

Ethics, Law and the Challenge of Cognitive Science

By Matthias Mahlmann*

A. Introduction**

Many questions come to the mind if one starts thinking about morality and the law – questions about the epistemological or ontological status of morality, its content, motivating force or cognitive accessibility. They concern the content of norms, the enigma of justice and the demands of human solidarity. The universality, particularity or relativity of morality and material legal standards is as much an issue as the general relation of morality and the law.

All of these questions are rather grand, and the object of a very long, serious and committed reflection in the history of thought. In one way or another, each of the foregoing questions are discussed and either implicitly or explicitly answered by contemporary schools of moral and legal thought.

In recent years, however, another perspective has increased in importance and forms now a central area in the study of ethics and law. Namely, the perspective of cognitive science and the modern theory of the human mind. Yet, there is quite a plurality of approaches within this framework – a fact that should not be overlooked. The most important emerging views include neo-emotivist neuroethics, approaches of evolutionary psychology and a mentalist theory of ethics and law. Neo-emotivist neuroethics identifies morality with emotional reactions that are hard-wired in human cognition,¹ beyond which utility

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¹ See M. GAZZANIGA, THE ETHICAL MIND 167 (2005): "A series of studies suggesting that there is a brain-based account of moral reasoning have burst into the scientific scene. It has been found that regions of the brain normally active in emotional processing are activated with one kind of moral judgment but not another. Arguments that have raged for centuries about the nature of moral decisions and their sameness or difference are now quickly and distinctly resolved with modern brain imaging. The short form of the new results suggests that when someone is willing to *act* on a moral belief, it is because the emotional part of his or her brain has become active when considering the moral question at hand. Similarly, when a morally equivalent problem is presented that he or she decides not to act on, it is

calculations reign, while evolutionary psychology takes morality as an evolved optimization device for gene-reproduction.² On the other hand, a mentalist theory of ethics and law regards morality and the law as complex, historically and socially embedded constructions on the base of enabling higher mental faculties, governed by abstract, non-emotional, foundational principles of justice and altruism that are part of the nature of the human mind.³

The purpose of the following paper is to therefore explore the relevance of the aforementioned approaches for the study of the philosophy and theory of ethics and law. It will be argued that neither emotivist neuroethics nor evolutionary psychology, but rather, a mentalist theory of ethics and law constitutes the most promising approach to tackle the challenges created by the cognitive revolution. This paper intends to show that some recent studies of the relationship of cognitive science, ethics and law pursuing alternative approaches suffer from a clearly identifiable deficiency. They impoverish the empirical phenomenon to be explained, the human moral and legal world, to a sometimes surprising degree. This is a fatal defect for any theory. No causal explanation of any kind will be successful if careful attention is not paid to the descriptive determination of the properties of the entity explained. This is a methodological truism, but deserves to be explicitly restated for at least for two reasons. First, morality is constituted or at least connected to a variety of mental and emotional states that are notoriously elusive and hard to grasp. Second, morality obviously matters in practical terms for the course of human lives and the makeup of society. The concept of morality is thus very vulnerable to all kinds of distortions and misconceptions that derive their force from sometimes very deeply seated cultural traditions, ideological formations and social background assumptions. The second point is equally relevant for conceptions of the law, which is after all a central instrument to administer force and power in any body politick. Accordingly, some efforts will be made to elaborate a descriptively adequate phenomenology of morality by paying careful attention to some core properties of morality. Hutcheson remarked quite rightly 200 years ago: "Some strange love of simplicity in the structure of human nature or attachment to some favourite hypothesis has engaged many writers to pass over a

because the emotional part of the brain does not become active. This is a stunning development in human knowledge because it points the way forward figuring out how the brain's automatic response may predict out moral response" [emphasis in the original].

² Cf. S. PINKER, *THE BLANK SLATE* 241 (2002).

³ See further M. MAHLMANN & J. MIKHAIL, *COGNITIVE SCIENCE, ETHICS, AND LAW*, in *ONTOLOGY AND EPISTEMOLOGY* (Z. Bankowski ed., 2005); M. MAHLMANN, *RATIONALISMUS IN DER PRAKTISCHEN THEORIE* (1999); J. MIKHAIL, *RAWLS' LINGUISTIC ANALOGY: A STUDY OF THE "GENERATIVE GRAMMAR"* (2000); J. MIKHAIL, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 *TRENDS IN COGNITIVE SCIENCE* 143 (2007); M. D. HAUSER, *MORAL MINDS* (2006).

great many simple perceptions which we may find in ourselves".⁴ Every effort will be made in the remarks that follow to pay careful attention to the "great many simple perceptions which we may find in ourselves", among other relevant observations, to avoid the pitfall of this "strange love of simplicity" in analysing the cognitive foundations of morals and law.

The task to clarify the relationship of the theory of the human mind, ethics and law is demanding and the results to be presented are perhaps less impressive than some claims self-confidently formulated by the grander theories pursued today. But as we will see, much of this self-confidence rests theoretically on no sound ground. Therefore, any small progress should be welcomed. Another aspect should not be forgotten. Morality is not just any phenomenon. Morality is one of our strangest and at the same time most intimately known and humane properties. Every word about the nature of morality is a word about an essential aspect of our existence. The same holds for the law. The appearance of the law and of legal work is often one of technicalities and formalities of a profound dryness. But this impression is misleading. The law defines apart from technical notions the core normative architecture of a society, and, given the development of international law, of the global community in general. Law is at its deepest level a mirror image of the self-perception of humanity. Therefore, at the end some tentative conclusions for our self-understanding as human beings will be drawn from the findings of the relationship of ethics, law and the theory of the human mind. They will assess whether the findings of modern cognitive science about the nature of morality and the law add reasons for anthropological melancholy, perhaps even despair, or provide modest grounds for ethical hope.

B. The Mentalist Starting Point

A currently explored approach in the study of morality, law and mind is a mentalist theory of ethics and law.⁵ It tries to reconstruct the idea of human practical reason with the conceptual tools mainly developed in a certain part of the multi-faceted modern theory of the mind. Of special importance is the study of language. Modern linguistics have gained importance way beyond the concrete field of understanding the world of language by providing insights in the general structure of the human mind and its higher mental faculties. Generative Grammar has made the assumption plausible, that human beings possess a language faculty with inborn properties – a universal grammar – that determines the possible

⁴ F. HUTCHESON, ILLUSTRATIONS ON THE MORAL SENSE 105 (1971).

⁵ See, *supra*, note 3.

properties human natural languages may have.⁶ The language faculty is the cognitive precondition of the possibility of language. The determination of the properties of universal grammar are now the object of very advanced, highly complex studies, with fascinating results. Given the explanatory power of this mentalist approach to the study of language, the question has been asked for years, whether practical philosophy could be informed by this approach.⁷

The following core hypothesis of this paper is the consequence of the mentalist approach: morality is based on a higher mental faculty, governed by a set of principles universal to the species, that generates moral judgement. This moral faculty is the cognitive precondition of the mental reality of morality as the language faculty forms the cognitive precondition of the mental reality of language. This theoretical stance is clearly distinguished from other current approaches. It is, however, as will be illustrated, deeply embedded in some of the best traditions of practical thought. It raises without doubt many fundamental questions. The most important are to be considered now, including the implications for a theory of law.

C. The Ontology of Morality

I. The Basic Questions

The first fundamental question to be addressed is that of moral ontology. Namely, is morality a reality or fact itself, or merely the linguistic appearance of something else? If morality is a reality the next question arises – what kind of ontological status does it have? Can we make sense of it from a standpoint that respects current standards of science as to the fabric of the world? How does it fit ontologically in the theory of the mind?

⁶ N. CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965); THE MINIMALIST PROGRAM, (1995); S. PINKER, THE LANGUAGE INSTINCT (1994); R. JACKENDOFF, PATTERNS IN THE MIND: LANGUAGE AND HUMAN NATURE (1994); M. BAKER, THE ATOMS OF LANGUAGE (2001).

⁷ See further, N. CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE 152 (1988); M. BIERWISCH, RECHT LINGUISTISCH GESEHEN 42 (Grewendorf, ed., 1992); S. STICH, MORAL PHILOSOPHY AND MORAL REPRESENTATION 215 (Hechter, Nadel, & Michod, eds., 1993); J. MIKHAIL, C. SORRENTINO, & E., SPELKE, TOWARDS A UNIVERSAL MORAL GRAMMAR 1250 (Gernsbacher & Derry, eds., 1998); S. DWYER, MORAL COMPETENCE 169 (Murasugi & Stainton, eds., 1999); R. JACKENDOFF, THE NATURAL LOGIC OF RIGHTS AND OBLIGATIONS 66 (Jackendoff, Bloom, & Wynn, eds., 1999); G. HARMAN, EXPLAINING VALUE (2000); J. Mikhail, *Law, Science, and Morality: A Review of Richard Posner's 'The Problematics of Moral and Legal Theory,'* 54 STANFORD LAW REVIEW 1057 (2002); M. MAHLMANN, *Sprache als Spiegel der praktischen Vernunft*, ZEITSCHRIFT FÜR RECHTSPHILOSOPHIE 168 (2003); M. MAHLMANN & J. MIKHAIL, COGNITIVE SCIENCE, ETHICS, AND LAW 95 (Z. Bankowski ed., 2005); M. MAHLMANN, THE COGNITIVE FOUNDATIONS OF LAW, in H. ROTTLEUTHNER, FOUNDATIONS OF LAW 75 (2005). For a discussion of the linguistic analogy, see J. RAWLS, A THEORY OF JUSTICE, 45 (rev. ed. 1999) .

This ontological question has important ramifications. If one thinks that morality is some kind of fact in the world one is faced with many difficult questions regarding the constitution of the world and is thus quickly led in the murky waters, it seems, of metaphysics, or perhaps even of an *ens cogitans*. To determine whether this is the case, one has to determine first whether morality is something objective existing independently of human moral judgement and cognition or not. There is a long tradition of serious human thought asserting the objective reality of moral entities from Platonic theories to versions of modern objective idealism or moral realism of some sort.⁸ The alternative view is that morality is not an objective reality or fact, but rather a concept that is subjective and exists within one's mind.

Various approaches relate morality with a special human faculty to varying extents – the Socratic *δαιμόνιον* (*daimonion*),⁹ Aristotelian *φρόνησις* (*fronesis*),¹⁰ Thomas Aquinas *Synderesis*,¹¹ the light of reason of the Natural Law tradition,¹² the intellectual nature of the Rationalists,¹³ the Moral Sense of the Scottish Moralists¹⁴ or Kant's Practical Reason,¹⁵ to name a few important examples.¹⁶ Depending on

⁸ For modern objective idealism, see V. HÖSLE, *PHILOSOPHIE DER ÖKOLOGISCHEN KRISE* (1991); for a recent defence of moral realism, see D. O. BRINK, *MORAL REALISM AND THE FOUNDATION OF ETHICS* (1989); R. SHAFER-LANDAU, *MORAL REALISM: A DEFENCE* (2003).

⁹ PLATON, *APOLOGY*, 31 d, 41 d. The *daimonion*, something divine, a inner voice, advises Socrates only to refrain from doing something. There is no explicit connection to morality and there are other issues involved like admission of pupils, PLATON, *THEAETETUS*, 151a, or the nature of death, *Apoloogy*, 40a – 42a. But the context is in important respects ethical – it is Socrates' commitment to virtue, justice and his attempt to preserve them and the laws, id., 31 d – 33 a, 40 a 42 a. XENOPHON, *MEMORABILIA*, Book I, I, 2, 4; Book IV, VIII, 1, 5: the „deity“ advises Socrates in various matters. The decisive question is, however, what is just and what unjust, id. Book IV, VIII, 4.

¹⁰ ARISTOTLE, *NIC. ETH.* 1140b. Practical wisdom is one of the dianoetic virtues.

¹¹ Compare T. AQUINAS, *SUMMA THEOLOGICA*, I-II, q. 94,1: “(D)icendum quod synderesis dicitur lex intellectus nostri, inquantum est habitus continens praecepta legis naturalis, quae sunt prima principia operum humanorum.” (“Synderesis is said to be the law of our intellect because it is a habit containing the precepts of the natural law, which are the first principles of human actions.”).

¹² See H. GROTIUS, *DE JURE BELLI AC PACIS*, I, I, X; S. PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM*, III, IX – XII.

¹³ R. CUDWORTH, *A TREATISE CONCERNING ETERNAL AND IMMUTABLE MORALITY* 20 (1996): “To conclude, therefore, things called naturally good and due are such things as the intellectual nature obliges to immediately, absolutely, and perpetually, and upon no condition of any voluntary action that may be done or omitted intervening”.

¹⁴ F. HUTCHESON, *AN INQUIRY INTO THE ORIGIN OF OUR IDEAS OF BEAUTY AND VIRTUE* xiv (1971).

¹⁵ I. KANT, *GRUNDLEGUNG DER METAPHYSIK DER SITTEN*, AKADEMIE AUSGABE VOL. IV; *DIE KRITIK DER PRAKTISCHEN VERNUNFT*, AKADEMIE AUSGABE VOL. V.

the ontological theory, this human faculty can play different roles – it can be the faculty of the cognition of the objective reality of morality or actively create its subjective idea. The first account one finds, for example, in Platonic thought or in the classical Natural Law tradition. A moral judgement is a judgement about what things really are, and not just the illusionary impression of something real.¹⁷ In terms of moral epistemology, a version of a correspondence theory of moral rightness is thus formulated. Truth is given according to this theory, if the subjective conceptualisation of a thing somehow matches the thing itself. The thing cognised in the context of morality is the moral quality of an act – say lying – or the value status of an entity – the goodness of virtues like courage, self-control or wisdom to take some of the examples classical and part of modern virtue ethics is very concerned with. This connection between objective moral facts and the subjective cognition of these facts is historically often made, but is theoretically a contingent, not necessary connection. This is illustrated by theories that follow the second path and cut the connection of the subjective cognition to objective moral facts and understand morality as nothing but an original creation of the human mind and correspondingly the special moral faculty as the origin of this creation. That is explicitly so in the Scottish Enlightenment, for example, in Hutcheson's thought and his theory of the moral sense,¹⁸ or in Hume,¹⁹ who in his later work

¹⁶ There are of course other concepts of conscience. M. HEIDEGGER, *SEIN UND ZEIT* (1984), 270 outlines an existential ontological analysis of conscience against the classical idea, that the conscience provides concrete obligations for particular actions in particular circumstances. He denounces this idea as being “vulgar”, id. p. 269, as or being connected to a horizon of existence that understands life as naked business under rules, id. p. 294: “Diese Erwartung gründet im Auslegungshorizont des verständigen Besorgens, der das Existieren des Daseins unter die Idee eines regelbaren Geschäftsganges zwingt”. Instead, conscience is for Heidegger the call to authenticity and the witness of its possibility, id. p. 277: “Das Gewissen offenbart sich als Ruf der Sorge: der Rufer ist das Dasein, sich ängstigend in der Geworfenheit (Schon-sein-in...) um sein Sein-können. Der Angerufene ist eben dieses Dasein, aufgerufen zu seinem eigensten Seinkönnen (Sich-vorweg...)” (emphasis in the original), p. 289. Guilt is accordingly not connected to action against some norms but is primordialially based on the nullity of human existence, id. p. 286. This kind of analysis does not account for any of the most basic properties of moral judgement, as developed below. For some further comments cf. M. Mahlmann, *Heidegger's Political Philosophy and the Theory of the Liberal State*, 14 *LAW AND CRITIQUE* 229 (2003).

¹⁷ R. PRICE, *A REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS* (Raphael ed., 1758): in his view, this subjective account fails to be convincing, because moral judgment must be telling us, what things really are, id., p. 14.

¹⁸ F. HUTCHESON, *AN INQUIRY INTO THE ORIGIN OF OUR IDEAS OF BEAUTY AND VIRTUE* 117 (1971); *ILLUSTRATIONS ON THE MORAL SENSE*, 133 (1971): “A certain incorporeal form, if one may use that name, a temper observed, a character, and affection, a state of sensitive being, known or understood, may raise liking, approbation, sympathy as naturally from the very constitution of the soul, as any bodily impression raises external sensations”. Hutcheson, id. 163, makes the distinction between “(1) the idea of external motion, known first by sense, and its tendency to the happiness or misery of some sensitive nature, often inferred by argument or reason”, “(2) apprehension or opinion of the affections in the agent, inferred by our reason”, “(3) the perception of approbation or disapprobation arising in the observer”. The approbation is held to be not an image of anything external.

was much influenced by Hutcheson's ideas. Kant is a difficult case in this respect. But if his doctrine of the moral law, its status as a fact of reason, as a law of autonomy of the homo noumenon is to be taken seriously, Kantian practical reasons seems to be related to this tradition too. Kant's moral law is not Plato's Idea of Good or the objective *lex aeterna* or *lex naturalis* of Thomas Aquinas – it is a law of reason and thus something situated in the subjective human mind itself.²⁰

II. Varieties of Analytical Reductionism

The modern tradition of non-cognitivism seems to be an heir to this second subjective understanding of the reality of the moral law. This is, however, only partly true. From the non-cognitivist position morality is indeed something subjective. The problem is, that from this point of view morality is really nothing at all if the term morality is to designate something *sui generis*. Non-cognitivism is partly the expression and consequence of the critique of metaphysics by analytical philosophy and the logical positivists and today in addition nourished by other theoretical schools, including post-structuralism. The research program of these schools is a twofold de-mystification of morality. First, by pointing out the ontological queerness of a realm of moral facts and a corresponding human faculty cognising them and the stain of metaphysics that makes theories with too little distance to such a realm of moral facts unattractive.²¹ Second, by providing an alternative account what moral evaluation is really about – namely not the cognition of pre-existing moral qualities or relations but the expression of a subjective emotional approval or disagreement with some act or entity.²² These emotional attitudes are the mundane stuff morality is made of. The approaches within this theoretical framework vary and are more or less refined. The general approach of non-cognitivists from Russell,²³ Ayer,²⁴ and Stevenson²⁵ to contempo-

¹⁹ „Take any action allow'd to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call *vice*. In which-ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never find it, till you turn your reflexion into your own breast, and find a sentiment of disapprobation, which arises in you towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object", D. HUME, A TREATISE ON HUMAN NATURE, Book III, Part I, Sect. I.

²⁰ On Kant's implicit moral psychology, see M. MAHLMANN, KANT'S CONCEPT OF PRACTICAL REASON AND THE PERSPECTIVES OF MENTALISM 85 (Z. Bankowski, ed., 2005).

²¹ On the argument from (ontological and epistemological) queerness, see J. L. MACKIE, INVENTING RIGHT AND WRONG 38 (1977).

²² *Supra*, note 19.

²³ B. RUSSELL, HISTORY OF WESTERN PHILOSOPHY 117 – 118, 834 (1999). It is an interesting question how this theoretical outlook relates to Russell's practise of political morality.

rary moral sentimentalism of a Rortian type²⁶ has, however, not changed in the general outlook, though the details and the concrete ethical outcome vary sometimes considerably. How powerful the idea is that behind the impressive veil of moral ideas and concepts subjective feelings of approval and disapproval are hidden some of the authors illustrate as well who investigate morality in contemporary innateness-debates. Here, too, the morality-equals-emotional-preference theses or its negative variant (morality is an emotional aversion against harm afflicted to others) is clearly a leading research hypothesis. It is the core of one of the major strands of current reflections of cognitive science on morality and law identified above.²⁷

Modern non-cognitivism thus leads us thus to another path open to answer the formulated fundamental question about the reality of morality. It is an example of analytical reductionism. It does not deny that there is a language of morality and grants that this language expresses something but proposes to understand this something as something quite different from what a standard idea of morality assumes. With this analysis, morality ceases to be a phenomenon that is *sui generis*. Not only are objective moral entities not “part of the fabric of the world”, as Mackie put it in a classical critique of moral realism,²⁸ but moral entities as such are not part of what constitutes the world. Instead of the strange entity the traditional accounts in the history of thought were reflecting about, morality turns out to be a set of emotional preferences, nothing more and mysterious.

There are other modern theories that follow the same path of analytical reductionism. Examples are theories that take morality as nothing but the expression of self-perpetuating traditions or patterns of (institutionalised) violence.²⁹ Some variants of Systems Theory and its critique of the “metaphysics of ought” can be named in this context as well.³⁰ Here morality is “demystified” as a self-description of the

²⁴ A. J. AYER, LANGUAGE, TRUTH AND LOGIC, 107 (1956): ethical concepts “pseudo-concepts”.

²⁵ C. L. STEVENSON, ETHICS AND LANGUAGE (1950).

²⁶ R. RORTY, HUMAN RIGHTS, RATIONALITY, AND SENTIMENTALITY 122 (Shute & Hurley eds., 1998): “manipulating sentiment” is the right thing to do in ethical debates, for example through a “long, sad, sentimental story”, id. p. 133, not some rational foundationalism.

²⁷ See M. GAZZANIGA, THE ETHICAL MIND 167 (2005). On some examples of such studies and their critical assessment, see below Fn 37.

²⁸ J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 15 (1977).

²⁹ See J. DERRIDA, FORCE OF LAW, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 59 (Cornell, Rosenfeld & Carlson, eds., 1992).

³⁰ N. LUHMANN, DAS RECHT DER GESELLSCHAFT (1993).

participants of an autopoietic system, which serves an important functional role for the reproduction of the system. From the standpoint of a second order observer, however, it has no substance beyond the functional role it fulfils within the system.³¹

III. The Complex Fabric of Morality

Given these options, which path of the ontology of morals is to be pursued? One that takes it as a subjective or objective reality *sui generis*, or one that reduces it to something else, most probably some emotional preferences? This question will not be answered without some amount of introspective moral phenomenology which is fortunately methodologically rehabilitated since some decades.³²

The first observation one has to make in this context is that morality has a strong and distinguishing emotional dimension. If one witnesses a massacre one does not just think: "this is wrong" as one does if one hears the proposition "Aristotle lived before Aeschylus". One feels as a consequence of one's moral judgement a sometimes very powerful emotional aversion. These moral feelings are distinct from all others. The approbation of some moral act is phenomenologically something else than, say, the approbation of a beautiful goal in a football game. The aversion felt witnessing a massacre is different to the aversion seeing a rotten dish.³³ More concretely, at least three distinct spheres of approbation and aversion can (and have been traditionally) distinguished – the sphere of the instrumental good, of the moral good and of aesthetics. To illustrate, a sofa can be regarded as an instrumental good if it is comfortable and promotes a good posture, though its promotion of a good posture is not a laudable moral deed and it might be quite ugly.³⁴ A palace – to take Kant's famous example – can cause a pleasing aesthetical

³¹ *Id.*, 496.

³² See J. SEARLE, *THE REDISCOVERY OF THE MIND* 3, 73 (1992); for an alternative perspective of eliminative materialism, see P.M. Churchland, *Eliminative Materialism and the prepositional attitudes*, 78 *JOURNAL OF PHILOSOPHY* 67 (1981).

³³ S. NICHOLS, *INNATENESS AND MORAL PSYCHOLOGY* (P. Carruthers et. al. eds., 2005) fails to appreciate this difference. He takes the disgust about spitting in a glass of water to be the same like moral disgust. Another example is the question discussed in moral psychology whether it is "moral" to eat a chicken with which one has had sexual intercourse before, a question e.g. J. Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgement*, 108 *PSYCHOLOGICAL REVIEW*, 814 (2001) takes as relevant for moral theory. The study of moral judgement is, however, something much more well-defined than a "general study of human aversion".

³⁴ F. HUTCHESON, *AN INQUIRY INTO THE ORIGIN OF OUR IDEAS OF BEAUTY AND VIRTUE* 117 (1971): there is an important difference between a "fruitful field", a "commodious habitation" and a "generous friend" or a "noble character". He rightly points out, that if that distinction would not hold, one had the "same Sentiments and Affections toward inanimate Beings" as toward "rational Agents". This is a non-trivial,

experience though the knowledge of the suffering caused by the social preconditions and by the process itself of its construction through forced labour or pressing taxation is revolting.³⁵ Thus, the same thing can be aesthetically pleasing but cause moral disgust. To collapse these very distinct reactions in one kind of approbation or aversion means to step back behind very old insights of the history of thought. These distinctions of the spheres of the instrumental and moral good and of aesthetics lead to another very important observation – the judgment in these different spheres depends not contingently on or is supervenient to a different set of facts. In the case of the instrumental good these facts are dependent on the aim the evaluated thing is supposed to serve. In the aesthetical case it is the core riddle of aesthetics what these facts are. Whatever the answer to this is, whatever the base of the perception of beauty is – these facts are clearly distinct to the facts that cause the moral judgement as Kant's palace example illustrates. But what are the morally relevant properties of an evaluated situation? Some are rather straightforward. To take just one very basic example, moral judgements depend on rather intricate notions of agency. One regards it as a moral deed if somebody donates something to the poor. If a hundred Euro bill falls from my pocket into the hat of a beggar this is in contrast not an action and not the object of moral evaluation at all. Agency is therefore certainly one of these facts moral judgements depend on. Whatever one's subjective outlook or cultural background is – one cannot take the promotion of the good posture of the sofa as a moral deed, though of course you can falsely ascribe to an object like the sofa agency – like children often do with regards to inanimate things. Agency, intriguing as the matter is, forms, however, only the tip of the iceberg. As we will see, a fuller analytical theory of moral judgement shows that some substantive principles can be tentatively identified that seem to guide moral judgement universally and contrary to the widespread assumption of the relativity of moral evaluation. These principles cannot be reduced to an emotional aversion to the harm of others, to some kind of empathy and its emotional dimensions as philosophical and neuroscientific emotivism would suggest.³⁶ One of the reasons why this cannot be true is that there is inflicted harm that is morally justified – for example to impose a sanction of some sort on another person or harm as a means for self-defence. One might feel much empathy for such a person but still think that it is justified to inflict this harm applying principles of morality that are – as we will see in more detail – not reducible to an aversion of causing any harm in others but only to inflict any unjustified harm to others which is quite something else. Another

empirical observation. There is a twin-earth imaginable, where the inhabitants would not make such rather intriguing differentiations.

³⁵ I. KANT, KRITIK DER URTEILSKRAFT, AKADEMIE AUSGABE Vol. V, 204.

³⁶ For a similar argumentation, see J. Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 TRENDS IN COGNITIVE SCIENCE 143 (2007).

reason is one of the basic properties of moral judgement: There is no doubt that people have feelings of empathy with the suffering of others and a positive concern for their well-being. There is no problem here to be discussed. The problem of ethics is, however, that moral judgement consists in a reflective attitude towards feelings and actions. Morality is not just a feeling of empathy leading to corresponding action but an evaluative judgement about such feelings and actions rendering them “good” or “just” and the like. It can therefore, as just illustrated with the examples of sanctions or self-defence, demand action contrary to such feelings.

Empathy can therefore be best understood as a central heuristic tool for moral judgement. This is the core function of norms like the Golden Rule. It makes the agent understand what is at stake by taking the position of the other. The taking of position is, however, not a moral judgement itself. One might perfectly understand that the patient will be suffering, and still do it because one thinks this suffering (which one fully fathomed by empathy) is exactly what the other deserves (for example, in the everyday situation of punishment). A lack of empathy can make people fail to understand why an act is bad because they do not vividly see the consequences for others.³⁷ Empathy is a precondition, perhaps even a necessary

³⁷ This leads to core problems of recent studies of neuroscience and “neuroethics”. To take some examples: Blair in a series of papers developed the theses, that moral judgement is emotive, because certain people like psychopaths show a correlation between lack of moral judgement and abnormally low responsiveness to distress clues, cf. e.g. R. J. R. Blair, *A Cognitive Development Approach to Morality: Investigating the Psychopath*, 57 *COGNITION* 1 (1995); R. J. R. Blair et al., *Is the Psychopath ‘morally insane’?* 19 *PERSONALITY AND INDIVIDUAL DIFFERENCES*, 741 (1995). The idea is that the moral deficit derives from the affective deficit. S. NICHOLS, *INNATENESS AND MORAL PSYCHOLOGY*, (P. Carruthers et. al. (eds), 2005) states that harm norms prohibit actions to which we are predisposed to be emotionally averse. J. Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgement*, 108 *PSYCHOLOGICAL REVIEW*, 814 (2001) argues that moral judgement and moral action are based on emotional intuitions shaped by socialisation, whereas reason provides post factum rationalizations. The argument about empathy and love as the core of moral orientations is put forward, too, id. p. 824p. If the arguments outlined here are on the right track, things are more complicated than that. This does not, by the way, rule out the possibility of the kind of social psychological influences Haidt and others investigate, like peer pressure or coherence motives. It does not even rule out the descriptive truth of statements like the following (despite the impoverished understanding of what lawyers do) that in reality, “moral reasoning is not left free to search for truth but is likely to be hired out like a lawyer by various motives, employed only to seek confirmation of preordained conclusion”, id. 822. These influences might, however, contribute not to a theory of moral judgement as such, but to a theory of the distortion of moral judgement. Greene, J. D., Sommerville, R. B., Nystrom, L. E., Darley, J.M. & Cohen, J. D., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *SCIENCE* 2005 (2001), pursue a comparable course: “judgments concerning “impersonal” moral dilemmas more closely resemble judgments concerning non-moral dilemmas than they do judgments concerning “personal” moral dilemmas”, *ibid.* at 2107. The argument is based on cases like the following: It is accepted that there is an obligation to help a hurt man at the roadside despite his blood damaging the property of the helping person. There is in contrast no obligation accepted to help the poor by a donation. The reason for this is taken to be the personal character of the former and the impersonal character of the latter dilemma. Only

precondition of moral judgement, but not the judgment itself, as the case of fully felt but morally justified harm to others illustrates.³⁸

These observations show that there is a constitutive cognitive component in moral judgement, at least through the formal preconditions of moral judgment like agency and through substantive principles as well which are more complex than an emotional aversion to harm.

Moral judgements consist therefore not in purely emotional connections between moral evaluation and the factual basis of this evaluation, perhaps even purely subjective and contingent.³⁹ Things are much more complicated than this simple and widespread view assumes.

IV. The Theory-Dependence of Interpretations of Neuro-Imaging Studies

Recently, moral cognition has become the object of highly interesting brain imaging studies.⁴⁰ There are, however, many methodological problems involved in these

direct confrontation incites emotion that is decisive for moral judgement, because only this can have evolved in the small groups of our ancestors. Greene sums up: “we ignore the plight of the world’s poorest people not because we implicitly appreciate the nuanced structure of moral obligation, but because, the way our brains are wired up, needy people who are ‘up close and personal’ push our emotional buttons, whereas those who are out of sight languish out of mind”, J. D. Greene, *From Neural ‘is’ to Moral ‘Ought’: What are the Moral Implications of Neuroscientific Moral Psychology*, 4 NATURE REVIEWS NEUROSCIENCE 849 (2003). Greene and Haidt combine their results and state, J. Greene & J. Haidt, *How (and Where) Does Moral Judgment Work*, 6 TRENDS IN COGNITIVE SCIENCE, 522 (2002): that “emotion is a significant driving force in moral judgment” and continue: “reasoning can play an important role in the production of impersonal moral judgements and in personal moral judgements in which reasoned considerations and emotional intuitions conflict”. The emerging picture seems to suggest, that moral judgements are either emotional (personal) or resembling non-moral considerations (impersonal), apparently utility calculations. M. GAZZANIGA, *THE ETHICAL BRAIN* 171 (2005) draws the following picture of moral judgement: There are emotional gut reactions, based on empathy and a post factum rationalisation by the “interpreter” of the reasons of the judgement. Cf. for further argument, J. Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 TRENDS IN COGNITIVE SCIENCE 143 (2007).

³⁸ This is how the roadside-vs.-third-world-donation-example (*supra*, note 37) can be explained: the different behaviour is a question of heuristics, of performance, not moral competence. This is because a vivid understanding, what a donation means, creates a moral obligation to help, as illustrated by the global wish to help e.g. after the Tsunami in eastern Asia. Apart from other problems, not considering this is one of the reasons why some studies with patients suffering from damage to the prefrontal cortex remain inconclusive, cf. e.g. Koenigs, M., Young, Y., Adolphs, R., Tranel, D., Cushman, F., Hauser, M. & Damasio, A., *Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgements*, 446 NATURE 908 (2007).

³⁹ See, *supra*, note 37.

⁴⁰ Greene, J. D., Sommerville, R. B., Nystrom, L. E., Darley, J.M. & Cohen, J. D., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2005 (2001); J. Greene & J. Haidt, *How (and Where) Does Moral Judgment Work*, 6 TRENDS IN COGNITIVE SCIENCE 517 (2002); Heekeren, H. R., Wartenburger, I.,

studies arising from the limited understanding of brain functions and the development of the technical means of investigation. If one accepts that, despite these problems that certain brain areas, at least some of which are particularly connected with emotional activity, are activated by moral judgement the conclusion does not follow that moral judgement is – at least in core areas – nothing but an emotional approval of some sort deprived of cognitive content. The reason is the phenomenology of morality just outlined that indicates that this cannot be true. The fact that important elements of moral judgement are not located yet in brain imaging studies does not mean that they do not exist – as the fact that the neurological substrate of consciousness is unknown does not mean that consciousness does not exist. To the contrary, a careful phenomenology of morals (as of consciousness) tells neuroscience what to look for. It is especially important in this context to remember the theory-dependence of the interpretation of data. If people show less brain activity in parts of the brain connected in recent research to emotions if faced with certain moral dilemmas than other dilemmas this does only show that moral judgement is purely emotional if you interpret these data in an emotivist framework. Otherwise, it only shows that if there is moral judgement, there is emotion involved. Whether these emotions are causes, consequences or a matter of heuristics of moral judgement cannot be conclusively established by the studies undertaken so far. Besides, the data do not exclude the possibility of many other additional cognitive processes, realized in whatever parts of the brain in whatever manner beyond emotions – processes that clearly play a role as a phenomenologically adequate account of morality indicates.⁴¹

V. Mentalism and Metaphysics

Does this mean that one is lead back to a metaphysic of morals? Does one have to assume odd moral qualities in the world, perhaps in the sense of the objective relations in the world the Rationalists like Clarke or Price asserted, that Hume powerfully criticised and that are to a widespread view just not “part of the fabric of the world”? The answer is no. A door to a different and promising solution is opened if one becomes aware of the following property of moral evaluation. The

Schmidt, H., Schwintowski, H.P. & Villringer, A., *An fMRI Study of Simple Ethical Decision-Making*, 14 NEUROREPORT 1215 (2003); Moll, J., Zahn, R., de Oliviera-Souza, R., Krueger, F. & Grafman, J. *The Neural Basis of Human Moral Cognition*, 6 NAT. REV. NEUROSCIENCE 696 (2005); Koenigs, M., Young, Y., Adolphs, R., Tranel, D., Cushman, F., Hauser, M. & Damasio, A., *Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgements*, 446 NATURE 908 (2007).

⁴¹ Another problem is that the lack of emotive responses to certain cases might be caused by a lack of a cognitive understanding of the wrongness of an act with the consequent lack of moral feelings (guilt, shame, remorse, etc.). Thus the affective deficit could turn out to be (partly) the result of a deficit of moral judgement and not vice versa.

goodness of an action bears a different relation to the outside world than the length of a tree to this object. Moral judgement ascribes to actions or entities a moral value or deontological status, but it does not mirror something existing in the outside world. An illuminating parallel can be drawn to aesthetical judgement. Les Demoiselles d'Avignon are not in the same sense beautiful as the canvas is extended in space this painting is painted on. The beauty of the painting is ascribed by the human mind in the process of perceiving this piece of art. Equally, the goodness of the act of helping the poor is ascribed by the human mind to this act while perceiving this act. A promising theory of morality thus takes morality ontologically as an original creation of the human mind. This step leads not necessarily to a subjectivist standpoint in the sense that the content of morality is different in very individual as it does not imply that the creation of morality by the human mind is different in every individual human mind. If it is true, its only – though important consequence – is that morality might be relative to human beings. Among human beings, however, it can well be universal, not despite but because of its origin in the human mind – a question to which we will return.

The background of this subjective ontology is a representational theory of the human mind as pioneered by Descartes,⁴² and pursued by others, in metaphysical terms by the Cambridge Platonists and at least in some interpretations by Kant.⁴³ It forms the most promising general framework for a modern theory of the human mind and is consciously pursued in contributions to Cognitive Science from a mentalist perspective.⁴⁴ From this point of view our world picture taken as the totality of entities of our consciousness is the creation of the human mind by its internal, often unconscious and to a certain amount innate resources triggered and

⁴² The theory of vision was important in this context. The classical Aristotelian conception of vision was that sense organs naturally display the nature of the world. It was assumed that the perceptual image of the world exactly matches the world as it is. This point of view was increasingly hard to defend when first insights in the structure of vision were gained, e.g. through Kepler's work about the retina and the inversion of pictures on it. It was a mayor insight by Descartes to realise that visual perception involved representation arising in preformed ways from inborn cognitive systems stimulated from outside. In this view, visual perception is created by the mapping of sense impression by a cognitive system into a visual experience, see S. GAUKROGER, DESCARTES 276 (1995).

⁴³ P. STRAWSON, THE BOUNDS OF SENSE 19 (2004) summarised (quite appropriately) what he took (presumably mistakenly) as a fundamental flaw in Kant's theory as follows: "It is true that Kant thought of himself as investigating the general structure of ideas and principles which is presupposed in all our empirical knowledge; but he thought of this investigation as possible only because he conceived of it also, and primarily, as an investigation into the structure and working of the cognitive capacities of beings such as ourselves. The idiom of the work is throughout a psychological idiom. Whatever necessities Kant found in our conception of experience he ascribed to the nature of our faculties". See, *supra*, note 20 on the question of Kant's moral psychology.

⁴⁴ N. CHOMSKY, LANGUAGE AND THOUGHT 36 (1993).

occasioned by sense experience. These entities are not less part of the “fabric of the world” because they are mental. The “fabric of the world” is taken to encompass ontologically such entities as well.⁴⁵

Morality fits neatly in this picture: Morality is a real phenomenon *sui generis* of a complex cognitive, emotional and – as we will see – volitional fabric that is a creation of the human mind from its internal resources triggered and occasioned by certain properties of objects of moral evaluation.

These theses make it plausible that there is a third ontological way between the assumption of odd metaphysical moral entities in the world and kinds of reductionism, thus between moral realism in the classical sense and non-cognitivism. This is the first interesting result of a mentalist theory of ethics and law.

D. The Reasonableness of Moral Judgement

I. Ethics and the Limits of Reason

The remarks so far have lead us to a point where one can formulate another perennial problem of ethics more precisely from a mentalist perspective. This problem concerns not the ontological but the epistemological status of moral judgements. Are moral judgements rational or to use a traditional term – reasonable – and if so – in which sense? Or are we just exchanging persuasive definitions, use performative, discursive violence as Derrida⁴⁶ proposes if we engage in debating moral issues or pursue emotional manipulations as Rorty asserts⁴⁷ and as it seems to follow from neuroethical emotivism?

The concept of rationality is often modelled along the lines of the apparently most secure kinds of knowledge – demonstrative proofs of mathematics or the concept of truth of – since the scientific revolution in the 17th century – empirical natural science. It is a standard argument in ethics that ethics fails to match this standard of

⁴⁵ On the mind-body problem and the ontology of mental entities, see N. CHOMSKY, ON NATURE AND LANGUAGE, (2002), 45.

⁴⁶ J. DERRIDA, FORCE OF LAW 13 (1992): “Its very moment of foundation or institution (...) the operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist in a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and which no justice nor previous law with its founding anterior moment could guarantee or contradict or invalidate. No justificatory discourse could or should ensure the role of meta-language in relation to the performativity of institutive language or its dominant interpretation”.

⁴⁷ R. RORTY, HUMAN RIGHTS, RATIONALITY, AND SENTIMENTALITY 133 (Shute & Hurley eds., 1998).

rationality and truth. It is argued that there are no objective empirical facts that can falsify (let alone verify) moral judgements.⁴⁸ It is rightly pointed out that ethics is about an ought, not an is. This is taken as another indicator that truth in ethics does not exist as truth is connected to propositions about facts, not normative judgements of ought: "As true conclusions argue no virtue in the agent, so false argue no vice".⁴⁹ In addition, theoretical judgements have no motivational force. Only affections of some kind can be a factor of motivation. As moral judgement does influence human motivation, it can consequently not be a true/false-statement that has no such power.⁵⁰

Finally, reason cannot determine an ultimate end, only subordinate ends. Ultimate ends are chosen because of given desires and preferences.⁵¹ It follows from the preceding remarks on the ontology of morals that it makes indeed no sense to apply truth standards of the natural sciences to ethics. The conclusion, however, that if that is so, no standards of reasonableness exist, is too rash. The make-up of the human mind and its relation to the world could be too complicated for that. It is far from clear and certainly not a priori given that the only alternative to falsifiable theoretical propositions about external objects is subjectivist irrationalism. Perhaps there is again a (as in the case of moral ontology) a third way beyond the extremes that might be worth considering. The following remarks use the term reasonableness for what is investigated. It is used in a rather wide sense to designate what one could call the considered use of a mental faculty and is not the same as understandings of that term that are used in other contexts.⁵² After discussing this point, the problem of motivation and of ultimate ends will be addressed.

⁴⁸ D. HUME, *A TREATISE ON HUMAN NATURE*, Book III, Part I, Sect. I.

⁴⁹ F. HUTCHESON, *ILLUSTRATIONS ON THE MORAL SENSE* 150 (1971).

⁵⁰ D. HUME, *A TREATISE ON HUMAN NATURE*, Book III, Part I, Sect. I. On his later, more differentiated views compare D. HUME, *ENQUIRY CONCERNING THE PRINCIPLES OF MORALS*, Sec. I: "The final sentence, it is probable, which pronounces characters and actions amiable or odious, praise-worthy or blameable; that which stamps on them the mark of honour or infamy, approbation or censure; that which renders morality an active principle and constitutes virtue our happiness, and vice our misery: it is probable, I say, that this final sentence depends on some internal sense or feeling, which nature has made universal in the whole species. For what else can have an influence of this nature? But in order to pave the way for such a sentiment, and give a proper discernment of its object, it is often necessary, we find, that much reasoning should precede, that nice distinctions be made, just conclusions drawn, distant comparisons formed, complicated relations examined, and general facts fixed and ascertained".

⁵¹ F. HUTCHESON, *ILLUSTRATIONS ON THE MORAL SENSE* 120 (1971); D. HUME, *A TREATISE ON HUMAN NATURE*, Book III, Part I, Sect. I.

⁵² Reasonable is for example not used in the same sense as in the Rawlsian distinction of the reasonable as opposed to the rational. Rawls takes reasonable to consist of two aspects, first, the willingness to propose fair terms of cooperation and to abide by them provided others do and, second, the willingness to recognize the burdens of judgement, J. RAWLS, *POLITICAL LIBERALISM* 48 (1993).

II. Frameworks of Moral Argument

There is a first sphere of ethical reasonableness that concerns the non-moral preconditions of moral judgement. X and Y might – to take a simple example – agree that helping the poor is a morally laudable act though they disagree about the means to do so. This trivial example shows that the issues raised by non-moral preconditions of moral acts can be very complex if issues of socio-politics are in question. One can for example draw very different conclusions what helping the poor means if one thinks a neo-liberal economy is better for the public at large than a mixed economy with an active state sector.⁵³ These questions of the non-moral preconditions of moral judgements cause, however, no special epistemological problems but the usual of how to construct theories about the world. The reasonableness of the non-moral preconditions of moral judgement forms therefore the first important aspect of the reasonableness of moral judgement in general.⁵⁴

Another issue of the reasonableness of ethical arguments concerns what one can call the ideological function of moral arguments. Often there are very fierce moral debates where at least on one side no real moral issue is at stake but some non-moral interests camouflaged in moral terms. It is another important part of a rational moral argument to make these influences transparent. If that happens, the moral issues often disappear.

III. Grundurteile - The Core of Moral Reason

A final aspect of the reasonableness of moral judgement to be mentioned is the role of what can be called in German *moralische Grundurteile* – foundational judgements of morality. These judgements form the ultimate yardsticks of moral debates. They are the reason why the subjective basis of moral judgement does not exclude in principle the possibility of yardsticks of legitimacy as we will see now.

⁵³ The questions get even more complicated if one thinks of questions like the nature of human beings – a particularly important non-moral precondition of moral judgement as the concept of humankind evidently determines moral judgement, though it does not provide normative principles itself. For some comments on human nature and a social vision, J. MCGILVRAY, CHOMSKY 248 (1999).

⁵⁴ W. FRANKENA, ETHICS 13 (1963): “I think that moral philosophers cannot insist too much on the importance of factual knowledge and conceptual clarity for the solution of moral and social problems. The two besetting sins in our prevailing habits of ethical thinking are our ready acquiescence in unclarity and our complacency in ignorance – the very sins that Socrates died combating over two thousand years ago”. Therefore he rightly states: “It is not enough to show that people’s basic ethical judgements are different, for such differences might all be due to differences and incompletenesses in their factual beliefs” id. p. 110.

If one takes a step back and considers the history of moral philosophy and ethics from a bit of distance one finds that behind the veil of diversity, which is sometimes taken as very the essence of it, some interesting convergence is hidden. Under closer scrutiny of the many ethical systems developed and their explicit or implied basis, two principles are candidates for the content of such Grundurteile or foundational judgements.

First, the principle of altruism. According to the positive part of this principle, it is morally good to intent to foster the well-being of feeling beings without concern to the non-moral interests of the evaluating agent or observer, and to act with this intention and beneficial effects. Conversely, it is morally bad to intent to harm somebody and to act accordingly with harmful effects. This is the *neminem-laede* formula.⁵⁵ These are, of course *prima facie* or *ceteris paribus* principles. But without much exaggeration, the concern for the interest of others, the conditions under which these interests take precedent over the interests of the agent and the moral reprehensibility of harming others are something like the core of the concept of morality in general. These kinds of principles have been formulated many times in history as the heart of ethics.⁵⁶ Nevertheless, these principles are full of riddles as the history of ethics and contemporary debates about the possibility of altruism illustrate. It has always been and still appears to be for many people namely a given truth, that all human action can only be motivated by narrowly interpreted self-interest, something one might call the foundational selfishness-hypothesis. To this hypothesis, the principle of altruism formulates a clear, and for many ethicists rather strong and therefore unconvincing claim, especially if it goes beyond – as it does here – forms of reciprocal or kin altruism.

⁵⁵ The *neminem-laede* formula does not follow analytically from the goodness of altruism. Altruism could be morally good, harm, however, morally neutral.

⁵⁶ For e.g. Kant, the fostering of the happiness (Glückseligkeit) of others was the central duty of virtue apart from self-perfection: I. KANT, *METAPHYSIK DER SITTEN, AKADEMIE AUSGABE*, Vol. VI, 388: “Wenn es also auf die Glückseligkeit ankommt, worauf als meinen Zweck hinzuwirken es Pflicht sein soll, so muß es die Glückseligkeit *anderer* Menschen sein, *deren* (erlaubten) Zweck ich hiemit auch zu dem meinigen mache. Was diese zu ihrer Glückseligkeit zählen mögen, bleibt ihnen selbst zu beurtheilen überlassen; nur dass mir auch zusteht manches zu weigern, was sie dazu rechnen, was ich aber nicht dafür halte, wenn sie sonst kein Recht haben es als das *Ihrige* zu fordern” (emphasis in the original). On the lack of self-interest in the observer: F. HUTCHESON, *AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE* 111 (1971): “The Word Moral Goodness, in this Treatise, denotes our Idea of *some Quality apprehended in Actions, which procures Approbation, and Love toward the Actor, from those who receive no advantage by the Action.* Moral Evil, denotes our Idea of a contrary Quality, which excites Aversion, and Dislike toward the Actor, even from Persons unconcern’d in its natural tendency” (emphasis in the original).

Second, the justice-as-proportional-equality-principle, or basic principle of justice. According to this principle, justice consists of proportional equality in two dimensions. First, proportional equality has to be maintained between a treatment X of an agent B by agent A and the given quantity of the entity that occasioned the treatment. Second, proportional equality has to be maintained between a treatment X of B in situation S by agent A and a treatment Z of C in situation T by agent A if the patients B and C and the situations S and T are sufficiently similar. To illustrate by a simple example. If a cake is distributed according to need, it seems just that a child that was ill and has to recover will get a bigger piece than others. Proportional equality is maintained between the treatment of the child by the distributor, the allocation of a quantity of cake to the child and the given quantity of the entity that occasions the treatment – here the need of the child. Other examples are the grading of exams which has to be proportional to the achievement of the student to be just or the measure of criminal punishment, which has to be proportional to guilt. If there is no reference point for the apportionment of the treatment, the second variant becomes relevant as something like a default principle – if there are no special reasons to do otherwise, an equal distribution of a cake is for example a just distribution. Note that it is not an analytical truth that equals ought to be treated equally. There is no contradiction implied in imagining a world where one ought to treat equal things unequally or every second equal thing equally. It is therefore an interesting fact about human moral judgement and the principles that direct moral judgment, if the foundational role of these principles in moral reasoning is shown.

The claim that these two principles play an important role in ethical debates will be made plausible by the discussion of one historic and two contemporary examples that might appear as theoretical superior alternatives, one of the latter consciously avoiding any strong claims about the ethical judgement of human beings. Their discussion will hopefully illustrate the role of Grundurteile or foundational judgements in ethical theory. They are the inescapable, if often hidden or even denied backbone of any plausible moral argument.

IV. Grundurteile in Operation – Some Examples

First, we will look at Kant's categorical imperative, then at the post-modern ethics of respect of otherness and finally at the Rawlsian principles of justice.

In its different versions, Kant's categorical imperative is a demanding topic to discuss. Its core is the principle of universalisation, the idea, that any moral principle can only be justified if everybody's interest counts equally in moral matters or – in the words of the second material version of the imperative – that

every human being is an end in-itself.⁵⁷ This principle of universalisation is, however, a derivative principle. It is not foundational in itself. This is so first because there are non-trivial anthropological assumptions (of which racists would deny) implied about the equality of different human beings and for the context pursued decisive, the basic principle of justice discussed. Universalisation presupposes namely - besides the essential descriptive equality of human beings - the prescriptive principle that everybody ought to be treated equally. Only if everybody is in the relevant normative respect equal and if there is a normative principle that equal things should be treated (proportionally) equal, the principle of universalisation has an argumentative base. The core example of an ethics of universalisation rests thus on one of the foundational principles formulated.

Consider another example. The constructive core of post-modern ethics is the respect for the Other. The central reference point for Derrida and others is Levinas and his contention that in the face, the visage, this otherness is embodied and creates an infinite ethical resistance toward abuses.⁵⁸ This ethics has a very high resonance because it seems to draw the most radical conclusions from the Nazi barbarism and the holocaust. It seems to offer a most trenchant critique of hidden patterns of violence, in all forms of human social interaction - from law to discourse.

There is, however, no reason to respect others just because of the otherness of the other. There is no normative contradiction in acknowledging fully the otherness of the other and of not respecting it at all. One can even imagine without any contradiction an agent who fully acknowledges the otherness of the other and concludes that he finally found something that is worth subduing. There is no path from the sheer factual otherness of the other to a normative principle of respect. Such normative principles are therefore tacitly presupposed by the ethics of post-modernity. Most importantly, the argument for the respect of others presupposes the principle of altruism - that you should not harm others and that it is good to foster their happiness.⁵⁹

⁵⁷ I. KANT, DIE KRITIK DER PRAKTISCHEN VERNUNFT, AKADEMIE AUSGABE, VOL. V., 87.

⁵⁸ "Cet infini, plus fort que le meurtre, nous résiste déjà dans son visage, est *l'expression* originelle, est le premier mot: « tu ne commettras pas de meurtre ». L'infini paralyse le pouvoir par sa résistance infinie au meurtre, qui, dure et insurmontable, luit dans le visage d'autrui, dans la nudité totale de ses yeux, sans défense, dans la nudité de l'ouverture absolue du Transcendant. Il y a là une relation non pas avec une résistance très grande, mais avec quelque chose d'absolument *Autre*: la résistance de ce qui n'a pas des résistance - la résistance éthique. (...) L'épiphanie du visage est éthique ", E. LEVINAS, TOTALITE ET INFINI 173 (1961).

⁵⁹ Some authors of post-modernity explicitly state something like the principle of altruism: The core of ethics is „that un-founded, non-rational, unarguable, no-excuses-given and non-calculable urge to

The last example we will discuss is Rawls principles of justice. They are clearly derivative principles, developed from the basic principle of justice. The equal-freedom principle and the equal-chance principle apply the basic principle of justice to special spheres of distribution – freedoms and chances. The difference principle starts with the basic principle of justice in the sphere of material goods and develops a derivative principle that is supposed to take account of other aspects. One important such aspect is that due to certain anthropological facts, the possibility of unequal distribution can benefit the worst off. The just savings principle extends these consideration into the future.⁶⁰

The importance of the Grundurteile or foundational judgements for Rawls theory can be illustrated at an even more fundamental level. In his account of the authors of moral philosophy Rawls is most interested in, Rawls develops an approach that can be called – using his terminology – a principle-and-conception-dependent constructivism.⁶¹ The point of this approach is that human desires as motives of action are regarded as normatively bound by certain principles, for example the principles of justice.⁶² These principles are derived from a certain conception of ourselves, namely that we are free and equal.⁶³ This is the core of Rawls proceduralism. From the basis that we conceive ourselves as being free and equal, the conclusion that we ought to treat each other as such follows, however, only if one presupposes the basic principle of justice outlined. If not, the fact that we are descriptively free and equal has not normative consequences at all. Rawls never justifies this principle he implicitly applies.⁶⁴ The objects of justification in his theory are the famous principles of justice discussed before. Their preconditions are the circumstances of the original position that are, however, nothing but a metaphorical illustration of the equality principle of justice. They are designed in a

stretch towards the other, to caress, to be for, happen what may”, Z. BAUMANN, *POSTMODERN ETHICS* 244, 247 (1993).

⁶⁰ J. RAWLS, *A THEORY OF JUSTICE*, 47 (rev. ed. 1999).

⁶¹ J. RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* (2000); for further comments, see M. Mahlmann & J. Mikhail, *The Liberalism of Freedom in the History of Moral Philosophy*, *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 122 (2003)

⁶² J. RAWLS, *A THEORY OF JUSTICE*, 45 (rev. ed. 1999).

⁶³ J. RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* 211 - 213 (2000).

⁶⁴ *Id.*, 241 discusses this problem, without solving it as the following summary illustrates, 243: “ As to whether our general and high-level convictions about practical reason are intuitions, as some say, they may of course be called that. However, as I have said, constructivism views these so-called intuitions not as convictions about an independent order of moral values, but as convictions about practical reason itself, about its principles and its ideas of reason”. The question is: what are these principles of practical reason and its ideas of reason, what is their content and origin?

way – especially through the veil of ignorance – to assure that the descriptively equal human beings are prescriptively treated equally without distortion by personal interest. The basic principle of justice is not explicitly stated as the basis of derivation. Rather, it is embodied in the deliberative architecture of the original position which has one clear cut precondition: That equal agents have to be treated equally and that human beings are such equal agents. This is why the veil of ignorance is drawn to cover their properties and conceptions of the good. It is a heuristic tool to make agents abstract from their difference and focus on the equality that gives rise to the claim to equal treatment that is elaborated in the principles of justice in their various forms.⁶⁵ The legitimacy of the circumstances of the original position is ultimately based on their intuitive plausibility.⁶⁶ They are in Rawls view commonsensical. The egalitarian intuitions are, however only commonsensical if the basic principle of justice is tacitly presupposed. The non-procedural precondition of Rawls proceduralism of justice as fairness is thus at least one of the foundational principles – the principle of proportional equality outlined. One can continue this kind of analysis, say with discourse ethics⁶⁷, but the kind of argument put forward here should be clear enough.

V. Yardsticks of Practical Reason

The consequence of this argument is that given the importance of the non-moral preconditions of moral judgements, the role of non-moral interests in moral dispute and the plausibility of the assumption of Grundurteile or foundational judgements guided by something like the formulated principles, there are yardsticks to criticise ethical systems. The subject-matters of moral debates are certainly in many cases very difficult and perhaps beyond clear answers, especially when major social issues are at stake. Given these factors determining concrete ethical evaluation there are, however, some standards of practical reasonableness that we should not forget or weaken through theoretical reflection. There is no reason to accept for example that the assertion “Jews may be killed” is as reasonable as its critique. That is the second not only interesting, but encouraging result.

⁶⁵ J. RAWLS, *A THEORY OF JUSTICE*, 10 (rev. ed. 1999).

⁶⁶ *Id.*, 16: „Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstance in the choice of principles“. This is only reasonable and generally acceptable on the basis that human beings are descriptively equal (a feudalist or racist would disagree) and should be treated equally. Rawls makes no original point here, but restates a standard intuition about justice. See S. PUFENDORF, *De Officio Hominis et Civis juxta Legem Naturalem*, I, 7.

⁶⁷ One can for example put forward the standard argument that communication does not necessarily presuppose a minimal ethics (one can communicate with slaves) and that therefore the discourse principles of ethics presupposes the foundational principles mentioned.

E. Moral Reasons and Moral Motives

Given these findings, the problem of the relation of moral reason and motives can perhaps be understood more clearly. If the thoughts so far were on the right track, moral reasons are derived from complex moral arguments in which non-moral preconditions of moral arguments, critique of interest and foundational judgements play an important role. Now the question arises: Why do such moral reasons motivate? This is a question that is debated with much passion in contemporary moral philosophy.

Internalists argue that the moral judgement itself has motivational force.⁶⁸ The paradigmatic internalist account is Kant for whom the moral law has motivational force through the ought itself buttressed (but not constituted) by the central moral feeling, in his view, reverence or respect for the categorical imperative.⁶⁹

Externalists deny that as it seems impossible and think that other, non-moral motives must play a role, e.g. the non-moral interest of agents like concrete desires, the wish to profit from certain social arrangements that are sustained by abiding by moral rules, etc.⁷⁰ A classical example of this argument is Hume's critique of the Rationalists: Even granted that there are moral truth these truth could never motivate people as only desires of some sort have motivational force.⁷¹ The internalist argument seems to fall again in the metaphysical trap, as e.g. Mackie argued against the Platonic idea that the perception of an idea of goodness motivates people to do good.⁷²

⁶⁸ R. PRICE, A REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS 186 (Raphael ed., 1758) for a concise explanation: "When we are conscious that an action is *fit* to be done, or that it *ought* to be done, it is not conceivable that we can remain *uninfluenced*, or want a *motive* to action".

⁶⁹ I. KANT, KRITIK DER PRAKTISCHEN VERNUNFT, Akademie Ausgabe Vol. V, 78: „Achtung fürs moralische Gesetz ist also die einzige und zugleich unbezweifelte moralische Triebfeder“.

⁷⁰ For further discussion of internalism see R. M. HARE, THE LANGUAGE OF MORALS 20, 30, 169, 197 (1952); R. M. HARE, MORAL THINKING 23 (1982); D. O. BRINK, MORAL REALISM AND THE FOUNDATION OF ETHICS 39 (1989); G. HARMAN, EXPLAINING VALUE, 30 (2000); an externalist view is taken by P. FOOT, VIRTUES AND VICES, 148 (1978).

⁷¹ D. HUME, A TREATISE OF HUMAN NATURE, Book III, Part I, Section I.

⁷² J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 40 (1977): "Plato's Forms give a dramatic picture of what objective values would have to be. The Form of the Good is such that knowledge of it provides the knower with both a direction and an overriding motive; something's being good both tells the person who knows this to pursue it and makes him pursue it. An objective good would be sought by anyone who was acquainted with it, not because of any contingent fact that this person, or every person, is so constituted that he desires this end, but just because the end has to-be-pursuedness somehow built into it. Similarly, if there were objective principles of right and wrong, any wrong (possible) course of action would have not-to-be-doneness somehow built into it."

One should not underestimate the importance of this problem. For Kant it is the very essence of morality itself that duty had to be done for duty's sake and not for some other reasons.⁷³ It is widely regarded as one of the main problems of utilitarianism ever since Prichard's critique that utilitarianism fails to give a consistent account of how a good of the greatest number could motivate an individual to act that fosters this good which might not be her own or even contrary to her own.⁷⁴ Williams even argued that this discrepancy between the demands of the utilitarian principle and the individual motivation could even endanger the integrity of a person.⁷⁵ Discourse ethics asks with impressive seriousness this question as well.⁷⁶ It seems to formulate a predicament: Either there are rational reasons for morality, whose motivational force is inexplicable, or there is moral motivation by feelings and desires but rational reasons are irrelevant for this motivation.

How to escape this predicament? The solution is to follow one of Wittgenstein's best pieces of advice, namely "Denk nicht, sondern schau", "Do not think, look."⁷⁷ It is one of the constitutive facts of morality that a moral judgement has motivational force. That is why it has normative content and its distinctive dimension of ought. If you witness a massacre you do not only feel a certain emotional aversion unlike the distant or – if you are a committed philologist – more concerned reaction to the wrong proposition "Aristotle lived before Aeschylus". In addition to these peculiar feelings, moral judgements have motivational consequences if they do not concern past situations, where nothing can be done anymore. You experience a moral ought, an obligation to perform a certain act, for example that you should do something to help. Nothing like this happens in the case of judgement about the instrumental good or aesthetics. The aesthetical judgement is volitional neutral. A judgement about an instrumental good can become a hypothetical imperative. "You ought to use curry for a spicy dish" means motivationally nevertheless something qualitatively different to "You ought to rescue the drowning man, if you can".

⁷³ Cf. e.g. the famous, admired and sometimes ridiculed praise of duty in I. KANT, *KRITIK DER PRAKTISCHEN VERNUNFT*, AKADEMIE AUSGABE Vol. V, 86.

⁷⁴ H. A. Prichard, *Does moral philosophy rest on a mistake?*, in *MORAL OBLIGATION AND MORAL INTEREST* (1968).

⁷⁵ B. Williams, *A critique of utilitarianism*, in J. J. C. SMART & B. WILLIAMS, *UTILITARIANISM – FOR AND AGAINST* (1973).

⁷⁶ For an example, see J. HABERMAS, *DIE ZUKUNFT DER MENSCHLICHEN NATUR* 124 (2001).

⁷⁷ L. WITTGENSTEIN, *PHILOSOPHISCHE UNTERSUCHUNGEN* No. 66 (1953).

This moral ought is an intricate phenomenon that is full of riddles if one looks at it closer.⁷⁸ There is a long and continuing debate about the nature of the moral ought and obligation in general.⁷⁹ The details are difficult, but at least this much is clear: The ought affects the human will, inclines it without binding or determining it. If you ought to act in a certain way, you still can act otherwise. Any attempt of understanding the intricacies of moral judgement should certainly pay careful attention to this aspect of the object to be explained. Moral reasons are thus the process to get to a point where – to use Rawls term, though in a slightly different sense – considered judgements are possible, not ill solicited appraisals based for example on a deficient account of the facts.⁸⁰ If one comes in the end, however, to the conclusion that act A is immoral this has motivational consequences. There are no moral judgements without motivational consequences. If the judgement had no motivational consequences it would not be a moral judgement at all.⁸¹ This is a fact about the constitution of moral judgement of human beings and their moral cognition that could be different but clearly is not.

The question that is pressing for individuals and cultures is thus not whether moral judgements have motivational force but how can the empirically given intrinsic motivational force of a moral judgement become the guiding motivation at least in the most important instances for the comportment of human beings? This is, of course, the question that Kant tried to answer with reference to the moral feeling of reverence for the law.⁸² Sometimes this question does not arise – the moral imperative itself is just too strong. When Hans and Sophie Scholl were distributing their leaflets in 1943 in Munich appealing to the ethical “Freiheit und Ehre” (freedom and honour) of the Germans to make them resist Hitler they were certainly motivated by nothing but the imperative to do something against the

⁷⁸ For discussion of the majesty vs. grace debate between Kant and Schiller, see F. SCHILLER, ÜBER ANMUT UND WÜRDE, SÄMTLICHE WERKE, Vol. V, 465; I. KANT, DIE RELIGION INNERHALB DER GRENZEN DER BLOßEN VERNUNFT, AKADEMIE AUSGABE, VOL. VI, 23 Fn.

⁷⁹ Hart rightly observes that “obligation” is the concept that “haunts much legal thought”, H. L. A. HART, THE CONCEPT OF LAW 85 (1997).

⁸⁰ On Rawls’ conception of considered judgements, J. RAWLS, A THEORY OF JUSTICE, 42 (rev. ed. 1999).

⁸¹ There is an interesting meta-critique of Hume by Rawls that makes a point that is relevant in this context. He rightly says that Hume’s critique of the Rationalists loses its force if one takes the Rationalists to propose not only objective truth in ethics but a motivational principle that truth in ethics perceives motivates. For more discussion, see J. RAWLS, LECTURES IN THE HISTORY OF MORAL PHILOSOPHY 80 (2000).

⁸² I. KANT, KRITIK DER PRAKTISCHEN VERNUNFT, Akademie Ausgabe Vol. V, 78.

great barbarism that devastated the world.⁸³ But these are exceptional circumstances and actors. In everyday life, moral acting – apart from minor cases – is and perhaps cannot be the rule. There are many motives that compete with moral motivation to do a certain act. Often these motives are stronger than the moral impetus. People are mostly not prepared to achieve their aims in life at the price of great harm or injustice to others (though the counter-examples are manifold) but may not be too concerned about great moral deeds. Only in the most clichéd of films are moral heroes the rule. This is one of the reasons – apart from diminishing the uncertainty of the content of rules and creating with courts a neutral institution to adjudicate them – to institute the law as far as it has a relation to moral norms and is not just about creating pragmatic and technical rules to organise society. One needs some social buttressing of moral norms because the motivational forces of morality, though existing, are limited. The necessity of social buttressing the motivational force of moral judgement should, however, not obfuscate the point of the intrinsic and constitutional connection between moral judgement and motivational consequence. It seems that some of the contemporary debate about moral reasons and motives misses this significant point.

To be sure, there are non-moral reasons for moral acting. One of the most important is the non-moral good of a social union – a thought with a long tradition. W. v. Humboldt developed it in a particularly convincing form: Individuals can only realise in their life part of what is valuable in human existence in general. They depend on the development of others to tap the reservoirs of humanity's achievements in general.⁸⁴ This has a consequence that von Humboldt does not draw himself, but that is clear enough: If by the realisation of their egoistic maxims this development of others is blocked, their apparent victorious self-realisation is in fact self-deprivation. If you want to enjoy for example Don Giovanni you have to make sure that Mozart is not starving in a slum or ends as a collateral damage in some imperial war. A community based on the principles of benevolence and justice certainly fosters this end and is therefore preferable even from the point of view of egoism if this egoism is sufficiently enlightened.

In addition, one can point to the consequences of moral acting. If the acting concerns serious issues the agent often pays a price for her comportment.⁸⁵ It is not

⁸³ For further, see the last leaflet of the group, e.g. in H. STEFFAHN, *DIE WEIßE ROSE* 143 (2005) and T. Mann's BBC radio address on the matter, June 27, 1943, in T. MANN, *GESAMMELTE WERKE*, Vol. XI, 1075 (1990).

⁸⁴ W. VON HUMBOLDT, *VERSUCH DIE GRÄNZEN DER WIRKSAMKEIT DES STAATES ZU BESTIMMEN*, in *WERKE IN FÜNF BÄNDEN*, Vol. I 64 (2002).

⁸⁵ It should be noted that Kant's magnificent idea of the "Würdigkeit" (worthiness) to "Glückseligkeit" (happiness, beatitude) as the consequence of moral acting is based on the view that the world is

the case that moral acting leads necessarily to happiness; indeed, as the mentioned example of German resistance illustrates, it can even lead to the Guillotine. The disconnection of morality and happiness can be less dramatic but nevertheless of great importance in everyday life. It is often difficult to follow moral rules in the grey daylight of every day's existence, in the hidden parts of social life, where there is no praise or public recognition to be gained, to attempt the good, to err, and to stay on course despite a lost opportunity here or a forfeited privilege there. But there is a certain satisfaction to be gained by a moral orientation and acting, perhaps even maintained despite some obstacles – a bit of self respect and the dignity of preserved uprightness which are not the worst of all possible human experiences.

Thus, the main answer to the problem of the motivational force of moral reasons is that moral judgements are the result of moral reasoning and that the thus developed moral judgements have intrinsic motivational force. In addition, there are non-moral reasons for following the intrinsic motivational force of moral judgement – institutionalised the law, beyond institutions the insight in the value of a community based on benevolence and justice and a sense for the worth of preserved moral integrity.

F. Constructivism

Moral dilemmas are an important topic in ethical debates. Examples are questions like: Is it permissible for a scientist to participate in developing a bomb and profit from it when he knows that if he does not do it somebody else will? Is X allowed to shoot Z, if this is the condition to save 19 others who will otherwise die? If a trolley is running down a track, are you allowed to turn a switch so that a single person is killed on track A instead of five on track B? Would you be allowed to throw a man in front of the train to save the other five? What about killing one person to save with her organs five others?

Moral dilemmas have been used to show the wrongness of ontological moral realism. There can be – the argument runs – no moral contradiction of principles which are the root of dilemmas if the moral principles derive from objective matters of fact in the world as there are not contradictory matters of fact in the world. There is a subjectivist version of this argument, too. Here it is argued that moral dilemma

constituted in a way that moral acting will not necessarily lead to the happiness of the agent, I . KANT, KRITIK DER REINEN VERNUNFT, AKADEMIE AUSGABE VOL. III, 525.

cannot exist, because morality is a construction of human culture. If there are dilemmas this construction is bad and has to be changed.⁸⁶

The first argument is not of much interest because here no ontological realism is pursued. The second appears not to be true. There are hard cases in ethics and of course in law where true dilemmas exist – from the Carneades-dilemma to abortion.

In addition, there is the experience in everyday life, especially as a lawyer who deals with concrete cases all the time, that there is often no quick normative evaluation at hand. And this is not only due to bad, incomplete, contradictory laws. To take some example from the German human rights jurisdiction: Are Nazis allowed to march through the Brandenburger Tor in Berlin? Are they allowed to pass the new Holocaust memorial? Are they allowed to do this on the 8th of May or 27th of January? What if survivors of the camps pay service to the victims at the memorial at that date? Difficult questions have to be solved in such cases. What is to take precedence – freedom of assembly and speech or the interests of the public not to let fascism rise and of survivors that their dignity is not violated? The rule, that the freedoms of speech and assembly form crucial democratic goods, the rule that Fascism should be fought and the rule that personality rights have to be protected have to be weighed and balanced. The solution to these concrete cases will vary but they seem to illustrate that in ethics as in law judgements about concrete cases are often the result of a constructive process that develops slowly a complex code of values and rules in whose framework new cases are solved. Any legal culture manifests how complicated these constructions can get. This complexity is not just the result of the strange mind of lawyers and law-makers. It is to a great degree a necessary consequence of the complexity of the issues involved. That is interesting, because a world is imaginable where every moral and legal question has a clear answer that is found instantaneously, spontaneously, without (much) reflection. But this seems not to be a human world. The inevitability of moral and legal constructions is therefore a further parameter of practical theory.⁸⁷ It clarifies that the realm of ethics and law is one that is deeply situated in conditioning history and social circumstance. It illustrates that fully developed moral codes or legal systems cannot be the object of mentalist approaches, but only the foundational judgements that are one set of the different preconditions of the constructive process, that lead together to the complex reality of morality and law.

⁸⁶ On the debate of dilemmas and realism see B. WILLIAMS, *ETHICAL CONSISTENCY; CONSISTENCY AND MORAL REALISM*, in *PROBLEMS OF THE SELF* (1973) and P. FOOT, *MORAL REALISM AND MORAL DILEMMA*, in *MORAL DILEMMAS* (2002).

⁸⁷ Note that this is a familiar picture in the history of thought; see T. AQUINAS, *SUMMA THEOLOGICA*, I-II, q. 91,3.

G. The Ontogenesis of Morality

Now the following problem appears: Some of the inner resources of human moral cognition cannot be learned in the usual sense of understanding this term, namely by instruction, repetition and internalisation. Just consider the most basic of all moral categories, namely "ought". Note that the issue is not the content of a certain prescriptive rule, say: You ought not to lie. The issue is the meaning of ought, its normative semantic. There is no way that you can instruct a child what ought as a category means if the child does not know it in advance. Sanctions can help to induce certain behaviour but let the inner side of this behaviour untouched. Explanations like: "Ought is a inner compulsion with affects the will without determining it, followed sometimes, in case of contradicting behaviour, by remorse." will certainly not help to create the phenomenon ex nihilo in the cognition of the child. It will look at the instructor and not understand a word. One can run through the same kind of argument - of course nothing else but the familiar poverty of stimulus argument known from the theory of mind - for other elements of the moral cognition, for example the moral emotions like shame, guilt etc, with the same results.

The same problem arises for the material principles of altruism and justice. There is interesting work done on the development of human moral cognition and one has to see where all this leads to.⁸⁸ But given the intricate constituents of moral judgement and the actual stimulus children encounter there is good reason to believe that the traditional learning theories are not to the point.

If so, that would be not surprising. Various areas of enquiry have made it plausible to assume that the human mind is not an all-purpose, infinitely malleable learning machine but an ensemble of different specialised faculties with to a certain degree inborn properties.⁸⁹ Well studied examples are vision or language.⁹⁰ Human moral cognition appears from this point of view thus to be generated by a human moral faculty with certain inborn features, among them categories like ought and material principles like the principle of altruism and justice.

This nativist stance formulates not a new claim. It is nothing less but the theoretically transformed restatement of the idea that human beings have a faculty of moral orientation, a practical reason as part of their nature in the terms of a

⁸⁸ Cf. for a short overview of the literature, J. Mikhail, *The Poverty of the Moral Stimulus*, in *MORAL PSYCHOLOGY* (W. Sinnott-Armstrong ed., forthcoming).

⁸⁹ For an overview e.g. S. PINKER, *THE BLANK SLATE* (2002).

⁹⁰ For an overview R. JACKENDOFF, *PATTERNS IN THE MIND* (1994).

modern anthropology not blind to the findings of the theory of the mind. And this thesis of the existence of practical reason is as old as human reflection itself, as the mentioned concepts of Socratic δαίμόνιον (daimonion), Platonic and Aristotelian φρόνησις (fronesis), Aquina's Synderesis, Hutcheson's and Hume's Moral Sense or Kant's Practical Reason illustrate.

From a mentalist point of view, many very complex problems arise. The empirical knowledge is limited.⁹¹ Many questions are far from being solved or even formulated properly⁹² and a strong sense for the limits of human understanding in ethical issues is as appropriate today as it was self-evident for major thinkers of the past.⁹³ But some problems that seem to speak against such a theory on first view are not conclusive arguments against it under closer scrutiny.

⁹¹ See, *supra*, note 88. On at least partly empirically-minded theories of moral cognition of authors like Piaget, Kohlberg or Habermas, see M. MAHLMANN, RATIONALISMUS IN DER PRAKTISCHEN THEORIE 46 (1999).

⁹² There is an increasing amount of work in this area. J. Mikhail pursues the thesis that the principle of double effect describes part of the universal moral grammar or, in technical language the I-morality. See further J. MIKHAIL, RAWLS' LINGUISTIC ANALOGY (2000); J. Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 TRENDS IN COGNITIVE SCIENCE 143 (2007). This is one of the first substantive theses about the content of a universal moral grammar and as such of great importance. For more discussion of this approach M. D. HAUSER, MORAL MINDS (2006).

Here a different course is taken: Basic judgements about altruism and justice are analysed that are highly abstract. Concrete moral principles are taken to be the product of constructions from this abstract base. Research in the notion of double effect and justice/altruism (and any other imaginable topic) is thus not contradictory but complementary. J. Mikhail is very clear about the status of the principle of double effect: "The Principle of Double Effect is not itself a test of whether an action is right or wrong; rather its status is that of a second-order "priority rule" or "ordering principle" whose proper application is to state the *only* conditions under which otherwise prohibited actions are (or may be) permissible. Put differently, the principle's natural application is to serve as a principle of justification that states the necessary conditions that must hold for a presumptively wrong action to be justified" J. MIKHAIL, RAWLS' LINGUISTIC ANALOGY 162 (2000) (emphasis in the original). This leaves the question open of what makes an action wrong (or right) in the first place. Here it is maintained, that justice and altruism are a good starting point to investigate this.

⁹³ E.g. I. KANT, GRUNDLEGUNG DER METAPHYSIK DER SITTEN, AKADEMIE AUSGABE VOL. IV, 463; or see further the comments before him of F. HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE 271 (1971) on the mysterious nature of the "occult Quality" of the moral sense: "This *natural Determination* to approve and admire, or hate and dislike Actions, is no doubt an *occult Quality*. But is it any way more mysterious that the Idea of an Action should raise *Esteem*, or *contempt*, than that motion, or tearing of Flesh should give *Pleasure*, or *Pain*; or the Act of Volition should move *Flesh* and *Bones*?" On the limits of understanding in general in cognitive matters cf. the classic distinction of "riddles" that are solvable and "mysteries" that are not, e.g. N. CHOMSKY, ON NATURE AND LANGUAGE 58 (2002).

First, note that given especially the importance of the non-moral preconditions of moral judgement and a constructive processes this does not imply that from this point of view any specific full morality is innate, for example an egalitarian morality. There is no room for any biologism in ethics. The only thing that might be innate are cognitive structure that can yield an egalitarian morality together with other factors, e.g. the non-moral proposition that human beings are in fact sufficiently equal in normative respect. There is a long way from Grundurteile or foundational judgements with a possibly innate basis to a full normative system of ethics in the sense this term is usually understood. All the work of normative ethics of centuries of work is situated in this sphere of construction of rules and systems of values beyond the foundational judgements. Theories of the moral mind are thus not a substitute for this reflection and will never be.

Second, given the fact, that moral motivation is in addition just one of many competing human motivations like pursuit of power, wealth and recognition, a whole further dimension of non-moral influences on human action has to be taken into account. There is no direct connection between moral judgement and human action. The variety of human action is therefore no argument against the existence of Grundurteile or foundational judgements, as the full moral judgements depend on (contentious) non-moral preconditions, a constructive process and are in addition just one of many motivational influences that determine in the end human action.

Third, for a highly developed and historically determined cultural artefact as the law the point of the only indirect and mediated connection between Grundurteile and legal codes is obvious. The relationship of law and morality is a contentious issue anyway. If one grants some connection between law and morals (the conceptions vary, but many positivists would certainly accept morality at least as a critical yardstick for positive laws),⁹⁴ there is still a long way to go to make these influences count in legal matters. Grundurteile or foundational judgements are one thing, to formulate and doctrinally unfold, for example, a (constitutional) human rights bill, or, on a more concrete level, say, labour or contract law, quite another that implies considerations of a technical, pragmatic and political nature way beyond foundational moral judgements.⁹⁵

⁹⁴ See, *supra*, note 79, 206.

⁹⁵ For an attempt on such a constructivist enterprise as regards to a fully developed human rights bill, see further M. MAHLMANN, ELEMENTE EINER ETHISCHEN GRUNDRICHTSTHEORIE (ELEMENTS OF AN ETHICAL THEORY OF FUNDAMENTAL RIGHTS), forthcoming.

Two further apparent consequences that certainly quickly come to the mind should not discourage the pursuit of these kinds of ideas. Assuming a human moral faculty does not mean committing a naturalistic fallacy and there is no conclusion from is to ought. There is no naturalistic fallacy because the irreducibility of moral goodness is not denied but underlined by the account developed about the falsity of analytical reductionism. There is no conclusion from is to ought because the statement that human beings have a certain kind of moral cognition entails not the conclusion that they should have this and not another foundational moral faculty. Of course one can ask: What is the foundation of the foundational judgements? It would be wonderful to know. But the last order question whether the moral mental constitution of human kind should be different cannot be answered. The answer would necessarily imply the use of the moral mental constitution the reach of which is in question. The answer to the question of last-order foundations is thus the same as to any kind of questions about last foundations of human judgement, namely that – though some forms of scepticism are self-contradictory –, a careful Pyrrhonism cannot be refuted in any intellectual endeavour, be it science or moral discourse. So it is true that the hope for last order foundations in any sphere of human judgement has to be abandoned. The melancholic consciousness of the limits of human understanding is the important heritage of sceptical thought. The consequence of this consciousness can, however, not be to declare all intellectual standards nil and void but to get as far as we can with the standards we have. In the framework of such a constructive attitude, a sense of the legitimacy of certain forms of scepticism can have healthy cultural consequences. It can instil a bit of intellectual modesty, for example, or encourage persistent seriousness that makes an effort with intellectual honesty to know as much as we can because there is no point in playfully increasing the shadows of ignorance that surround human beings anyway with more obscurantism. This is the way any science proceeds, and this is the way practical reason should pursue its tasks with some self confidence, too.

Questions of the foundations of foundational judgements reformulate them thus as a case of what Kant calls comprehensible incomprehensibility and takes as what we can plausibly demand from a critique of reason⁹⁶ – we can demarcate the limit of our knowledge but not transgress it.

H. Universalism and Relativism

From a certain perspective, moral relativism is clearly true. Opinions are very different, say as regards the rights of women in Saudi-Arabia, in Europe or Canada. There are many other examples, where within certain groups one finds more often

⁹⁶ I. KANT, GRUNDLEGUNG DER METAPHYSIK DER SITTEN, AKADEMIE AUSGABE VOL IV, 463.

than in other groups a particular set of full ethical convictions. If one looks back in history, the point seems to become even more obvious – from slavery to human sacrifice nearly any kind of behaviour was regarded legitimate. Thus Locke seems to have formulated nicely an argument not only against innate ideas, as he intended, but against universalism as well when he wrote: “Whether there be any such moral principles, wherein all men do agree, I appeal to any, who have been but moderately conversant in the history of mankind, and looked abroad beyond the smoke of their own chimneys”.⁹⁷

Under closer scrutiny, the apparently obvious case for relativism, however, gets more complicated. Human groups are never homogeneous. In any group there are many dissenters and dissidents. The question arises: If there is really a determining relation between the group you belong to and ethical convictions, where does dissent come from? And more interestingly: Where does successful dissent come from? Why is there something like moral progress in human thought? There are good reasons to think that there is not much ethical progress in practise if one remembers that the 20th century was one of the most horrible in human history given the major wars and genocides of this epoch. It seems, however, hard to deny that especially over the last 50 years a very remarkable moral consciousness has developed that is embodied in the modern culture of human rights. If Kant had with some reason the impression when writing about perpetual peace that a time had come, where the violation of a human right was felt around the world irrespective from the place it happened, this is even truer today.⁹⁸ This does not mean that there are not severe problems – to the contrary. But it is hard to deny that the world has changed if not to the good (it will perhaps never do), it has at least done so to the comparatively better, especially if one follows Locke’s good advice and does look “beyond the smoke of on one’s chimney” to keep a sense of historical proportions. Why is this process possible? What is its epistemological basis? Persuasive definitions? Emotional manipulation by long, sad, sentimental stories? Discursive violence?

The answer seems clear given the preceding restatement of the meaning of practical reasonableness or shorter and more traditional – of practical reason in mentalist terms. The dices seem to be epistemologically cast in favour of universalism. None of the factors of a reasonable moral judgement in the outlined sense is dependent

⁹⁷ J. LOCKE, *An Essay Concerning Human Understanding*, BOOK I, CHAPTER III, § 2.

⁹⁸ I. KANT, ZUM EWIGEN FRIEDEN, AKADEMIE AUSGABE VOL. VIII, 360.

on belonging to a certain group or culture.⁹⁹ The only precondition is to belong to the human species and share the common cognitive human moral resources.¹⁰⁰

A peculiarity of the current debate should be noted in this context. Nearly always, relativism in current debates practically locates human rights, democracy and the rule of law in Western traditions, opposed to other traditions, say of the East or

⁹⁹ The account proposed here is thus remote from a roertian kind of contingency-based irony. See R. RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989). It is furthermore “vindicatory” in the sense B. Williams uses the term, arguing that ethics is one of the intellectual and cultural endeavours that cannot be “vindicatory.” See B. Williams, *Philosophy as a Humanistic Discipline*, 75 *PHILOSOPHY* 487 (2000): “For liberal ideas to have won an argument, the representatives of the *ancien régime* would have had to have shared with the nascent liberals a conception of something that the argument was about, and not just in the obvious sense that it was about the way to live or the way to order society. They would have had to agree that there was some aim, of reason or freedom or whatever, which liberal ideas served better or of which they were a better expression, and there is not much reason, with a change as radical as this, to think that that they did agree about this, at least until late in the process. The relevant ideas of freedom, reason, and so on were themselves involved in the change. If in this sense the liberals did not win an argument, then the explanations of how liberalism came to prevail – that is to say, among other things, how these came to be our ideas – are not vindicatory.” Saying that some is morally wrong means therefore in Williams view not very much: “it conveys only the message that the earlier outlook fails by arguments the point of which is that such outlooks should fail by them. It is a good question whether a tune as thin as this is worth whistling at all”, id., 488. The alternative to an vindicatory approach is for Williams some kind of ethical existential fatalism: “We believe, for instance, that in some sense every citizen, indeed every human being – some people, more extravagantly, would say every sentient being – deserves equal consideration. Perhaps this is less a propositional belief than the schema of various arguments. But in either case it can seem, at least in its most central and unspecific form *unhintergebar*: there is nothing more basic in terms of which to justify it. We know that most people in the past have not shared it; we know that there are others in the world who do not share it now. But for us, it is simply there. This does not mean that we have the thought: ‘for us, it is simply there’. It means that we have the thought: ‘it is simply there.’ (That is what it is for it to be, for us, simply there)”, id. 492 (emphasis in the original). For an attempt to transcend this account from the view of pragmatism, see H. PUTNAM, *ETHICS WITHOUT ONTOLOGY* 129 (2005) with reference to “*situated* resolution of political and ethical problems and conflicts” (emphasis in the original). If the mentalist argument is right, the Grundurteile, or foundational judgements are *unhintergebar*, they are, however, as such not historically and cultural contingent (though many things in a full ethics is) and they are the bases of any “situated resolution” that will be ethically convincing.

¹⁰⁰ In recent distributions there are attempts to account for moral difference by the use of a technical device of universal grammar – parameters, See S. DWYER, *MORAL COMPETENCE* 169 (Murasugi & Stainton, eds., 1999); M. D. HAUSER, *MORAL MINDS* 44, 158, 420 (2006). Of course, such parameters could exist. But as has been stated before, there is no reason to assume that morality is like language in this respect. There is no point in arguing somebody out of a linguistic parameter. There is a point, however, in arguing about, for example, human rights. There are reasons for different moral judgements, not all clear, like knowledge of the relevant facts, ideological distortions etc, but parameters are not part of these reasons. The possibility of understanding exists and is illustrated in the current global human rights culture by any small progress in moral questions from slavery to the relations of man and woman. In consequence, there is ample empirical evidence that morality is rather like visual perception, and not operating with parameters like language at all. See further M. Mahlmann & J. Mikhail, *Cognitive Science, Ethics, and Law*, in *ONTOLOGY AND EPISTEMOLOGY* 95, 100 (Z. Bankowski ed., 2005).

recently especially of the Muslim world. There is a distinct grain of historical amnesia in these arguments. There is certainly much to be criticised in, say, Chinese autocracy or Islamist religious extremism. The history of Europe, however, was certainly itself not the history of human rights, democracy and rule of law – internally not and not during its conquest of the world. Human rights, democracy and rule of law were won against ruling traditions; they are in addition to a great degree the result of the cataclysm of the Second World War and the moral reaction to it and are not just simple embodiments of the normative tradition of the West. This point should not be contentious if one refrains from the soothing temptation to whitewash the past. Even today they are not just given expressions of a forceful culture, but have to be maintained and broadened against quite fierce attempts (deeply rooted in dominant traditions) to make the concepts of human rights, democracy and rule of law meaningless. This kind of selective reconstruction of history, horrified by the baseness of the others in contrast with the edifying nobility of the own traditions as a source of relativism is a prevalent feature of the debate since hundreds of years. The comments by a perceptive commentator of the discussions of the 18th Century illustrate this vividly: “But a *Human Sacrifice*, a Feast upon Enemys Carcases, can raise an Horror and Admiration of the wondrous Barbarity of *Indians*, in Nations no strangers to the *Massacre at Paris*, the *Irish Rebellion*, or the Journals of the *Inquisition*. These they behold with religious Veneration; the *Indian Sacrifices* flowing from a like Perversion of *Humanity* by *Superstition*, raise the highest Abhorrence and Amazement.”¹⁰¹

The plurality of ethical convictions is therefore not the last word in practical debates. The issues are complicated and the process long, but some agreement can be achieved applying the standards mentioned. The culture of human rights practically testifies to the plausibility of this universalistic epistemological thesis by its very existence and recent genesis. The provincialism of some irreconcilable local and historical codes of morals is thus not the last horizon of ethics. This is another encouraging result.

I. The Phylogenetic Origin of Moral Judgement and the Merits of Evolutionary Psychology

If it is true that the origin of foundational parts of human morality can be ontogenetically traced to a human moral faculty yielding Grundurteile or foundational judgements, then the question arises: How did this faculty evolve? There is in parts of contemporary thought on this matter a tendency to pursue a

¹⁰¹ See F. HUTCHESON, AN INQUIRY INTO THE ORIGIN OF OUR IDEAS OF BEAUTY AND VIRTUE 203 (1971) emphasis in the original.

rather narrow adaptionist view on the origin on any property of an organism and thus too as regards higher mental faculties.¹⁰² There is, however, an equally strong criticism of this approach favouring a more differentiated (and thus complex) approach.¹⁰³ The former assumes that for any trait of an organism a functionalist explanation must exist. Only if the trait enhanced (reproductive) fitness, it can persist. There is, however, not much reason to make such strong a priori assumptions. To the contrary, a more promising approach first turns to the properties of an organism and tries then to find ways to explain why these properties came into existence. Here adaption certainly plays a role, but other factors as well, like general architectural constraints, side products of adaptations, Gould and Lewontins' "spandrels" and the like. This second view is therefore clearly methodologically superior, though (or better: because) it makes it much harder to formulate theories of the origin of human properties.

This scepticism about sweeping explanatory claims in evolutionary psychology is especially important for the higher mental faculties. Sometimes a picture of these faculties is painted that has little to do with the empirical evidence found in human life but is mainly a mirror of the a-priori constraints of the adaptionist theory and its functionalistic fallacies.¹⁰⁴ None of these constraints are accepted here. Therefore, the findings about the nature of human moral cognition are taken as the empirical base of further attempts to develop a theory of their origin in the natural history of humankind which is not the topic of these remarks. Taking this rather sober stance leads to the impression, that not much if anything is known about the evolutionary origin of human mental faculties in general and certainly not about the moral faculty of human beings.

¹⁰² Following the parameters set by the classical texts on socio-biology, J. WILSON, *SOCIOBIOLOGY* (1975); R. DAWKINS, *THE SELFISH GENE* (1976).

¹⁰³ For example, see S. J. Gould & R. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: a Critique of the Adaptionist Programme*, in *PROCEEDINGS OF THE ROYAL SOCIETY B* 205 581 (1979).

¹⁰⁴ To take one example for a narrow adaptionist argument of this kind: Inborn moral judgements must be enhancing fitness. Inborn moral judgement decided upon fitness under conditions of small groups of hunters and gatherers. Only a morality that cares for a small group can have evolved. As this is so, human beings actually have a small group morality.

One can expand this kind of argument to all kind of properties discussed in evolutionary psychology: aggression, sexual behaviour, mate selection, territorial claims and so on. The proceeding is a reversal of an empirical approach that looks at the properties human beings have and than asks for an evolutionary explanation, being open that (at the moment or forever, we will see) that there is none at hand. The functionalist fallacy is to take the opposite course and to ascribe properties to an organism not because there are empirical hints that they exist, but because they have to exist due to the a priori methodological assumptions. As indicated in the text, there is for example a rather good case for a universalist morality and not a small-group-morality as the real thing to be explained in a moral theory that takes empirical data seriously. See further, M. MAHLMANN, *RATIONALISMUS IN DER PRAKTISCHEN THEORIE*, 285 (1999).

J. Some More Consequences for the Law

As we have seen, a mentalist theory of ethics provides a clear concept of the origin of the foundation of morals which in turn is the decisive critical yardstick for the legitimacy of law. There are, however, many other perspectives worth to be explored leading beyond the scope of these remarks, including a critique of some applications of cognitive science to the law.¹⁰⁵ Examples encompass as much the clarification of certain perennial analytical problems, e.g. of the semantics of ought, as such grand material challenges as a scientific framework to tackle some of the core normative questions raised in legal systems, e.g. of the legitimacy of human rights. In addition, a mentalist viewpoint gives a sense for the deficiencies of accounts of the law that take morality as something soft and unscientific which should have no importance in legal work and which wrongly enjoy the aura of hard science like certain forms of the economic analysis of law – a point that J. Mikhail has made with much force.¹⁰⁶

K. Moral Judgement and the Self-Perception of Humankind

To sum up: Given the preceding findings, the following picture seems to emerge. Morality is a real phenomenon *sui generis* with cognitive, emotional and volitional dimensions that is a creation of the human mind from its internal resources triggered and occasioned by certain properties of objects of moral evaluation. The totality of these cognitive resources can be called the human moral faculty or practical reason in traditional terms. The moral faculty is universal and uniform in all human beings and forms part of human cognitive nature the evolutionary basis

¹⁰⁵ At the moment, far reaching questions are discussed in respect to the relation of neuroscience and law: For example free will and responsibility in criminal and civil law, enhancement of cognitive functions (have witness to undergo such procedures?), tests of truth and lying, or bias, even prediction of behaviour, see further *NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE* (B. Garland ed., 2004). It is an important question whether there is any hard theory of cognitive functions that really raises the normative questions discussed in this context. Is there, for example, really remotely a theory in sight that would in any significant sense predict behaviour? One should not forget that there were many equivalent claims in the past formulated with equal self-confidence like some of the current claims which failed to live up to their promise. An important concern for the law should therefore be to prevent that illusions about the reach of cognitive science will distort the administration of justice. For some comments on the importance of the theory of mind and language for general legal theory. See J. Mikhail, "Plucking the Mask of Mystery from Its Face": *Jurisprudence and H. L. A. Hart*, 95 *THE GEORGETOWN LAW JOURNAL* 733 (2007).

¹⁰⁶ J. Mikhail, *Law, Science, and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory* 54 *STANFORD LAW REVIEW* 1057 (2002). One might argue that the economic analysis of law is very much inspired by scepticism about the rationality or even reality of moral concepts. Because morality seems to offer no clear guidance, the sober and seemingly clearer alternative of utility and effectiveness calculations is pursued.

of which is beyond our current understanding. Part of these mental resources lead to Grundurteile, foundational judgements, expressing among others the principles of altruism and of justice. Together with the rationality of other factors entering into a full moral judgement, most importantly the non-moral preconditions of moral judgements, these principles form standards of ethical or practical reason. The moral judgements have – that is part of their nature – motivational force by affecting the human will by a moral ought. This moral ought demands moral acting for no other reason than for duty's sake. Non-moral reasons for following and not resisting the moral ought are the non-moral worth of a community based on solidarity and justice for the individual and the value of preserved moral integrity. The outlined content of practical reason opens the path to a universalistic ethics. Ethics consists of a constructive process trying to construct answers to new problems by weighing and balancing competing prima facie rules and values derived themselves from Grundurteile or foundational judgements in concrete cases. The law is an institutionalized form of this complex process.

What is the consequence of this picture for our human self-perception? This question arises necessarily in practical reflection because every remark about morality arouses emotions because something important about human existence is at stake. What are our rights? What are our obligations to others? What does justice demand?

Any theory of morality embodies a concept of humankind, this way or the other. Humans can appear as selfish animals, only limited in their harmful actions against others by shrewd utility calculations of their own greatest advantage that might lead them to some grudging concessions to the interests of others if this turns unfortunately out to be the most prudent path to maximal satisfaction of their own selfish desires. Humanity can appear as a minor dependent on transcendental revelation and guidance by benign supernatural forces if it is not to drown in crime, pain and war. It can be described as the malleable mass, the passive obedient plaything in the hands of history, social circumstance or economic forces.

Assuming the existence of a human moral faculty means to assert a different picture. It takes human beings to be invested – along other remarkable faculties like language, artistic creativity, and the faculty to form sciences and to self-determination – with a moral orientation, a practical reason, a conscience.¹⁰⁷ This

¹⁰⁷ It should be remembered in this context, that moral orientation is traditionally taken as (one of) the bases of the ascription of human dignity. See F. HUTCHESON, AN INQUIRY INTO THE ORIGIN OF OUR IDEAS OF BEAUTY AND VIRTUE 142 (1971). Also, see I. KANT, DIE KRITIK DER PRAKTISCHEN VERNUNFT, AKADEMIE AUSGABE, VOL. V., 87: "Der Mensch ist zwar unheilig genug, aber die *Menschheit* in seiner Person muß ihm heilig sein. In der ganzen Schöpfung kann alles, was man will, und worüber man etwas vermag, auch *blos als Mittel* gebraucht werden; nur der Mensch und mit ihm jades vernünftige Geschöpf ist *Zweck*

conscience demands some concern for others and the respect for everyone's due share of the material and immaterial goods of this world, a share which – one should never forget – is not given to the individuals as crumbs from the table of grace but as a matter of right. The good of others and the commands of justice preserved are normatively relevant and a natural part of our life from this point of view independently of utility calculations, traditions of authoritative metaphysical laws or social conditioning.

Without doubt: A curtain rises. The presence of conscience is not obscured anymore like in the competing pictures of humanity where selfish utility calculations, obedience to super-human forces or passive submission to social formation reign supreme. The inner life gains suddenly its wider horizons again – of genuine generosity, a bit of magnanimity, mutually respected rights and a comforting touch of human care.

Developing this picture does not mean to indulge in sentimental anthropocentric narcissism of an unpleasant kind. It does not mean to entertain the idea that human beings naturally are good, honest, peaceful and full of universal love. This is so because to acknowledge the potential relevance of morality (and a bit of its appeal) means not, as explained above, to assert that human beings are only motivated by moral considerations. There is much else. In a country like Germany you just have to travel to the remnants of a concentration camp (never very far away) to understand what this simple sentence entails. But the theory of the moral faculty does mean that there are hard scientific reasons to believe that morality is a reality of human life. Human beings have means to ease some of their sufferings and open perhaps even the door a bit wider to the experience of some shared happiness. Among these means are the inner moral resources of their autonomous minds. Given the old problems of the world, new wars and grand power schemes, the cruelly fuelled religious fanaticism, the often blind responses to it and the grown disdain for the idea of an international order of right, the years to come do not look too bright. But if we can entertain some hopes for a human life in a bearable light the inner moral resources of the human mind are one of the better reasons why.

an sich selbst. Er ist nämlich das Subjekt des moralischen Gesetzes, welches heilig ist, vermöge der Autonomie seiner Freiheit“ (emphasis in the original).