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JUSTICE AND LOVE

Raymond B. Marcin*

I. IDEALS

From heaven's height a heaven-born sympathy we drew. To us the Maker gave a soul that mutual kindly feeling might us prompt to seek and render aid, and peoples form from scattered dwellers . . . .

Those words of Juvenal were on my mind as I sat down to participate in a seminar on "the philosophical underpinnings of constitutional interpretation." Juvenal's words are pleasant, not profound, and the sentiment they express is simple, not complex. Juvenal was merely saying that the human being is a social animal.

The seminar began, and we found ourselves searching for ways of defining those fundamental rights which, by a process of "noninterpretive review," might exist in the vicinity of first- and fourteenth-amendment thought. Basic concepts of justice naturally suggested themselves to us, and we found ourselves exploring the various definitions of "justice" espoused by the various legal philosophers. As we progressed, our inquiry came quite close to the ground-zero level of moral thinking. We were unhampered by legalisms or even by direct constitutional restrictions. Our question became something like this: What is the prime characteristic which ought to be present in human social interaction? Of course, we assumed "justice" to be the broad answer and our immediate problem to be honing the concept down to its essence. And as we discussed the various offerings of the various legal philosophers on the meaning of justice, a common thread seemed to be discernible. They all seemed to be based on theories of rights and entitlements, or on how to organize a political system in which the rights and entitlements of human beings would be most fully

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3. The seminal and somewhat question-begging definition is that of Ulpian: "Honeste vivere, alterium non laedere, suum cuique tribuere"—To live honestly, to cheat no one, and to give each his due. T. Cooper, The Institutes of Justinian § III, at 6 (1812).
recognized. Justice, in other words, seemed to be grounded in an axiom that what ought to characterize human social interaction is a recognition of rights and entitlements—rights to acquire, to keep, to use, to own, to be let alone, to be helped. And this rights-and-entitlements focus seemed, in turn, to be grounded in one human characteristic—the human wish or need to acquire, to keep, and to hold against other humans, in other words, acquisitiveness.

The words of Juvenal came to mind, and suddenly the thought struck. When we define "justice" in terms of human acquisitiveness—more precisely, when we define "justice" exclusively in those terms—we may be creating a milieu for human social interaction which urges, perhaps determines, us to think in terms of acquisitiveness, possibly at the expense of other, more deeply human qualities. We were forced back into our original question of what is the prime characteristic which ought to be present in human social interaction. And this time a different, more startling answer suggested itself. And yet maybe it oughtn’t to have been startling. If one resists the temptation to give an immediate answer to that question of what is the prime characteristic which ought to be present in human social interaction, if one lets one’s simplest feelings roll and jostle around a bit, the answer that percolates to the surface ignites one with the force of an ideal: Love ought to be present in human social interaction.

But perhaps that thought isn’t such a great insight. Perhaps it’s only a great insight for a lawyer. Perhaps the legal philosophers actually do begin their thought with that forceful ideal. But reality necessarily intrudes. It’s precisely because human social interaction isn’t always characterized by love that social rules must come into being. We simply can’t pause at that ideal of “love” and build a society around it, because love is not ame-

4. “Love” is, of course, a complex topic, not free of ambiguity and anomaly. Rollo May has identified four usages of the term: “There are four kinds of love in Western tradition. One is sex, or what we call lust, libido. The second is eros, the drive of love to procreate or create—the urge, as the Greeks put it, toward higher forms of being and relationship. A third is philia, or friendship, brotherly love. The fourth is agape or caritas as the Latins called it, the love which is devoted to the welfare of the other, the prototype of which is the love of God for man.” R. MAY, LOVE AND WILL 37 (1969). It is Dr. May’s belief that “[e]very human experience of authentic love is a blending, in varying proportions, of these four.” Id. Irving Singer, on the other hand, has said that “concepts of eros and agape are ultimately inconsistent with one another. . . . Eros recognizes value and loves it—Agape loves, and creates value in its object.” I. SINGER, THE NATURE OF LOVE 322 (1966) (emphasis added). Erich Fromm has perhaps described “love” in a way most consistent with the use of the term in this essay: “The basis for our need to love lies in the experience of separateness and the resulting need to overcome the anxiety of separateness by the experience of union.” E. FROMM, THE ART OF LOVING 53 (1956). In the social context, Fromm’s idea of love seems to be most closely related to “philia.” For the most part we use the term in that sense, although in later portions of the essay we will discuss “agape” implications.
nable to being organized, and is certainly not amenable to being compelled. Love seems to be something which is simply present in human beings—the "heaven-born sympathy" and "mutual kindly feeling" of which Juvenal wrote—to be given, not wrested. Indeed, love wrested is no longer love. And so the philosophers dismiss love as an organizing principle. We build our political systems on justice rather than on love, and necessarily so.

But still, no matter how sensitive and humane our definition of justice may be, we feel discomfort. In the microcosm of the individual human being it is not unusual for feelings of discomfort to arise when one realizes, sometime during the maturing process, that one must temper the pure idealism of youth with the realities that one must often choose the lesser of evils and that not everyone's ideas of righteousness, justice, goodness, and truth comport with one's own. But the discomfort abates in the mature individual who, while still accepting the ideals of youth, has come to recognize those ideals as guides rather than dogmas—guides which cannot always be literally adhered to, but which strengthen and inform one's approach to social and moral questions. Few there are who would argue that the ideals of youth, however naive they may be, ought to be crushed when adulthood arrives. It's not their destruction but their shaping that matures a mind.

If now we turn our telescope around and look at the macrocosm of society, we can see the reason for our discomfort with the philosophers' definitions of justice. We have, somewhere deep in our collective psyche, the youthful ideal of love. But we've matured. We've come to recognize that the realities of the human situation—human imperfection, ideological pluralism—prevent us from building and nurturing a political system directly and solely on that youthful ideal. And so we build and nurture our political systems on concepts of justice. And perhaps the source of our continuing discomfort is the suspicion that in basing our concepts of justice on the wish or need to acquire, to keep, and to hold against others, regardless of how humanely or progressively we've treated it, we may be crushing rather than shaping that ideal of love.

II. ALF ROSS AND THE MEANING OF "JUSTICE"

Alf Ross, the Scandinavian jurist and apologist for the logical positivist school of jurisprudence, analyzed the concept of justice as understood by the major legal philosophers and jurisprudential schools and was able to discern what have appeared to be the major components of the concept.\(^5\)

Beyond the somewhat question-begging Roman concept of giving everyone his due,\(^6\) Ross noted the uniform occurrence of an equality notion in the more content-oriented definitions of the term, a requirement in general that no one be arbitrarily subjected to treatment that differs from that accorded to any other person.\(^7\) Further, he observed that since none of the definitions demanded absolutely equal treatment for individuals, there was a rationality component in the concept as well, a demand that differing treatment be in some way reasonable, a yardstick of evaluation for departures from absolute equality.\(^8\) And in these features of content-oriented approaches to defining justice—the lack of a demand for absolute equality and instead a demand for some form of rationality governing departures from equality—Ross found the gremlin that untracks all such approaches, i.e., ideological pluralism.

Ross may have overstated the case when he said: “All wars have been fought by all parties in the name of justice, and the same is true of the political conflict between social classes.”\(^9\) But there does seem to be just enough empirical truth in the assertion to give one pause. And it may not be, as Ross contended it was, “possible to advance every kind of material postulate in the name of justice,”\(^10\) but Ross’s main lesson is not lost on us. People may honestly, honorably, and rationally disagree about the meaning of the term justice, and any approach to defining the term that does not take that fact into account is doomed. Ross’s unsettling conclusion:

To invoke justice is the same thing as banging on the table: an emotional expression which turns one’s demand into an absolute postulate. . . . It is impossible to have a rational discussion with a man who mobilizes “justice,” because he says nothing that can be argued for or against. His words are persuasion, not argument. The ideology of justice leads to implacability and conflict, since on the one hand it incites to the belief that one’s demand is not merely the expression of a certain interest in conflict with opposing interests, but that it possesses a higher, absolute validity; and on the other hand it precludes all rational argument and discussion of a settlement.\(^11\)

Thus we see in Ross’s critique of the justice-definers an added reason for our feeling of discomfort. Not only does the content of most of the definitions bespeak acquisitiveness, the wish or felt need to acquire, to keep, and

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6. See supra note 3.
7. See A. Ross, supra note 5, at 269.
8. Id. at 270.
9. Id. at 269 (emphasis added).
10. Id. at 275.
11. Id. at 274-75 (citation omitted).
to hold against other human beings, but the very fact of believing in one's definition of justice leads to implacability and conflict. Our philosophers and theorizers are taking us far indeed from that youthful ideal.

III. THOMAS BECKET AND BROTHER JOHN

The implications of all this for participants and practitioners in a system of justice, particularly an Anglo-American system, are obvious and ominous. Our legal systems are, predictably and predominantly, win-or-lose apparatuses. With acquisitiveness at the base of an ideal the very adherence to which perpetuates implacability and conflict, our purpose as lawyers seems to be to win for our clients. We do, of course, view our purpose as lawyers as somewhat more complex than that (we like to think); but in the end we even dally with the notion that our purpose is to win for our client right-or-wrong. The arguments and tactics we devise bespeak division and hostility. We are all too often, and sometimes all too close to irretrievably, soldiers. We war. And deep down, we don't feel good about this, because deep down we know that humanity is good and that all of us, lawyer and opposing counsel, client and opponent, even oppressor and oppressed, share humanness and the goodness in it. And we know, deep down, that what is needed in the area of human-social-interaction-gone-awry is not victory, but healing.

One wonders whether healing is or can be consistent with a concept of justice. The answer is not easy. Jean Anouilh included in his play "Becket" a brief colloquy on the meaning of justice. Moments before Becket was to be murdered in the Cathedral at Canterbury, he and Brother John, the somewhat feisty and very human monk who served him as acolyte, discussed a premonition of the attack:

MONK. . . will it be today?
BECKET. (Gravely) I think so, my son. Are you afraid?
MONK. Oh, no. Not if we have time to fight. All I want is the chance to strike a few blows first; so I shan't have done nothing but receive them all my life. If I can kill one Norman first—just one, I don't want much—one for one, that will seem fair and right enough to me.
BECKET. (With a kindly smile) Are you so very set on killing one?
MONK. One for one. After that I don't much care if I am just a grain of sand in the machine. Because I know that by putting more and more grains of sand in the machine, one day it will come grinding to a stop.

BECKET. (Gently) and on that day, what then?
MONK. We'll set a fine, new, well-oiled machine in the place of
the old one and this time we'll put the Normans into it instead.
He asks quite without irony: That's what justice means, isn't it?
BECKET smiles and does not answer him.13

It is a measure of our discomfort that Becket merely smiled, and didn't
answer Brother John. We might have expected Becket, who at that point
in the play had developed into a wise and saintly man, to have answered
Brother John with some saintly wisdom: "No, Brother John. Justice does
not mean that. Justice means healing, and reconciling, and showing mercy
even though the Normans have shown none." But Becket only smiled.
The discomforting truth is that justice does indeed mean what Brother
John thought it meant. It is indeed "just" that a wrongdoer be punished.
And that being so, striking back at the oppressor was Brother John's enti-
tlement and the oppressor's due. Hidden in Becket's smile is perhaps the
image of Normans oppressing Saxons, then Saxons oppressing Normans,
then Normans oppressing Saxons, et cetera ad nauseam—all in the name
of justice. One wishes that there were more to justice than the scale.

IV. THOMAS SHAFFER AND THE PROPHET NATHAN

There are, of course, reasons for optimism. Sometimes reforming sensi-
tivities in the practical world precede those in the world of theory. Law-
yer-philosopher-theologian Thomas Shaffer, analyzing techniques of
advocacy used by lawyers, recently came up with a definition, not of "jus-
tice," but rather of "advocacy"—a definition which has a derivative impact
on theoretical understandings of justice. "Advocacy," Shaffer insisted, "is
largely, in fact, the practice of reconciliation."14 Shaffer's model of law-
yerly advocacy is the Prophet Nathan. Those of us schooled in Judaeo-
Christian traditions will recall that Nathan's difficult task was
prosecutorial—to bring King David to justice. David had treated Uriah
unjustly. Coveting and then taking Uriah's wife, Bathsheba, King David
then sent Uriah to the war front and predictable death. Nathan success-
fully indicted David by telling him a similar tale of injustice, eliciting the
king's own statement condemning the injustice, and then revealing to the
king the analogy between the tale of injustice and the king's own treatment
of Uriah.15 Shaffer's point is that we, as advocates, succeed most readily
and most fully when we "as Nathan did, first engage conscience."16 One

15. 2 Samuel 12:1-7.
thinks, as does Shaffer, of Mohandas Gandhi and Martin Luther King, Jr., who as advocates did indeed “first engage conscience,” and achieved society-altering success.

Shaffer’s is a healing model of advocacy. That model certainly exists in our systems of justice. But it can not be said to be the predominant model, or even the norm. The norm is, as Shaffer has indicated, our “professional tradition nourished by images of the champion.” And it is not an unattractive norm, this image of a champion of another’s cause, doing battle righteously, uncompromisingly—the knight in the right, the avenging angel bringing evil to its just reward. We like this norm, this image of the champion. It exudes to us courage, steadfastness in the face of danger, and many of the qualities which we feel ennoble us. And yet, while we readily hold to this image as, perhaps, the highest tradition of the bar, we once again feel discomfort.

A great value of Shaffer’s work is that it helps pinpoint the source of our discomfort. When we look closely at his example of the advocacy of the Prophet Nathan we see a small, but all-significant distinction. Nathan was indeed a champion doing battle, but he was not an avenging angel. Nathan’s battle was not against David, but with him, champion and adversary alike joined in battle against the real enemy—injustice. In Nathan we see all the virtues that we admire in the champion—undeniable courage, steadfastness in the face of danger—but we do not feel discomfort. The result of Nathan’s advocacy was a healing. The result of an avenging angel’s advocacy is—what? Vengeance? The evil-doer getting his due? Frustration of the evil-doer’s mischievous design? The defeat, the comeuppance of the evil-doer? We go on and on and we never come to a result that will completely satisfy us. The wrong is frustrated, but not righted. Injustice is excised, but justice not established. There is no healing.

But Nathan healed. And he did so by engaging David’s conscience, by taking David out of the mental position that he (David) was in, with all its well-insulated and guarded emotional predeterminates, and by placing him in a different mental position, an artificial position unclouded by the factors which had so hampered David’s judgment in the Uriah incident. This “artificial-position” technique which resulted in the healing, in a reestablishment of justice, is curious. Nathan, in achieving not simply a just result, but justice itself, never defined justice. David became a just man once again, and “just” not simply on his own subjective level clouded and insulated by ego defense mechanisms, but “just” on some objective level, really “just,” healed—and all without an explanation of what justice ob-

17. *Id.* at 111.
jectively means. One wonders whether Alf Ross would have trouble with the notion of justice in the Nathan story. Nathan’s is not the objective syllogistic advocacy model of “justice” that Ross so devastatingly de-
frocked, the “justice is what I claim it to be, your conduct does not com-
port with that, therefore you have committed an injustice” model. Nathan’s justice, strangely devoid of specific content, somehow leaves us convinced that there is content, content beyond mere self interest, impor-
tant content, in the term, and a content that goes beyond rights and entitle-
ments and acquisitiveness to something deeper, nobler. This content-less artificial-position approach merits further discussion.

V. BROTHER JOHN MEETS THE PROPHET NATHAN

We spoke earlier about Thomas Becket’s wan smile in the face of Brother John’s fairness-and-equality type of definition of justice. Brother John’s definition of justice was, assuming that the Normans really were wrongdoers, conventional. We cannot help but believe that there is something unconventional about the Prophet Nathan’s non-definition of justice, a non-definition that seems to have much more content, much more social worth, than Brother John’s. Those of us who like to categorize and classify will have no trouble with that seeming anomaly. As with love, we use the term “justice” to cover more than one idea. In “justice” there are two concepts, the legal standard and the moral virtue. And the categorizers among us, particularly those of us who adhere to legal positiv-
ism, will have no trouble decreeing to us that the legal-standard notion of justice belongs to the discipline of law or jurisprudence, while the moral-virtue notion of justice belongs to the discipline of ethics or moral philosophy. Law regulates the external relations of human beings, whereas morality governs their internal life. One might find the reasoning of the categorizers more persuasive if the end result of Brother John’s ap-
proach to justice (the legal-standard type of justice) were not so socially and politi-
cally destructive and the end result of the Prophet Nathan’s approach to justice (the moral-virtue type of justice) were not so socially and politi-
cally constructive. It may be that by categorizing and classifying and then filing “justice” so completely and with such exclusivity into two separate academic disciplines we have overdone it a bit. Thus, the categorizers among us will probably understand this essay as an exploration into the

18. See supra notes 5-11 and accompanying text.
19. See supra note 13 and accompanying text.
20. See generally supra note 4.
connections between the virtue of justice and the standard of justice. But the title of this essay suggests something deeper, something the presence of and connection with which may have rendered the Prophet Nathan's nondefinition of justice so full of meaning, and the absence of or separation from which may have rendered Brother John's definition of justice so disturbing. And we're left with a quandary at this point. If content-based definitions of justice tend to focus on entitlement and acquisitiveness and if the very idea of insisting upon a specific content for the concept of justice leads to implacability and conflict, then how are we to view this highest of our social ideals? Are we to eschew it in favor of another ideal, e.g., the possibly higher ideal of love? But we've already granted that love is inappropriate as an organizing principle for a political society. If defining justice leads us nowhere, we may try the Prophet Nathan's idea of not defining justice. We might explore the "artificial position" approach.

VI. ARTIFICIAL-POSITION THEORIES

Perhaps the prophet Nathan's artificial-position approach struck us as novel. But in truth it is based on a sensibility that's at least as old as the teachings of Jesus, Hillel, Confucius, and Moses: the Golden Rule.22 "Do unto others as you would have them do unto you" is so commonly known an artificial-position approach to the moral virtue of justice that we perhaps seldom plumb its true depth and certainly seldom if ever explore its relevance to systems of justice. Indeed Matthew quoted Jesus as saying that the Golden Rule sums up the law and the prophets.23 But Jesus has not been the only one to mention the Golden Rule in the same breath with "law." The famed Categorical Imperative of Immanuel Kant is a version of the Golden Rule that is still having its impact on legal and moral theory: "There is . . . only one categorical imperative. It is: Act only according to the maxim by which you can at the same time will that it should become a universal law."24

Both the Golden Rule and Kant's Categorical Imperative are content-avoiding approaches to the meaning of justice. They prescribe no specific content at all and yet, as with Nathan's approach, they seem to be bursting with meaning and importance. They place the decisionmaker, the justice-seeker, in an artificial position, that of committing one's act on oneself or on all of humankind. We often regard the Golden Rule and the more

23. Matthew 7:12.
contemporary versions of the Categorical Imperative as platitudes, little axioms of experience that seem to work. We seldom ask why—what it is about human nature, humanness, that seems to give them validity and effectiveness. Perhaps it's the fault of the maxims themselves. They are process-oriented rather than content-based. And we tend to measure the truth of processes in terms of effectiveness, whereas we tend to measure the truth of content in terms of reasoning and grounding. But to ignore the reasoning and grounding of these process-oriented, artificial-position approaches to the meaning of justice is to ignore an opportunity to learn more about humanness.

VII. JOHN RAWLS

One finds it difficult to write of justice in the contemporary era without filtering it through the thought of John Rawls. Rawls' *A Theory of Justice* puts forth a fully developed artificial-position approach joining Kantian moral theory to the political and contractarian ideas of Rousseau and Locke. Rawls sets forth a method of discovering (and justifying if you will) a society's fundamental principles of justice. His method involved the assumption of an artificial position, what Rawls called the "original position," a situation in which rational, self-interested persons who have general knowledge about society and who appreciate the worth of moral principles, but who know nothing else about themselves—not their social status, their race, their preferences as to life style, not even their own sex—choose the general principles of justice for their society. Rawls' idea, of course, was to abstract from all those factors which make for bias or error in moral thinking. People under this "veil of ignorance," as he called the original-position condition, can be trusted to come up with those general principles of justice which best comport with fairness.

The genius of Rawls' theory is that it accommodates the two ideals which most if not all content-based theories of justice strive to serve: individual liberty and social equality. The justice-seekers in Rawls' original position are motivated by self-interest (the individual-liberty factor) and are deprived of knowledge of those factors which so often in the past have resulted in social inequality. Rawls' mechanism for deciding, the process, is fair; hence he has called his theory "Justice as Fairness."26

It is significant that Rawls posited that his justice seekers in the original position be "self" interested. He was quite definite on this point, and ex-

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26. Id. at 11.
pressly rejected “benevolence” as an original-position trait. But curiously, almost paradoxically, Rawls insisted that a sense of justice is “continuous with” the love of humankind. How Rawls reconciled his requirement of a rational “self” interest in his original-position theory with an outward-looking love of humankind can best be understood by first taking a slight side-trek into history.

The French Revolution is perhaps most commonly remembered today for its excesses. We find it difficult, recalling those excesses, to regard the French Revolution as a phenomenon of constructive political theory, and yet it was. A new social order was created—a new one—not the old vertical, hierarchical order, but a level, horizontal order based on the two great needs of the day: freedom and equality. And again, focusing on those later excesses, it is difficult to credit the revolutionary theorists with genius. But they did possess genius, and perhaps it was best exemplified in their recognition that there is a root tension between the concepts of freedom and equality. Individual freedom results in social inequality, and imposed social equality curtails individual freedom. The solution of the revolutionary theorists was, of course, proudly proclaimed in the slogan of the French Revolution: Liberty, Equality, and Fraternity. The two conflicting political principles were seen as reconcilable, but only in the resolving agent of “fraternity.”

That the “fraternity” seized upon by the revolutionaries themselves ultimately proved to be the Freudian Oedipal brotherhood of destructive violence instead of some more benign manifestation is not, one may believe, the fault of the idea. Other conceptions of fraternity are possible. In fact, two millennia before the French Revolution Aristotle saw the need for political fraternity, though not as a reconciling agent between liberty and equality. In Aristotle’s scheme of things, political fraternity was a benign force empirically necessary in order to hold a society together and forestall revolution, but also somehow preexisting the political society; it was a force like Juvenal’s “mutual kindly feeling,” making political society a natural and necessary human enterprise. The origin of this benign force,

27. Id. at 191.

28. One is, of course, tempted to try to avoid the single-sex connotation inherent in the word “fraternity” by using a gender-neutral synonym, e.g., “solidarity,” “friendship,” “unity,” but both the slogan and Rawls used “fraternity,” and we stay, for the most part, with that term.

29. Aristotle saw the need for political fraternity as a mediating link between the spheres of household, where in his Greek society slaves and women lacked individual liberty, and civic life. See Kronman, Aristotle’s Idea of Political Fraternity, 24 AM. J. JURIS. 114, 115 (1979).

30. See supra note 1 and accompanying text.
according to Aristotle, was a kind of inter-identity among human beings, a recognition of the fact that humanness is shared and that other human beings are other "selves." 31

John Rawls certainly understood the significance of fraternity in connection with freedom and equality, and his understanding of that significance occupies a focal point in his theory of justice. Rawls' "veil of ignorance" placed the justice-seeker in a most awkward position. Rawls required that the person in the "original position" discharge his or her task on the basis of self-interest, but he left precious little of the "self" to be interested in. There seems to be no way of knowing which general principles of justice are especially in one's own self-interest if one is in Rawls' original position. And that seems to be the point of it all. Thus positioned, one may be expected to cultivate and assert one's own advancement and advantage, but never at the cost of making another person less advantaged, because one never knows but that one might actually be that other person. This led Rawls to his "difference principle": the person in the original position, under the veil of ignorance, would not want to have greater advantages unless that situation would also be to the benefit, in some degree at least, of others who are less well off. The difference principle seems to be what keeps Rawls' theory of justice relentlessly progressive. And it is this difference principle that Rawls identified with the term "fraternity." 32 It is fraternity in Rawls' scheme of things. In truth, this self-interest based idea of fraternity does seem to be an improvement on the esprit-de-corps kind of fraternity based on "us-again-them" sentiments which found shuddering expression in the later excesses of the French Revolution (and, one might project, in Brother John's idea of justice), 33 but it is quite clearly based on that quality of acquisitiveness, the human wish or need to acquire, to keep, and to hold against other humans, albeit with an edge of tolerance.

There is that other interpretation of fraternity, the one that seems to underlie Aristotle's approach to the idea, and Rawls was sensitive to it, while dismissing it. It is the kind of fraternity based on benevolence or altruism. Why did Rawls require one in the original position to act out of self-interest, instead of out of other-interest, altruism? The answer to this

31. See Kronman, supra note 29, at 114, 126-27. It of course pains one that Aristotle either did not see or did not feel the need of pursuing this inter-identity concept in the context of the existence of slavery in his society. His approach seems to have been to analyze humanness, individuality, self-ness and the like, and in the political context to apply that analysis to "households" rather than to individuals.

32. See J. Rawls, supra note 25, at 106.

33. See supra note 13 and accompanying text.
question brings us to the crux of what is paradoxically both the connection and the distinction between justice and love in Rawls' theory.

One is tempted to suggest that it matters little if at all whether the person in the original position under the veil of ignorance is self-interested or is other-interested, simply because he or she has no way of knowing which general principle of justice will benefit the self more than the other. One has no way of knowing whether one is a giver or a taker. And if one wishes to be a giver, one is still led inexorably to Rawls' difference principle. And perhaps the more so if one is truly an altruist. One would be forced by his or her own ideal of other-interest to tolerate some self-benefit, just as the self-interested person in the original position is forced to tolerate some other-benefit. In neither case is the person in the original position in any position to know who the self is and who the others are. And there is a tantalizing third type of interest besides self-interest and other-interest. There is what might be called "all-interest," probably best encapsulated in the familiar scriptural injunction to love others as one loves oneself. An original-position person who has that third type of interest would also be accepting of the difference principle, but perhaps with a more leveling effect, since to the all-interested person both self and other-interest must be served.

But Rawls would have none of this. He stayed with self-interest. A sense of justice, within Rawls' original-position device, is linked to self-interest. The love of humankind, Rawls asserted, differs from the sense of justice in that love of humankind prompts acts of supererogation, i.e., acts above and beyond the call of duty. And Rawls seems to be correct here. It is difficult to speak of love and duty in the same breath. Love is given. It


35. Professor Darwall argued to the contrary and seemed to see a form of other- or all-interest in Rawls' formulation of the difference principle. In Professor Darwall's view:

Because of the veil of ignorance the original position is not a perspective of self-interest, but rather of an interest in selves, or individuals as such. . . . What is crucial to the perspective is the idea of a concern for individual rational beings, or selves, as such.


Rawls himself has made statements which seem both to support and to contradict Professor Darwall's reading: "[T]he combination of mutual disinterest and the veil of ignorance achieves the same purpose as benevolence," see J. Rawls, supra note 25, at 148, and "[T]he persons in the original position are assumed to take no interest in one another's interests." Id. at 147.
has to be. It cannot be wrested or compelled or it ceases to be love.\(^{36}\) Love belongs, suggested Rawls, to a higher order of morality.\(^{37}\) It is a gift, and justice is a duty. There is indeed some distinction, at least definitionally, between justice and love. But Rawls seemed to regard the distinction in terms of distance rather than definition, when he insisted that "the sense of justice is continuous with the love of mankind."\(^{38}\) It is difficult, as one reads the following passage from Rawls, to conclude other than that he believed that there is a qualitative connection between the concepts of justice and love, a sameness differentiated only by quantity and distance:

> We must . . . distinguish between the love of mankind and the sense of justice. The difference is not that they are guided by different principles, since both include a desire to give justice. Rather, the former is manifested by the greater intensity and pervasiveness of this desire, and in the readiness to fulfill all the natural duties in addition to that of justice, and even to go beyond their requirements. The love of mankind is more comprehensive than the sense of justice and prompts to acts of supererogation, whereas the latter does not. . . . Although justice as fairness begins by taking the persons in the original position as individuals, or more accurately as continuing strands, this is no obstacle to explicating the higher order moral sentiments that serve to bind a community of persons together.\(^{39}\)

Love of humankind, "the higher order moral sentiments that serve to bind a community of persons together," Aristotle's political "fraternity," Juvenal's "mutual kindly feeling"—all seem in Rawls' theory to be "continuous with" the sense of justice, the human sense of justice writ large, supererogated.

It may be astonishing to some to find such a clear recognition of a justice/love connection in thought as individualistic as Rawls'. But in truth Rawls posited the self-interest requirement for persons in the original position as a device, a trick if you will, to reach results consistent with the conflicting ideals of liberty and equality, and not as a full ontological expression of what it is to be human. And, to be fair, one must acknowledge that Rawls was just as relentless in positing the equality, fraternity, unity factors for persons in the original position. The veil of ignorance, in a sense, demands recognition of the fact that human beings are united, identified with one another, in Rawls' words "continuing strands," just as the

\(^{36}\) See, e.g., R. May, Man's Search for Himself 206 (1953): "Certainly love which is not freely given is not love."

\(^{37}\) See J. Rawls, supra note 25, at 192.

\(^{38}\) Id. at 476.

\(^{39}\) Id. at 191-92.
self-interest requirement demands recognition of the fact that human beings are free individuals.

In Rawls’ original position, self-interest is the deliberative criterion, but it must be exercised against a backdrop that enforces recognition of the fact that there is a significant identity among human “selves,” a shared something which leads human beings to interact and to care about one another. And that latter sensibility should not surprise us. Even the staunchest individualists among us recognize the euphonious chord struck by John Donne’s “No man is an island.” But one can’t let the point rest on a base of euphony alone. One cannot resist the temptation to add to euphony the authority of fable. Martin Heidegger once retold the following old story in an effort to describe his understanding of what it is to be human:

Once when “Care” was crossing a river, she saw some clay; she thoughtfully took up a piece and began to shape it. While she was meditating on what she had made, Jupiter came by. “Care” asked him to give it spirit, and this he gladly granted. But when she wanted her name to be bestowed upon it, he forbade this, and demanded that it be given his name instead. While “Care” and Jupiter were disputing, Earth arose and desired that her own name be conferred on the creature, since she had furnished it with part of her body. They asked Saturn to be their arbiter, and he made the following decision, which seemed a just one: “Since you, Jupiter, have given its spirit, you shall receive its spirit at its death; and since you, Earth, have given its body, you shall receive its body. But since “Care” first shaped this creature, she shall possess it as long as it lives. And because there is now a dispute among you as to its name, let it be called ‘homo,’ for it is made out of humus (earth).”

Care, in Heidegger’s thought, is a function of the whole person, of selfhood. It has ontological reality. Rollo May referred to care as human-kind’s state of being and, drawing on Kierkegaard, traced the relationship between care and love:

“In love every man starts from the beginning,” wrote Soren Kierkegaard. This beginning is the relationship between people which we term care. Though it goes beyond feeling, it begins there.

One does not have to accept the humanistic psychology of Rollo May, or

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41. R. MAY, supra note 40, at 303.
the existentialist philosophy of Martin Heidegger, or the scriptural religion of John Donne to sense that care is indeed a part of what it is to be human. It is the care within us that poses the questions we ask, that sets us on our moral quests, that carries us along as we search for justice in human interrelationships. It seems an unremarkable proposition that the "care" of which Heidegger and May wrote, the "mutual kindly feeling" of which Juvenal wrote, and the benevolence and love of which Rawls wrote are all synonymous and basic to the human condition. And it seems equally unremarkable that those human attributes ought to be at the essence of a theory of justice.

That those attributes are not at the syllogistic heart of John Rawls' theory is not necessarily an adverse criticism of his theory, for the idea behind Rawls' device is to reach results consistent with a reconciliation, insofar as possible, between the ideals of individual liberty and social equality; results which, one might believe, would be consistent with the love of humankind of which Rawls wrote. Nonetheless, our trek through artificial-position theory continues.

VIII. LEONARD NELSON

John Rawls has disclaimed any originality for his views.42 The reader of his book will quarrel with his use of the word "any," but artificial-position theory does indeed predate Rawls.

"The name of Leonard Nelson (1882-1927) does not figure among the famous philosophers of the 20th century," wrote Julius Kraft in a fit of understatement back in 1965.43 Despite his English-sounding name, Nelson was a German philosopher, teaching and writing in Germany during the first quarter of this century. The tragedy of his career, and perhaps one of the series of tragedies that removed obstacles to the rise of Nazism in Germany, was that he died young, at the age of forty-five in an era in which Nazism was only beginning to come to power. We are told that, although Nelson himself did not live into the Hitler regime, virtually all his students were, for as long as they were alive and not in prison, engaged in underground and other illegal work against Nazism.44

Nelson was a self-acknowledged Kantian. He gave his magnum opus, published in 1917, a title in the Kantian style: The Critique of Practical...
Reason. Moreover, as with Kant with his Categorical Imperative, Nelson was an artificial-position theorist, quite similar in approach to John Rawls.

Nelson was a rationalist. He opposed dogmatism on the one hand and skepticism on the other.\textsuperscript{45} His message, like that of Rawls, was that in questions concerning fundamental principles of justice there is a correct answer, and that the correct answer is discoverable through an artificial-position technique. Unlike the artificial position in Rawlsian theory, however, Nelson's artificial position was not based clearly on a contractarian model. But like Rawls' theory, Nelson's involves a mental construct, a trick of the mind involving the shedding of something—as Rawls' veil of ignorance involves the shedding of many personal attributes which lead to bias and moral error. What is shed by the justice-seeker in Nelson's artificial position, is something which he called the "numerical determinant."

What Nelson meant by the "numerical determinant" has been subject to some confusion in the English translations of his work. Nelson wrote about his artificial-position approach to deciding fundamental principles of justice in two books: his System of Ethics, intended for the general public, and his Critique of Practical Reason, a longer work intended for the professional philosopher. Norbert Guterman translated both works into English. In his translation of Nelson's System of Ethics, Guterman stayed close to the original German as he had Nelson putting forth a "principle of abstraction from the numerical determination of persons."\textsuperscript{46} Curiously, however, in his translation of the much more technical Critique of Practical Reason, Guterman had Nelson putting forth a "principle of abstraction from the identity factor."\textsuperscript{47} At his use of the term "identity factor" in the Critique, however, Guterman alerted the reader to a certain liberty he was taking. An asterisked footnote reads "Literally 'the numerical determinant' (die numerische Bestimmtheit)."\textsuperscript{48} Perhaps the reason why Guterman left the more technical, literal rendition in the work intended for the popular mind was that, in that work, Nelson gave his own definition of "numerical determinant." He explained:

\begin{itemize}
\item \textsuperscript{45} This stance led Nelson to attack positivistic jurisprudence as a system leading necessarily to extreme political relativism. See generally L. Nelson, Jurisprudence Without Justice (1917).
\item A similar characterization, opposing both dogmatism and skepticism, has been made of John Rawls. Louis Katzner saw his theory as steering a middle course between forms of absolutism and forms of relativism. L. Katzner, The Original Position and the Veil of Ignorance, reprinted in John Rawls' Theory of Social Justice: An Introduction 61 (H. Blocker & E. Smith ed. 1980).
\item L. Nelson, supra note 43, at 112.
\item L. Nelson, Critique of Practical Reason 443 (N. Guterman trans. 1957).
\item Id.
\end{itemize}
[It] is not possible to establish the individual identity of a given object by stating its qualitative characteristics. This individual identity of an object, which cannot be established by stating the concepts under which the object can be subsumed, is what I call its "numerical determination." It can be perceived only instinctively.\textsuperscript{49} Thus Nelson would have his justice-seekers abstract from or forget about the individual identity or identities of those on whom the preferred principle of justice is to work. It is at this point that Nelson's artificial position seems to contrast with Rawls'. Rawls would have his justice seekers abstract from or forget about their own qualitative characteristics, leaving them with little else than their own individual identities. Nelson, on the other hand, requires his justice-seekers to abstract from or forget about the identities both of themselves and of those on who are to be affected by the proposed principle of justice. What Nelson's justice-seekers know, in their artificial position, is the qualitative characteristics, for example, race, sex, status, etc., but not the identities of those to be affected. And curiously, although each philosopher has his justice-seekers focusing on different things, it is at this point that Nelson's and Rawls' artificial positions come within hailing distance of each other. If Nelson's justice-seekers are deciding upon general principles of justice (the only kind that Rawls would let his persons in the original position decide upon), then they themselves must be among those to be affected and they themselves must abstract from or forget about their own individual identities.

This notion of Nelson's justice-seekers themselves being both authors and objects of general principles of justice and being required under Nelson's theory to forget about their individual identities as objects, but needing their individual identities in order to be able to author or to act at all in creating the general principles of justice is such an obvious flaw that one is tempted to reread his theory, more closely. One is struck by Nelson's explanation of his term "numerical determinant." Guterman called it "the identity factor." But Nelson himself did not use the word "identity" alone in his explanation of what he meant. He certainly could have done so, or he could have used some synonym, like "self." He didn't. He prefaced his use of the word "identity" with the adjective "individual." It's not the identities or selves of those who are to be the objects of the principles of justice that are abstracted from. It's only that part of their identities or selves that individuates them. Nelson quite carefully chose a very cumbersome expression, "numerical determinant." He could as easily, and with

\textsuperscript{49} L. Nelson, supra note 43, at 114.
much greater clarity, had he intended to do so, used words like “identity” or “self.” He focused instead on individuation, what makes persons numerically separate from one another. That is what must be forgotten by his justice-seekers. What is left of “identity” or “self” when it’s no longer individuated? That part of the identity or self which does not recognize itself as a distinct, autonomous unit. That part of the self which likely motivated John Donne to remind us that we are involved in mankind. Nelson underscored this observation himself when, time and again, he worded his principle of abstraction from the numerical determination of persons in the alternative, as a principle of regarding all the interests involved as belonging to a single person.\(^\text{50}\) Personal identity is not abstracted from merely individuated personal identity.

Rawls' mental trick seems clearly the easier to perform. Nelson’s seems difficult, based on a sensibility that we seem able to grasp easily only in poetry or mysticism, a task seemingly fit to order for Plato’s philosopher kings. Nelson's is, in a sense, an affirmative artificial position as opposed to Rawls' negative. Nelson’s justice-seeker receives no check-list of factors to be ignored in his or her quest as do Rawls' original-position people. Nelson’s people receive only a road-sign: Justice lies in the direction of human union and not in the direction of human individuation. It may be that Rawls' check-list approach to the artificial position is what makes it so popular among today's thinkers: we like check-lists and classifications. And it may be that Nelson’s road-sign approach to the artificial position is what has kept it from becoming popular among today's thinkers. It is ethereal, perhaps outdated, and yet it attracts us—this notion of unindividuated human identity. We are moved to look further into it.

**IX. GEORGIo DEL VECCHIO**

Although persons in Nelson's artificial position would seem to be less circumscribed in their deliberations than persons under Rawls’ veil of ignorance, both sets of justice-seekers have the same grounding—a “justice instinct.” Both Rawls and Nelson presupposed a justice instinct in human beings,\(^\text{51}\) but whereas Rawls extensively explored its acquisition in the context of an ordered society, Nelson did not.\(^\text{52}\) Georgio Del Vecchio, however, did, and found what he believed to be the origin and true nature of such an instinct.

\(^{50}\) *Id.* at 114, 120, 123.


\(^{52}\) Because Nelson did not explore its acquisition in the context of an ordered society, Ross criticized Nelson’s theory in A. Ross, *supra* note 5, at 279.
Del Vecchio was not an “artificial-position” theorist or even a Kantian in the sense that Rawls and Nelson were. He was an Italian natural-law jurist. And as is typical of natural-law theorists, Del Vecchio’s theory of justice is quite thorough. As is, perhaps, not typical of natural-law theorists, however, Del Vecchio’s thoroughness took him into the realm of a psychology of justice. If, as Rawls and Nelson presupposed, there is a “justice instinct” in human beings, then it is in the area of psychology that we must look in order to find something about the origin and nature of such an instinct. Del Vecchio’s theory quite clearly places us in that area:

[T]he proper or “juridical” conception of justice . . . proceeds directly from the inner nature of consciousness and represents one of its necessary and fundamental attitudes and modes of behaviour.\(^5\)

Del Vecchio discussed this “inner nature” of human consciousness in terms of a consciousness of the self as “self.” Being thus “self”-aware, we human beings quite naturally relate to objects as being not our “selves.” The English translation of Del Vecchio’s work has him saying that we posit objects as being “against” ourselves. The meaning is that we come, at some point, to recognize objects as apart from our selves. And this is all quite unremarkable. We are consciously self-reflective entities, with the knowledge that there is “self” and “not-self.” But Del Vecchio went on to suggest that there is more than consciousness of self as self and not-self as not-self. Some parts of the not-self world we recognize as other selves, more than just objects:

What, however, our critical philosophy has not yet made sufficiently clear is that the object which the subject contraposes to itself may in its turn be recognized as a subject by the subject, in which case there arises a new relation, which is no longer reducible simply to the antithetic general formula of self and not-self but must be conceived as an inter-subjective relation, that is to say, a relation between the self and another self.\(^5\)

In Del Vecchio’s thinking, “justice” arises instantly, as a demand of that “inter-subjective relation,” that moment when the self recognizes some objects as being more than mere objects, as being other selves. There seems to be a scarcely definable claim that arises from one “self’s” recognition of an object as another “self,” an entity unarguably separate from yet somehow identical to the observing entity. And the claim is clearly one of “inter-subjective” equality.

\(^5\) G. Del Vecchio, Justice: An Historical and Philosophical Essay 77 (1953).
\(^5\) Id. at 77-78 (emphasis in original).
X. J U S T I C E  A N D  L O V E

It is at this point—the point at which a sense of justice is seen as proceeding from a recognition of the self-ness of other human beings—that justice touches love. Both justice and love can be thought of as proceeding from a recognition of the self-ness of other human beings. Psychoanalyst Willard Gaylin has traced the origin of human love in a way remarkably similar to the way in which Del Vecchio traced the origin of the human sense of justice. The process, in Gaylin’s thought, is one of identification:

We established our sense of identity by a multiple set of maneuvers through varying ages. The first part of the process involves sensing one’s self. . . . The next step . . . is to have . . . a sense of oneself as differentiated from some other. . . . [F]inally we must have a sense . . . of our own personhood. It is this sense of self that is particularly facilitated through the processes of identification, and it is only one more irony of human development that we learn to love others only after first learning love of self. . . . Identification is a particular form of first attachment to another person. By incorporating that person into ourselves, we are somewhere halfway between self-love and other-love, for that person with whom we identify is fused and confused into a new kind of matrix of self and other.55

The phrase that Gaylin chose to use to express incipient human love, “a new kind of matrix of self and other,” brings us back, of course, to artificial-position theory. It may not be too far afield to suggest that what Rawls with his veil of ignorance and Nelson with his abstraction from the numerical determinant both seek to achieve is a “matrix of self and other,” an “identification” among justice-seekers. But one is hard put to call their contrived and compelled forms of identification “love,” and as we have seen, Rawls specifically dismissed the idea.56 Love and a sense of justice, though their beginnings in the human psyche may be common, become separated quite quickly.

If justice and love have their common beginning in the human psyche, what is it that causes them to separate and take their divergent courses? What is it that causes “justice” to become a norm of equality or fairness in organizing human interaction and “love” to become a supererogatory appetite? We saw that Rawls recognized that “the sense of justice is continuous with the love of mankind”57 and that the two are not guided by

56. See supra note 39 and accompanying text.
57. J. RAWLS, supra note 25, at 172 (emphasis added).
different principles. But the two do diverge, and quite quickly, in ethical and political thinking, justice to the realm of the working mandate, love to the realm of the supererogatory ideal. It’s interesting, however, that in the realm of ethics or moral philosophy they linger together quite a bit longer. Moreover, in the realm of ethics, love and the sense of justice remain squarely linked to a recognition of self-ness in others. One recalls the Judaeo-Christian rendering: “Thou shalt love thy neighbor as thyself . . . .”

It must be admitted, however, that while love can perhaps be compelled as a moral precept, it cannot be compelled as an organizing principle.

And yet one wonders, in reading Rawls, whether the two, love and justice, might have diverged too quickly. The wistful thought is that perhaps the ideal of love could possibly stay connected with justice a bit longer, long enough to give systems of justice a different complexion.

XI. RUDOLF STAMMLER

As has been indicated, neither Rawls nor Nelson countenanced an artificial-position concept of justice which is based on loving one’s neighbor as one’s self. Rawls doggedly rejected altruism and based his original position on a self interest. And Nelson abstracted the individuated-self factor completely from his artificial position. At least one artificial-position theorist, however, based his process definition of justice on a species of interaction between allegiance to self and allegiance to “neighbor.” Rudolf

58. Id. at 191.
60. Indeed, Rollo May suggested that love compelled cannot be love at all. R. MAY, MAN’S SEARCH FOR HIMSELF 206 (1953). But Soren Kierkegaard, well aware of the paradox in the Christian duty to love, argued the contrary:

Christian love . . . contains the apparent contradiction, that loving is a duty. . . . “Thou shalt love.” Only when it is a duty to love, only then is love everlastingly secure against every change; everlastingly emancipated in blessed independence; everlastingly happy, assured against despair.

S. KIERKEGAARD, WORKS OF LOVE (1847), reprinted in A KIERKEGAARD ANTHOLOGY 290, 293 (1936). The paradox is well explained in Kierkegaard’s Journals, where he distinguished between love as work or action and love as feeling, between agape and eros:

To the Christian love is the works of love. To say that love is a feeling or anything of the kind is an unchristian conception of love. That is the aesthetic definition and therefore fits the erotic and everything of that nature. But to the Christian love is the works of love. Christ’s love was not an inner feeling, a full heart and what not, it was the work of love which was his life.

Id. at 281. The relevance of the Kierkegaardian view of Christian love to the Gandhian reconciliation between justice and love is clear. See infra notes 76-80 and accompanying text.
Stammler (1856-1938), Leonard Nelson’s contemporary, and also a disciple of Kant, developed an artificial-position theory which placed the mythical justice definers not in a position of ethnic amnesia or sterile abstraction but in a “special community”:

The model of just law is the idea of a *special community* among those who must be controlled and determined according to the principles of just law. The material of doubt and dispute is furnished by the movements of social life. But our problem in all cases deals with the right conduct of definite persons whose distinct volitions stand opposed to each other. These persons who are disputing and doubting must first be brought *mentally* into a community into which each one has to bring in his disputed volition so that they may then be objectively adjusted. Without such mental unification, without embracing the disputed parties in a framework that will comprehend them all, it would be altogether impossible to adjust their differences in an appropriate manner.  

It is true that the idea of “community” has no inexorably necessary connection with love, or “care,” or “fraternity,” or “neighbor.” But Stammler’s “special community” does seem to be built upon some such sensibilities. Stammler expressed agreement with Justinian’s otherwise platitudinous statement that “societás jus quodammodo fraternitatis in se habet” and seemed to make it a cornerstone or first principle of sorts of his special community method.

We saw above that Rawls’ and Nelson’s artificial-position devices had characteristics, i.e., descriptive elements which were supposed to lead the justice-seekers inexorably to fundamental principles of justice. Stammler’s “special community” has characteristics as well. The characteristics of Stammler’s special community, as those of Rawls’ and Nelson’s, are few:

When we speak of the abstract concept of a community, we have in mind the union of all volition whose aim is free. In this way we obtain the formula of a community of men willing freely, as the final expression which comprehends in unitary fashion all possible purposes of persons united under the law. I call this the *social ideal*.

Stammler thus used “community-ness” as his resolving agent between liberty and equality, between conflicting free individual wills.

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63. *See supra* note 61, at 216.
64. *Id.* at 153 (emphasis in original).
Unlike Rawls, Stammler actually viewed his artificial-position device as a means of resolving specific controversies.\textsuperscript{65} Rawls only claimed for his artificial-position device a status as a means to discern fundamental principles of justice, as for example his "difference principle." But Stammler did discuss fundamental principles of justice in connection with his special community device, albeit as preconditions rather than as elicited results. And Stammler’s fundamental principles of justice seem quite relevant to the possibility of a closer connection between justice and love. He spoke of principles of respect and principles of participation:

The Principles of Respect — 1. The content of a person’s volition must not be made subject to the arbitrary desire of another. 2. Every legal demand must be maintained \textit{in such a manner that the person obligated may be his own neighbor}.

The Principles of Participation — 1. A person under a legal obligation must not be arbitrarily excluded from a legal community. 2. Every ability of disposing that is granted by law may be exclusive only \textit{in the sense that the person excluded may be his own neighbor}.\textsuperscript{66}

The concept of "neighbor," of course, was expressly borrowed by Stammler from Judaeo-Christian teachings.\textsuperscript{67} But quite clearly he was borrowing only the \textit{term}, not the full Judaeo-Christian \textit{ideal} of love: "To realize completely the love of one's fellowman as oneself would presuppose a perfect rational being that was at the same time social without any limitation."\textsuperscript{68}

Stammler’s limited definition of "neighbor," was not, however, totally uninfluenced by the ideal:

The person . . . must be respected as an end in himself, and treated as a participant in the community. He must not be regarded as a means, or excluded from the community as an isolated individual. And the manner of his obligation to others must be such that even when in a given case he is excluded, he may still remain his own neighbor . . . . [I]t is not intended merely as an ethical doctrine, but as a principle of practical benevolence and beneficence.\textsuperscript{69}

Some may say that Stammler’s "special community" and "neighbor"
theory deteriorated when he proceeded to speak of concentric circles, like ripples going outward, determining the extent of one's duties of neighborliness and community-ness. Others may say that the circles were his way of preserving the connection between the ideal and the practical; between love and justice. At any rate, Stammler's claim that his system can be used for the resolution of specific controversies has been criticized as overly sanguine and his underlying principles of just law as "too abstract, too far away from life, to be easily and profitably adapted to the infinite varieties of concrete cases."  

XII. CONCLUSION: MOHANDAS GANDHI

Rudolf Stammler would, perhaps, hold the record among lawyers for keeping the ideas of justice and love conceptually together for the longest possible time, were it not for Mohandas Gandhi. We don't often think of Gandhi as a lawyer, much less as a legal scholar, and yet he was both. Perhaps his stature as a modern-day saint gets in the way. Or perhaps we neglect his legal scholarship because we don't find in his writings analyses of Holmes, Pound, Austin, or Bentham. We cannot seem to take seriously as a legal scholar one who has not bowed in obeisance before those framers of the Western legal mind. What we do find in Gandhi's legal scholarship is an eclectic and seemingly narrow sampling of the speeches of Jesus, the thought of Tolstoy, and the works of the 19th century American transcendentalists.

There is a reason for the seeming narrowness and selectivity of Gandhi's legal scholarship. In its practical applications, his thought was original. Gandhi applied his thought to social justice, to group politics. And the testing ground for the truth of Gandhi's views on justice and love was not logic or precedent, but (as Holmes would have appreciated) experience.

In the context of our inquiry into the concepts of justice and love, i.e., the artificial-position context, what Gandhi did, paradoxically, was to bring things full circle. We began our inquiry by decrying the fact that most definitions of "justice" speak in terms of entitlement and serve the motivation of acquisitiveness. We then examined many of the "artificial-position" theorists who seemed to succeed in some measure but never completely satisfactorily in introducing motivations other than acquisitiveness and content other than entitlement into concepts of justice. Through an in-the-shoes-of-the-other-person device they seemed to place the justice-

70. Id. at 221.
seeker in a mode of tolerance and acceptance. The way in which Gandhi brought all of this full circle is that his concept of justice was based on entitlement, an entitlement, not directly to justice, but rather to have the oppressor see the justice or injustice of his or her activity by viewing its concrete results on other human beings. And what Gandhi relied on for the effectiveness of this full-circle-artificial-position approach was, of course, the fact that human beings see other human beings as other “selves,” i.e., that an identification takes place. It is a concept grounded in the identity, not of interests, but of being, among human beings, that ontological identity which gives rise to sensibilities of justice and of love alike. In that deep sense, and not simply operatively, Gandhi’s approach is grounded in the inherent goodness of the human being, that aspect of humanness which those from the Judaeo-Christian tradition will recognize as the image of God.\textsuperscript{72}

Gandhi’s views developed and changed over the years because they depended so much on events and experiences. And any thumbnail sketch of his “theory of justice” is bound to be suspect. But the following quotation from his explanation of “ahimsa” or “love” [those acquainted with the Christian concept of “agape” love will find parallels in “ahimsa”] comes close:

We punish thieves, because we think they harass us. They may leave us alone; but they will only transfer their attentions to another victim. This other victim however is also a human being, ourselves in a different form, and so we are caught in a vicious circle. The trouble from thieves continues to increase, as they think it is their business to steal. In the end we see that it is better to endure the thieves than to punish them. The forebearance may even bring them to their senses. By enduring them we realize that thieves are not different from ourselves, they are our brethren, our friends, and may not be punished. But whilst we may bear with the thieves, we may not endure the affliction. That would only induce cowardice. So we realize a further duty. Since we regard the thieves as our kith and kin, they must be made to realize the kinship. And so we must take pains to devise ways and means of winning them over. This is the path of ahimsa.\textsuperscript{73}

Those familiar with Jesus’ Sermon on the Mount will probably note that the path of ahimsa is also the path to the kingdom of heaven:

\textsuperscript{72} See Genesis 1:27 “God created man in His own image, in the image of God created He him; male and female created He them;” 1 John 4:8 “God is love.”

\textsuperscript{73} M. GANDHI, NONVIOLENT RESISTANCE (SATYAGRAHA) 41 (1951) (emphasis added).
Ye have heard it hath been said, an eye for an eye, and a tooth for a tooth: But I say unto you, that ye shall resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also. And whosoever shall compel thee to go a mile, go with him twain. Give to him that asketh thee, and from him that would borrow of thee turn not thou away. Ye have heard that it hath been said, thou shalt love thy neighbor, and hate thine enemy. But I say unto you, love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; that ye may be the children of your Father which is in heaven; for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust.\(^74\)

Gandhi, of course, willingly and frequently acknowledged his debt to Jesus’ Sermon on the Mount.\(^75\) One need not be a careful reader to notice a similarity between Gandhi’s “ahimsa” and Jesus’ love of enemies. Jesus did not stop at the nonresistance injunction. One is told that one must not resist evil (or “the evil one” or “an evil one” in some translations). And then one is told what one must affirmatively do. Similarly, under Gandhi’s “ahimsa” one does not stop at nonresistance. One must take steps to affirmatively apprise the evildoer of his or her human identity. Gandhi’s “ahimsa” has been referred to not as an ethic of NON-resistance to evil, but rather as an ethic of nonviolent (Gandhi himself disliked the adjective “passive”)\(^76\) RESISTANCE to evil. The name one gives to the ethic, however, seems far less important than its paradoxical message: Evil is most effectively resisted through non-resistance. Gandhi’s discovery was that by accepting the physical consequences of the unjust act, but also (and this most importantly) by bringing the fact of that injustice and the fact of shared human identity to the attention of the evildoer, i.e., by “first engaging conscience,”\(^77\) one was bringing about a situation of true, thorough, and ultimate justice instead of the forced physical representation of justice with which courts and lawmakers must content themselves.\(^78\)

There is an obvious attraction in Gandhi’s theory of justice/love. All-

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\(^74\) Matthew 5:38-45 (King James Version).
\(^75\) See, e.g., M. Gandhi, supra note 73, at 375.
\(^76\) See id. at 161; see also M. Gandhi, All Men Are Brothers: Autobiographical Reflections 91, 92 (1958).
\(^77\) See supra notes 14-16 and accompanying text.
\(^78\) This too was the designed result of the Sermon-on-the-Mount ethic. When one returned good for evil, the evildoer’s conscience became engaged, and, like David, he convicted himself. See Romans 12:17, 20 (King James Version) (Paul’s retelling of the nonresistance-to-evil ethic: “Recompense no man evil for evil.... [I]f thine enemy hun-
most by definition and certainly by design, if it works, it solves the problem of recidivism. But criticisms abound. One criticism is that Gandhi’s theory works outside, against, or perhaps “on” the government’s institutions and organs of justice and not with, as a part of, or even (in the real world) as a substitute for them. Tolstoy’s adherence to Jesus’ nonresistance-to-evil ethic, in fact, led him to deny the moral legitimacy of the bench and the bar.79 Another criticism is that Gandhi’s theory is “other-worldly,” unrealistic, too ideal.80 But to give Gandhi his due, his nonviolent-resistance doctrine is seldom delved into deeply by academicians and the common belief that it amounts to sketchy idealism is unwarranted. Gandhi placed great stress on method and effectiveness. This is apparent in Gandhi’s oft misunderstood teaching on fasting as a method of nonviolent resistance:

Fasting in Satyagraha81 has well defined limits. You cannot fast against a tyrant, for it will be a species of violence done to him. You invite penalty from him for disobedience of his orders but you cannot inflict on yourselves penalties when he refuses to punish and renders it impossible for you to disobey his orders so as to compel infliction of penalty. Fasting can only be resorted to against a lover, not to extort rights but to reform him, as when a son fasts for a father who drinks.82

Gandhi’s life-long arena was social justice. He sought the justice that was missing in the British colonial rule over India, in the Hindu treatment of the untouchables,83 in the relationships between Hindu and Moslem Indians,84 in the apartheid of South Africa. And his method of achieving

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79. For what may be the most devastating attack in all literature on the idea that one can be a Christian and a lawyer at the same time, see generally L. TOLSTOY, MY RELIGION (1885).

80. Jesus’ nonresistance-to-evil ethic has also been subjected to this criticism, sparking G.K. Chesterton’s epigram: “The ideal of Christianity has not been tried and found wanting. It has been found difficult and not tried.” The conventional wisdom among those who would counsel against taking Jesus’ nonresistance-to-evil ethic too seriously is that the ethic is simply an example of “Hebrew hyperbole,” that writing technique which overstates in order to make a point. E.g., “[If thine eye offend thee, pluck it out.” Matthew 18:9 (King James Version). But Jesus gave examples of exactly what he meant by not resisting evil, and lawyers must be sobered by the contexts into which Jesus placed his ethic: the criminal assault, the civil lawsuit, and the act of political oppression.

81. Literally, “Truth-force”: the name Gandhi gave to his theory/movement.

82. Letter to Mr. George Joseph, reprinted in M. GANDHI, supra note 73, at 182.

83. M. GANDHI, supra note 73, at 180.

84. In which endeavor, he did use the fasting technique. See supra note 82 and accompanying text.
Justice was, quite simply, love. Not love, the sentiment, the appetite, but love, the activity, the work. And not just any well-intentioned activity or work suffices in Gandhi's system. "That action alone is just," Gandhi once wrote, "which does not harm either party to a dispute." In Gandhi, we see the melding of justice and love, the appropriate relationship between the two. And in Gandhi we find a bit of a lesson: justice is to be sought rather than used; it is not a means, it is an end, an end that is "justified" by means of love. And the lives of Gandhi, his followers, and many others are testimony that we have those means within us. From the theoretical perspective we uncover a startling truth in Gandhi's thought and work. Those idealized artificial positions in which the theorists place their justice-seekers are in reality not artificial at all. In the deepest sense of what it is to be human, they are natural, in us from the beginning. Deep down, we know that. And we wonder what goes wrong.

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85. Tantalizing are the obvious parallels between Gandhi’s idea of love, i.e., ahimsa, and the Christian idea of love, i.e., agape. Recall Gandhi’s explanation of ahimsa in M. Gandhi, supra notes 73-74 and accompanying text; see S. Kierkegaard, supra note 60.
