. McClennen, Justice and the Problem of Stability, 14 Phil. & Pub. Affairs 3, 9 (1985).

46. Raymond Saleilles, The Individualization of Punishment 3 (Rachel Szold Jastrow trans., 1913) (L'individualisation de la peine; étude de criminalité sociale 2d ed. 1909) (1st ed. 1898).

47. Emile Durkheim, Crime and Punishment, in Durkheim and the Law 59, 69 (Steven Lukes & Andrew Scull eds., 1984) (translation of Emile Durkheim, De la division du travail social (1893)).

48. Id. at 69.
49. Id. at 71.
50. Id. at 68.
51. George H. Mead, The Psychology of Punitive Justice, 28 Am. J. Sociology 577, 580–81 (1918).
52. Id.; cf. George Herbert Mead, Probation and Politics, 27 Survey 2003 (1912), http://spartan.ac.brocku.ca/~lward/Mead/pubs/Mead_1912e.html.
53. Mead, The Psychology of Punitive Justice, 580–81.
54. Id. at 585.
55. Id. at 586–87.
56. Id. at 587.
57. See Gabriel Tarde, Les lois de l'imitation (1890).
58. Gabriel Tarde, Penal Philosophy 88 (Rapelje Howell trans., 1912) (4th ed. 1903; 1st ed. 1890).
59. Id.
60. Id. at 110; see also Saleilles, The Individualization of Punishment, 3.
61. Tarde, Penal Philosophy, 88.
62. Id.
63. Id. at 105 (emphasis added).
64. See Sigmund Freud, Group Psychology and the Analysis of the Ego (James Strachey trans., 1922) (1921).
65. See Michael Bihler, Rechtsgefühl, System und Wertung: Ein Beitrag zur Psychologie der Rechtsgewinnung (1979).
66. See Sigmund Freud, Civilization and Its Discontents (Joan Riviere & James Strachey trans., James Strachey ed., 1963) (1930).
67. Saleilles, The Individualization of Punishment, 3.
68. Jürgen Habermas, Legitimation Problems in the Modern State, in Communication and the Evolution of Society 178, 188 (1979).
69. John Rawls, A Theory of Justice 504 (1971).
70. Jürgen Habermas, Moral Development and Ego Identity, in Communication and the Evolution of Society 69, 86–87 (1979).
71. Jürgen Habermas, What Is Universal Pragmatics? in Communication and the Evolution of Society 1, 29 (1979).
72. Rawls, A Theory of Justice, 505.
73. Id.
74. Id. at 46.
75. Id.
76. Id. at 51.
77. Id. at 48.
78. Id. at 51.
79. Id. at 46.
80. Id. at 505, 567.

81. Id. at 312 (emphasis added).
82. Id. at 577.
83. Id.
84. Id. at 455.
85. State v. Maldonado, 137 N.J. 536, 565–70, 645 A.2d 1165, 1179–82 (1994) (quoting Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933)).
86. Rawls, A Theory of Justice, 46.
87. Id. at 12.
88. Id. at 463.
89. Id. at 470.
90. Id. at 474.
91. Id. at 470.
92. Id.
93. See supra pp. 24–25.
94. Markus Dirk Dubber, Toward a Constitutional Law of Crime and Punishment, 55 Hastings L.J. 509 (2004).
95. As Carole Pateman points out, Rawls faces a much larger problem to the extent he adopts Kohlberg's views on moral psychology, which follow a long tradition in denying women the capacity to develop a sense of justice. Carole Pateman, "The Disorder of Women": Women, Love, and the Sense of Justice, in The Disorder of Women: Democracy, Feminism, and Political Theory 17 (1989). For Carol Gilligan's celebrated response to Kohlberg, see Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982) (contrasting a feminine ethic of care with a masculine ethic of justice); cf. Lawrence A. Blum, Gilligan and Kohlberg: Implications for Moral Theory, 98 Ethics 472 (1988).
96. On the difficulties of basing moral development on intrafamilial relationships, see Susan Moller Okin, The Gendered Family and the Development of a Sense of Justice, in Values and Knowledge 61 (Edward S. Reed, Elliot Turiel, & Terrance Brown eds., 1996); see also Susan Moller Okin, Reason and Feeling in Thinking about Justice, 99 Ethics 229 (1989).
97. Rawls, A Theory of Justice, 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 parents are well-intentioned and children well-behaved by definition.
98. Id. at 506.
99. See John Rawls, The Sense of Justice, 72 Phil. Rev. 281, 302 (1963) (emphasis added).
100. See generally Dubber, Toward a Constitutional Law of Crime and Punishment; see also infra ch. 5.

101. Id.

102. Id. at 305.

103. U.S. const. art. I, § 9; Trop v. Dulles, 356 U.S. 86 (1958).

104. Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights (2002).

105. See id., pt. II (crime victim compensation).

106. Id. at 303.

107. "Psychopaths" and others suffering from a motivational incapacity instead currently fall under the same broad category of mental incompetence as those suffering from cognitive or volitional impairments.

108. See supra pp. 40–42.

109. Federal Election Commission, State Voter Registration Requirements, http://www.fec.gov/votregis/state_voter_reg_requirements02.htm. On felon disenfranchisement, see Patricia Allard & Marc Mauer, Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws (2000) (3.9 million Americans, or one in fifty adults, disenfranchised because of a felony convictions).

110. Note that in the case of criminal offenders, this finding presumably would have to amount to a diagnosis of psychopathy or some other motivational defect, since the detection of cognitive or volitional incapacities would bar criminal liability in the first place under the insanity defense. (Volitional defects wouldn't support a finding of insanity in jurisdiction that followed the purely cognitive *M'Naghten* test, instead of the Model Penal Code's test.)

111. See Oliver Wendell Holmes, The Common Law 44 (1881).

112. Osborne set up the first Mutual Welfare League at Auburn Prison in 1914. See Thomas Mott Osborne, Society and Prisons (1916, repr. 1972); see also Frank Tannenbaum, Osborne of Sing Sing 66, 71–87 (1933).

113. See Markus Dirk Dubber, The Criminal Trial and the Legitimation of Punishment, in The Trial on Trial 85 (R. A. Duff et al. eds., 2004).

114. What victim participation means in a criminal case is difficult to say; everything depends on who—or what—is thought of as the victim of crime. If the victim of crime is the state (or "The People," or "The United States of America"), then the prosecutor (or state's attorney, district attorney, U.S. attorney, and so on) represents the communal or institutional victim. To the extent that the victim is a person, however, there is no reason why, everything else being equal, that person should not be permitted to participate in the criminal proceeding against the person charged with having committed a crime against her. The problem is, of course, that everything is not equal insofar as victim participation may interfere with the defendant's rights to a fair trial by improperly influencing the fact finder. See Dubber, Victims in the War on Crime; Dubber, The Criminal Trial. On the institution of victim's counsel in German criminal

law, see William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, 32 Stan. J. Int'l L. 37 (1996).

115. See, e.g., 1 Frederick Pollock & Frederic William Maitland, The History of English Law before the Time of Edward I, at 410 (2d ed. 1898; reissued 1968) (judgment of peers, rather than king, in treason cases "based on the maxim that no one should be judge in his own cause").

116. See Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stan. L. Rev. 547 (1997).

117. The distinction between participation and decision also is illustrated by the role of lobbyists: They are entitled to introduce arguments into public debate which, if considered from the proper standpoint of justice, may win the day despite the obviously, and explicitly, self-serving motivation that underlies them.

118. That would make us saints. Regarding *nothing but* our self-interest would make us moral lepers, to stick with Michael Moore's contrast. Michael S. Moore, The Moral Worth of Retribution, in Responsibility, Character, and the Emotions 179, 185 (Ferdinand Schoeman ed., 1987); see supra pp. 57–61. Rawls's model is designed for those of us who fall somewhere in between.

119. Rawls, A Theory of Justice, 19.

120. Id. at 312.

121. Thomas McCarthy, Introduction, in Jürgen Habermas, Moral Consciousness and Communicative Action vii, viii (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990).

122. Id. at viii–ix.

123. Rawls, A Theory of Justice, 18 (1971).

124. Habermas, What Is Universal Pragmatics? 2.

125. Habermas, Legitimation Problems in the Modern State, 188.

126. Habermas, What Is Universal Pragmatics? 19.

127. Habermas, Moral Development and Ego Identity, 91.

128. Rawls, The Sense of Justice, 302 ("It is plausible to suppose that any being capable of language is capable of the intellectual performances to have a sense of justice.").

129. Rawls, A Theory of Justice, 46.

130. Id. at 47.

131. On the debate, see Language and Learning: The Debate between Jean Piaget and Noam Chomsky (Massimo Piatelli-Palmarini ed., 1980).

132. This feature of Rawls's work, and the connections between moral theory and linguistics in general, recently have begun to attract attention after initially having been largely ignored. See, for example, Gilbert Harman, Moral Philosophy and Linguistics, in Explaining Value and Other Essays in Moral Philosophy (2000); Gilbert Harman, Three Trends in Moral and Political Philoso-

phy, 37 Value Inquiry 415 (2003); John Mikhail, Rawls' Linguistic Analogy: A Study of the "Generative Grammar" Model of Moral Theory (Cornell University Ph.D. diss. 2000); John Mikhail, Law, Science, and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory, 54 Stan. L. Rev. 1057 (2002); Susan Dwyer, Moral Competence, in Philosophy and Linguistics 1 (K. Murasugi & R. Stainton eds., 1999).

133. 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., 1980).

134. Rawls, A Theory of Justice, 47 (citing Chomsky, Aspects of the Theory of Syntax, 3–9).

135. Habermas, What Is Universal Pragmatics? 14.

136. Rawls, A Theory of Justice, 50.

137. Chomsky, Aspects of the Theory of Syntax, 3.

138. Habermas, What Is Universal Pragmatics? 32.

139. 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*].").

140. 16 Grimmsches Wörterbuch 2758 (entry "Sprachgrenze") (quoting Jacob Grimm).

141. Grimm, for instance, admired (German) women for "their healthy maternal wit (*gesunder Mutterwitz*)" and "their unspoiled sense of language." Id. at 2753 (entry "Sprachgefühl").

142. Joachim Heinrich Campe, Wörterbuch der deutschen Sprache (1810), preface, at xvi.

143. E.g., 3 Moriz Heyne, Deutsches Wörterbuch (1906) (entry "Sprachgefühl").

144. See supra pp. 76–85.

145. 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).

146. Gauger & Oesterreicher, Sprachgefühl und Sprachsinn, 13.

147. See, e.g., Chomsky, Aspects of the Theory of Syntax, 4.

148. T. C. Williams, Kant's Philosophy of Language: Chomskyan Linguistics and Its Kantian Roots 12 (1993) (quoting Noam Chomsky, Cartesian Linguistics 70–71 (1966)).

149. Jean Piaget, Moral Judgment: Children Invent the Social Contract (1932), in The Essential Piaget 159, 190 (Howard E. Gruber & J. Jacques Vonèche eds., 1977).

150. Habermas, Moral Development and Ego Identity, 91.

151. Rawls, A Theory of Justice.

152. Immanual Kant, Fundamental Principles of the Metaphysics of Morals (1785).

NOTES TO CHAPTER 5

1. For an extended discussion of the interrelation among these three aspects of penal law in the modern regime of punishment, see Markus Dirk Dubber, The Pain of Punishment, 44 Buff. L. Rev. 545 (1996).

2. See supra pp. 53–61.

3. Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights pt. I (2002); Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. Crim. L. & Criminology 1 (2001).

4. On telishment, see John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3 (1955).

5. In this sense the offender can even 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).

6. See generally Dubber, Victims in the War on Crime.

7. See Randall L. Kennedy , McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388 (1988).

8. See Markus Dirk Dubber, Regulating the Tender Heart When the Axe Is Ready to Strike, 41 Buff. L. Rev. 85, 142–43 (1993).

9. Jeremy Bentham, Principles of Penal Law (Rationale of Punishment), in 1 The Works of Jeremy Bentham 401 (J. Bowring ed., 1843).

10. See Richard A. Posner, Emotions versus Emotionalism in Law, in The Passions of Law 309, 321–25 (Susan A. Bandes ed., 1999).

11. See Bentham, Principles of Penal Law, 398. Grotius's theory of punishment had already stressed the identity of humans in contrast to omniscient and omnipotent God. Hugo Grotius, De Jure Belli ac Pacis, bk. 2, chap. 20, sect. 4 (1625). See also Samuel Pufendorf, De Jure Naturae et Gentium, bk. 8, chap. 3, sect. 8 (1672); Christian Thomasius, Institutiones Jurisprudentiae Divinae, 7th ed. (1730; 1687), bk. 3, chap. 7, sect. 36; Michael Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850 (1978), 55–56 (discussing John Howard). At least since Hobbes, intracommunal punishment was distinguished from extracommunal war. Thomas Hobbes, Leviathan, chap. 28 (1651); John Locke, Of Civil Government, chap. 2, sect. 9, and chap. 7, sect. 88 (1689).

12. Johann Gottlieb Fichte, Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre §§ 20, 254 (Fritz Medicus ed., 1967; 1796).

13. Immanuel Kant, Grundlegung zur Metaphysik der Sitten AB 70–71 (A

ed. 1785; B ed. 1786); G. W. F. Hegel, Grundlinien der Philosophie des Rechts §§ 36 (persons), 100 (1821); see generally Markus Dirk Dubber, Rediscovering Hegel's Theory of Crime and Punishment, 92 Mich. L. Rev. 1601 (1994).

14. See generally Immanuel Kant, What Is Enlightenment? (1784).

15. The significance of identification, and differentiation, in the early prison reform movement in the United States will be discussed below, when we turn to the role of the sense of justice in the final, inflictive, aspect of the penal process. See infra pp. 141–45.

16. William Bradford, An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania 5 (1793).

17. William Roscoe, Observations on Penal Jurisprudence and the Reformation of Criminals 8–9 (1819). On Roscoe, a remarkably versatile historian and writer, see Henry Roscoe, The Life of William Roscoe, 2 vols. (1933).

18. 4 William Blackstone, Commentaries on the Laws of England 2–3 (1769). On Blackstone's influence in the United States, see, e.g., Robert A. Ferguson, Law and Letters in American Culture 11 (1984) (*Commentaries* "rank second only to the Bible as a literary and intellectual influence on the history of American institutions").

19. On treatmentism (which encompasses both rehabilitative and incapacitative treatment), see Markus Dirk Dubber, Penal Panopticon: The Idea of a Modern Model Penal Code, 4 Buff. Crim. L. Rev. 53 (2000); see also Markus D. Dubber, Criminal Law: Model Penal Code (2002) (detailed exploration of a treatmentist system of criminal law, the Model Penal Code).

20. Karl David August Röder, Besserungsstrafe und Besserungsanstalten als Rechtsforderung: Eine Berufung auf den gesunden Sinn des deutschen Volks 13–14 (1864). See generally Dubber, The Right to Be Punished.

21. Röder, Besserungsstrafe, 14.

22. Id. at 34.

23. See Franz von Liszt, Der Zweckgedanke im Strafrecht, 3 ZStW 1, 45 (1883) (so-called "Marburger Programm"); Sheldon Glueck, Principles of a Rational Penal Code, 41 Harv. L. Rev. 453, 461, 462, 469 (1928) (punishment to be used only "by trained scientists, and only where 'indicated,' as the physicians would say"; punishment "but one of numerous 'medicines' or devices that are more and more being put at the disposal of trained experts"; arguing against capital punishment on the ground that "it is short-sighted to destroy our 'laboratory material' without study"); Albert J. Harno, Rationale of a Criminal Code, 85 U. Pa. L. Rev. 549, 550, 555, 562 (1937) (comparing the criminal to "a man with a contagious disease" and criminality to "matters of sanitation and health").

24. On the conflation of punishment as a legal sanction and as a quasi-patriarchal police action, see Markus Dirk Dubber, The Police Power: Patriarchy and the Foundations of American Government (2005).

25. Solitary confinement, for example, was recommended as the proper treatment for offenders because "isolation is the best means of acting on the moral nature of children." Michel Foucault, Discipline and Punish 294 (Alan Sheridan trans. 1978). The reaction to rehabilitationism since the mid-1970s has reversed the inspirational flow, while retaining the analogy between juvenile and adult punishment. See Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 8 (1981).

26. Glueck, Principles of a Rational Penal Code, 467.

27. See David Garland, Punishment and Welfare 40–41 (1985).

28. See Dubber, The Police Power.

29. Martin J. Wiener, Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914, at 229 (1990).

30. On phrenology in the United States, see W. David Lewis, From Newgate to Dannemora 236–37 (1965); David Brion Davis, Homicide in American Fiction, 1798–1860, at 25–26 (1957); see generally Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 41 (1981).

31. Liszt, Der Zweckgedanke im Strafrecht, 45.

32. Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide (pt. I), 37 Colum. L. Rev. 701, 758 (1937).

33. Alfred L. Gausewitz, Considerations Basic to a New Penal Code (pt. I), 11 Wisc. L. Rev. 364, 374, 382 (1936); see also Glueck, Principles of a Rational Penal Code, 461, 478.

34. See Dubber, Criminal Law: Model Penal Code, § 1.

35. As recently as 1995, a conference in Maryland was devoted to the genetic origins of crime. Sam Fulwood, Scholars Gather to Debate Genetics-Crime Research, L.A. Times, Sept. 23, 1995, A14; see also James Q. Wilson and Richard J. Herrnstein, Crime and Human Nature (1985); The Causes of Crime: New Biological Approaches (Sarnoff A. Mednick, Terrie E. Moffitt, & Susan A. Stack eds., 1987).

36. Plato distinguished between curables and incurables and their respective treatments, rehabilitation and incapacitation. Mary Margaret Mackenzie, Plato on Punishment 186–89, 198–99 (1981). Plato's account even foreshadows the rehabilitationists' classification of criminal punishment as a matter of public hygiene (*Laws* 735). For later analogies between crime and disease, and punishment and medical treatment, see, e.g., Grotius, De Jure Belli, bk. 2, chap. 20, sect. 6 (citing Plutarch's definition of punishment as medicine for the soul); Benedict Carpzov, Practica nova rerum criminalium imperialis Saxonica (1635), pt. 3, qu. 101, nn. 1, 13, 14; Pufendorf, De Jure Naturae, bk. 8, chap. 3, sect. 9 (quoting Plato, Gorgias); Thomasius, Institutiones Jurisprudentiae Divinae, bk. 3, chap. 7, sects. 100–30; Hans Ernst von Globig and Johann Georg Huster, Abhandlung von der Criminal-Gesetzgebung 10 (1783).

37. See Markus Dirk Dubber, Theories of Crime and Punishment in German Criminal Law, 53 Am. J. Comp. L. 679 (2006).

38. On the distinction between character- and act-based varieties of retributivism, see generally Markus D. Dubber & Mark G. Kelman, American Criminal Law: Cases, Statutes and Comments 22–24 (2005).

39. See generally id., ch. 2.

40. 35 Pa. D. & C.2d 615 (Ct. Common Pleas 1964).

41. Including in Pennsylvania, where common law crimes have been abolished by statute. See Pa. Crimes Code § 107(b).

42. For a discussion of the sense of justice as a communal phenomenon, see supra pp. 61–68.

43. Payne v. Tennessee, 501 U.S. 808 (1991). See supra.

44. United States v. Handakas, 286 F.3d 92 (2d Cir. 2002).

45. 18 U.S.C. §§ 1341, 1346.

46. This classic phrase is taken from Johnson v. United States, 333 U.S. 10, 13–14 (1948).

47. See supra pp. 32–33.

48. The executive hunch plays a particularly central role in the law of search and seizure under the Fourth Amendment. There courts have struggled to require police officers to enunciate "probable cause" or, at the very least, "reasonable suspicion." While both terms have proven difficult to define with any precision, it is clear that a police officer's hunch is insufficient to pass either test. Here the hunch is, strictly speaking, a factual rather than a legal hunch, though every fact is significant only insofar as it helps the police officer determine whether the legal definition of a criminal offense has been met. See generally Charles H. Whitebread & Christopher Slobogin, Criminal Procedure: An Analysis of Cases and Concepts (4th ed. 2000).

49. 527 U.S. 41 (1999).

50. See Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner, Chicago v. Morales, No. 97–1121 (June 19, 1998) (amici include "20 civic, religious, and other community associations from throughout Chicago").

51. Woodson v. Foster, 182 Kan. 315 (1958); see generally 42 A.L.R. 3d 1116.

52. See generally Dubber & Kelman, American Criminal Law, ch. 6.

53. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.12 (1986) (citing Model Penal Code § 2.03, Comment at 262 (1985)).

54. Model Penal Code § 2.03(2)(b) & (3)(b). See supra pp. 19–21.

55. See, e.g., People v. Kibbe, 35 N.Y.2d 407 (1974).

56. See generally Dubber & Kelman, American Criminal Law, ch. 5.

57. See generally id., ch. 7.

58. For an example of an objective defense element, see People v. Craig, 78 N.Y.2d 616 (1991) (necessity).

59. People v. Haney, 30 N.Y.2d 328 (1972) (citing Model Penal Code, Tent. Draft No. 9 (May 8, 1959), at 53); see also Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 417 (1958).

60. Model Penal Code, Tent. Draft No. 9 (May 8, 1959), § 201.4, at 53.

61. See Dubber, The Police Power.

62. See generally Dubber, Criminal Law: Model Penal Code.

63. People v. Wesley, 76 N.Y.2d 555 (1990).

64. See supra pp. 77–78 (discussing Smith) & pp. 85–86, 91–105 (discussing Rawls)

65. Model Penal Code § 2.09.

66. Model Penal Code § 2.09, Comment at 7 (Tent. Draft No. 10, 1960) (quoting Hart, The Aims of the Criminal Law, 414 & n.31); see also State v. Toscano, 74 N.J. 421, 378 A.2d 755 (1977).

67. Id.

68. People v. Goetz, 68 N.Y.2d 96, 506 N.Y.S.2d 18, 497 N.E.2d 41 (1986).

69. For an exploration of this question, see Dubber & Kelman, American Criminal Law, ch. 7.B.5 (2005).

70. Model Penal Code § 2.09.

71. Id. § 3.05(1).

72. Id.

73. On the central role of the household, and quasi-household, in conceptions of criminal law, see Dubber, The Police Power.

74. See, e.g., Wis. Stat. § 940.34; 12 Vt. Stat. Ann. § 519. For an earlier explicit rejection of the view that omission liability should track the sense of justice, see United States v. Knowles, 26 F. Cas. 800, 801 (N.D. Cal. 1864) ("the duty omitted must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity, or his sense of justice or propriety").

75. See supra p. 63 ("the healthy sentiment of the people"); see generally Dubber & Kelman, American Criminal Law, ch. 4.

76. See, e.g., State v. Morgan, 86 Wn. App. 74, 936 P.2d 20 (1997) (in omission case, noting defendant's "egregious lack of remorse").

77. See supra pp. 14–15.

78. On the distinction between incapacity and inability excuses, see Dubber, Criminal Law: Model Penal Code, 267.

79. Criminality here simply means a match between the conduct and the definition of some offense; unlawfulness means the absence of a justification. Responsibility means the absence of an excuse. On the tripartite analysis of criminal liability, see Dubber, Criminal Law: Model Penal Code, ch. 1; Dubber & Kelman, American Criminal Law, ch. 3.

80. Model Penal Code § 4.01(1).

81. E.g., N.Y. Penal Law § 40.15 ("[L]ack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, [the defendant] lacked substantial capacity to know or appreciate either: 1. The nature and consequences of such conduct; or 2. That such conduct was wrong.").

82. McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962) (en banc).

83. See, e.g., Thomas Nagel, The Possibility of Altruism 19 (1970) ("The principle of altruism . . . is connected with the conception of oneself as merely one person among others. It arises from the capacity to view oneself simultaneously as 'I' and as someone—an impersonally specifiable individual.").

84. See supra pp. 95–101.

85. See Shaun Nichols, How Psychopaths Threaten Moral Rationalism, or Is It Irrational to Be Amoral? 85 The Monist 285 (2002); John Deigh, Empathy and Universalizability, in The Sources of Moral Agency: Essays in Moral Psychology and Freudian Theory 160 (1996); Jeffrie Murphy, Moral Death: A Kantian Essay on Psychopathy, 82 Ethics 284 (1972).

86. Autism presents another difficult case. There appears to be considerable evidence, however, that autism also involves a cognitive deficiency, specifically the incapacity for empathic role taking. See Shaun Nichols, Mindreading and the Cognitive Architecture underlying Altruistic Motivation, 16 Mind & Language 425 (2001); see also Jeanette Kennett, Autism, Empathy, and Moral Agency, 52 Phil. Q. 340 (2002).

87. See Dubber, Regulating the Tender Heart.

88. 98 N.Y.2d 373 (2002)

89. Id. at 410.

90. Id. at 400.

91. "This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' " Tison v. Arizona, 481 U.S. 137 (1987).

92. People v. Sanchez, 98 N.Y.2d 373, 400 (2002).

93. But see E. P. Evans, The Criminal Prosecution and Capital Punishment of Animals (1987) (1906).

94. This oversimplifies the current state of affairs and its historical origins. For a more detailed discussion of this subject, see Dubber & Kelman, American Criminal Law, ch. 2.

95. See, e.g., the overhaul of federal insanity law following John Hinckley's acquittal of charges relating to his attempt to assassinate President Reagan or, for that matter, the genesis of the original *M'Naghten* insanity rule in the wake of an acquittal of an attempt to assassinate the British Prime Minister. See Richard J. Bonnie, Peter W. Low, & John C. Jeffries, Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr. (2d ed. 2000).

96. Anything else would violate the principle of prospectivity (also known as the prohibition of *ex post facto* criminal lawmaking). See Dubber & Kelman, American Criminal Law, ch. 2.

97. This too is a constitutional requirement—criminal laws targeted by the legislature at a particular person are prohibited as bills of attainder. See U.S. Const. art. I, sec. 9; United States v. Brown, 381 U.S. 437 (1965).

98. Although this progression is gradual and rarely made explicit in legal or constitutional doctrine, the rebuttal of the presumption of innocence in the form of a conviction is generally considered to represent a significant way station. See, e.g., United States v. Kills Enemy, 3 F.3d 1201, 1203 (8th Cir. 1993) (contrasting pretrial releasees with convicted persons awaiting sentence, and noting that the latter are "no longer entitled to a presumption of innocence or presumptively entitled to [their] freedom").

99. Henry Schwarzschild, Homicide by Injection, N.Y. Times, Dec. 23, 1982, at A15 (quoting then-Governor Reagan's 1973 comments in support of lethal injection); see generally Dubber, The Pain of Punishment, 563–73.

100. On the difficulty of empathic identification at the capital sentencing hearing after the defendant has been convicted of capital murder, see Robert Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305; Dubber, Regulating the Tender Heart.

101. Today, upward of 90 percent of criminal cases are resolved without a jury trial. See Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stan. L. Rev. 547 (1997).

102. On antisympathy instructions, see Martha C. Nussbaum, Equity and Mercy, 22 Phil. & Pub. Aff. 85 (1993); Dubber, Regulating the Tender Heart.

103. Dubber, The Pain of Punishment.

104. For previous discussions of the jury and the sense of justice, see supra pp. 64–68.

105. Cf. Thomas A. Green, Societal Concepts of Criminal Liability in Mediaeval England, 47 Speculum 669, 688 (1972) ("from the outset of the common law period, trial juries reflected a sense of justice fundamentally at odds with the letter of the law").

106. For a spirited defense of jury nullification in certain cases, see Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677 (1995).

107. FIJA Home Page Fully Informed Jury Association, http://nowscape.com/fija/fija_us.htm.

108. South Dakota Rejects Jury Nullification, in Minnesota Planning, Minnesota IssueWatch, Dec. 2002, http://www.mnplan.state.mn.us/issues/scan.htm?Id=3198.

109. Bob Egello, Judge Keeps Tight Rein on Pot Trial: References to Med-

ical Uses Quickly Squelched in Federal Court, S.F. Chronicle, Jan. 31, 2003, http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/01/31/BA213606.DTL.

110. Id.

111. See Model Penal Code §§ 3.02 & 3.03.

112. Josh Richman, Jurors Tell Ed Rosenthal They're Sorry, Oakland Trib., Feb. 5, 2003, http://www.oaklandtribune.com/Stories/0,1413,82%257E1865%257E1159355,00.html#.

113. Id.

114. No defendant, and no victim, has the right to a jury composed of members of her race, or even one that reflects the racial makeup of her community. The Sixth Amendment right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed" has been held to require that the jury be selected at random from a fair cross-section of "the community" (as determined by the locus of the crime, not the residence of either defendant or victim). Under the Equal Protection Clause, underrepresentation of a group within "the community" may raise a presumption of intentional discrimination against that group. For a recent illustrative case on representativeness, see United States v. Rodriguez-Lara, 421 F.3d 932 (9th Cir. 2005); see generally Markus Dirk Dubber, The Criminal Trial and the Legitimation of Punishment, in The Trial on Trial 85 (R. A. Duff et al. eds., 2004).

115. On the question of representativeness in nonjury proceedings, see Dubber, American Plea Bargains.

116. Caleb Lownes, An Account of the Alteration and Present State of the Penal Laws of Pennsylvania, in William Bradford, An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania 73, 76 (1793).

117. See, e.g., The State of the Prisons in England and Wales (1777); An Account of the Principal Lazarettos in Europe (1789).

118. Francis Hutcheson, An Inquiry into the Original of Our Ideas of Beauty and Virtue, Treatise II: An Inquiry Concerning the Original of Our Ideas of Virtue and Moral Good 165 (1725); Anthony Ashley Cooper, Third Earl of Shaftesbury, 2 Characteristicks of Men, Manners, Opinions, Times 420 (1737–38); David Hume, A Treatise of Human Nature 316–20, 369–71, 470–76 (L. A. Selby-Bigge ed., 1888; 1749); Adam Smith, The Theory of Moral Sentiments (9th ed., 1801; 1759); Jacques Rousseau, Emile or On Education (Allan Bloom trans. 1979; 1762); David Hume, An Enquiry Concerning the Principles of Morals 146 (1777; 1751); see also Garland, Punishment and Modern Society, 221, 233, 236; David Marshall, The Figure of Theatre: Shaftesbury, Defoe, Adam Smith, and George Eliot (1986); John Mullan, Sentiment and Sociability: The Language of Feeling in the Eighteenth Century (1988); Karen Halttunen, Humanitarianism and the Pornography of Pain in Anglo-American History, 100 Am. Hist. Rev.

303 (1995); Norman S. Fiering, Irresistible Compassion: An Aspect of Eighteenth-Century Sympathy and Humanitarianism, 37 J. Hist. Ideas 195 (1976).

119. Lownes, An Account of the Alteration and Present State of the Penal Laws of Pennsylvania, 83.

120. No feature of prison life, however, was considered to be more disagreeable than the "coarse fare." Id.; see Bentham, Principles of Penal Law, 421 (ranking "Confinement to disagreeable diet" as first and "Total exclusion from society" as fourth on a list of seven "*Accessory Evils, commonly attendant on the Condition of a Prisoner*").

121. Lownes, An Account of the Alteration and Present State of the Penal Laws of Pennsylvania, 76–77. Ironically, the gangs of wheelbarrow men were the first offspring of the punishment reform effort in late-eighteenth-century Philadelphia. From 1786 until 1790, four years before the opening of the "Penitentiary House," offenders convicted of noncapital felonies cleaned the streets of Philadelphia with "an iron collar around their necks and waist to which a long chain is fastened and at the end a heavy ball." Michael Meranze, The Penitential Ideal in Late Eighteenth-Century Philadelphia, 108 Pa. Mag. Hist. & Biography 431, 432 (1984). Their heads shaved, the wheelbarrow men wore conspicuous clothes ("an infamous habit") that indicated the nature of their crime. Lownes, 76.

122. 1 Smith, The Theory of Moral Sentiments, 1–5; Hume, A Treatise of Human Nature, 319, 371, 385. For an example of a similar contemporary account of empathic judgment, see Martin L. Hoffman, Toward a Theory of Empathic Arousal and Development, in The Development of Affect (Michael Lewis & Leonard Rosenblum eds., 1987); see also Empathy and Its Development (Nancy Eisenberg & Janet Strayer eds., 1987).

123. Hume, A Treatise of Human Nature, 316–20, 359, 604; see also Randall McGowen, Punishing Violence, Sentencing Crime, in The Violence of Representation: Literature and the History of Violence 144, 146 (Nancy Armstrong & Leonard Tennenhouse eds., 1989) (role of empathy and identification in the criminal law reform movement in early-nineteenth-century England); Garland, Punishment and Modern Society, 260 (discussing Burke's theory of rhetoric as producing identifications).

124. Lownes, An Account of the Alteration and Present State of the Penal Laws of Pennsylvania, 82–83 (emphasis in original).

125. Id.

126. See supra pp. 119–22.

127. See Joanna Innes, The King's Bench in the Later Eighteenth Century: Law, Authority and Order in a London Debtors' Prison, in An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries 251, 257 (John Brewer & John Styles eds., 1980).

128. Meranze, The Penitential Ideal, 442 (quoting Pennsylvania Gazette, 26 September 1787).

129. Cf. Michael Meranze, Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760–1835, at 60, 156, 176 (1996) (class distinctions in late-eighteenth-century Philadelphia).

130. A similar distinction among offenders appears in Jefferson's proportionate punishment bill for the State of Virginia, which sough to "reform" offenders "committing an inferior injury," but to "exterminate" anyone "whose existence is become inconsistent with the safety of their fellow citizens," albeit only as "the last melancholy resource." Thomas Jefferson, Preamble to Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital of 1779; see generally Markus Dirk Dubber, "An Extraordinarily Beautiful Document": Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment, in Modern Histories of Crime and Punishment (Markus Dirk Dubber & Lindsay Farmer eds., forthcoming 2006).

131. Gunter Haber has pointed out that much of the zeal with which the rising German bourgeoisie pursued the introduction of public jury trials during the first half of the nineteenth century can be attributed to the identification with the bourgeois victims of the political prosecutions of the period. Gunter Haber, Probleme der Strafprozeßgeschichte im Vormärz: Ein Beitrag zum Rechtsdenken des aufsteigenden Bürgertums, 91 ZStW 590 (1979). In late-eighteenth-century England, the plight of political prisoners likewise did much to mobilize political resistance against the expansion of solitary cell penitentiaries. Michael Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850, at 120–33 (1978).

132. See generally Christopher Adamson, Wrath and Redemption: Protestant Theology and Penal Practice in the Early American Republic, 13 Crim. Just. Hist. 75 (1996).

133. Constitution of the Philadelphia Society for Alleviating the Miseries of Public Prisons (May 8, 1787), in Reform of Criminal Law in Pennsylvania: Selected Enquiries 1787–1819, at 105 (1972); see also Roscoe, Observations on Penal Jurisprudence, 176–77 (reform "is founded on Christian principles, and applies the precepts of our religion to the conduct of our lives [and] considers a criminal as an unfortunate fellow-creature, led on to guilt through a great variety of causes, but capable by kindness, patience, and proper discipline, of being reformed and restored to society").

134. Note also the identity of reformer and offender in contrast to omniscient and omnipotent God. Grotius, De Jure Belli, bk. 2, chap. 20, sect. 4.

135. See generally Dubber, The Right to Be Punished.

136. See Patricia Allard & Marc Mauer, Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws (2000); Extending

Democracy to Ex-Offenders, N.Y. Times, June 22, 2005, at A18, col. 1 (five million citizens barred from voting in the 2004 presidential election).

137. Note that the loose, and largely symbolic, limits that constitutional prison law places on prisoner abuse by guards are framed in terms of empathy, or rather its absence. As a basic defect in his sense of justice (malice, malignant heart) once deprived the householder, at least in theory, of his discretionary authority to discipline members of his household as he saw fit, so today prison guards may not, at least in theory, constitutionally discipline prison inmates out of "malice and sadism." Hudson v. McMillian, 503 U.S. 1 (1992).

138. See, e.g., Correctional Services Act 1998 (S. Africa); StVollzG (German Code of Punishment Execution); see generally James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe (2003).

139. Whatever constitutional law addresses the treatment of prisoners specifically differentiates between various breakdowns in guards' sense of justice vis-à-vis inmates under their control, ranging from "deliberate indifference" to "malice or sadism." Compare Estelle v. Gamble, 429 U.S. 97 (1976) with Hudson v. McMillian, 503 U.S. 1 (1992). Constitutional law comes into play only if the guards' conduct (or omission) constitutes an "unnecessary and wanton infliction of pain." Note the parallel here to the definition of depraved indifference murder, discussed supra pp. 135–36. See also People v. Gonzalez, 1 N.Y.3d 464 (2004) ("wanton [and] deficient in a moral sense of concern").

140. See, e.g., United States v. Scott, 424 F.3d 888 (9th Cir. 2005).

141. See id.

142. For an argument that punishment execution in the United States has remained a species of police rather than of law, see Dubber, The Police Power, 33–34, 51–52.

143. See generally Sharon Dolovich, State Punishment and Private Prisons, 55 Duke L.J. 437 (2006).

144. See Dubber, Victims in the War on Crime, pt. I.

NOTES TO THE CONCLUSION

1. See supra ch. 1.

2. See supra chs. 2 & 3.

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

4. See German Penal Code § 2 (1935) (emphasis added): "That person will be punished who commits an act which the law declares to be punishable or which deserves punishment according to the fundamental principle of a penal

statute and *the healthy sentiment of the people*." On the legality principle, see supra pp. 123–26.

5. See, e.g., Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933).

6. John Rawls, A Theory of Justice 312 (1971).

7. See, e.g., Justice Black's attack on the "natural-law-due-process formula," discussed supra at p. 12.

8. See Edmond N. Cahn, Authority and Responsibility, 51 Colum. L. Rev. 838 (1951); see also Edmond Cahn, The Moral Decision: Right and Wrong in the Light of American Law (1955).

9. Occasionally it appears that the fundamental question of American constitutional law is "*Whose* sense of justice is trump?" So Henry Hart, in his famous 1958 article *The Aims of the Criminal Law,* lamented that the U.S. Supreme Court had abdicated its constitutional responsibility by leaving principles of criminal law to the "legislature's sense of justice." Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 410 (1958). In an extended, if somewhat belated, critique of Hart's article, Louis Bilionis recently took Hart to task for thinking that the political process was insufficient to handle cases where the legislature's sense of justice "does not agree with the *public's* sense of justice." Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269, 1286 (1998) (emphasis added). Bilionis suggested that Hart would have been better off thinking about what would happen if Supreme Court Justices "confused their own elitist views for the sense of justice held by the public as a whole." Id.

10. See, e.g., United States v. Russell, 411 U.S. 423 (1973).

11. See supra ch. 4.

12. For a detailed discussion of the American legal system as a system for the vindication of victims' rights through victim compensation and, as a last resort (*ultima ratio*), punishment, see Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights (2002).

13. See supra ch. 5.

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Markus Dirk Dubber is Professor of Law and Director of the Buffalo Criminal Law Center, SUNY Buffalo School of Law. His many books include *The Police Power: Patriarchy and the Foundations of American Government* and *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (NYU Press, 2002).