

THE MEANING OF JUSTICE IN THE WORLD TODAY

By Louis E. Wolcher*

PRESENTED IN THE ORCAS CROSSROADS LECTURE SERIES

10 October 2010

at

Orcas Center
917 Mount Baker Road
Eastsound, Washington 98245

* Charles I. Stone Professor of Law, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, Washington 98195-3020, USA. *Telephone:* (206) 543-0600; *Fax:* (206) 616-4519; *e-mail address:* wolcher@u.washington.edu.

1.

Thank you for giving me such a kind and generous introduction and for welcoming me so graciously to this beautiful island of yours. It is a tremendous pleasure and honor to speak to you today as part of the Orcas Crossroads Lecture Series, and I would like to take this opportunity to express my gratitude to the Orcas Crossroads Committee, and especially to David Schermerhorn, for the invitation. In accordance with the usual practice here, I plan to speak to you for about forty-five minutes, after which time I would be delighted to receive your questions and comments.

My topic today is justice. We Americans, as heirs of the Western intellectual tradition, have inherited a certain routine way of thinking about justice. In one way or another, the most important conventional distinction we draw is between *political* justice and *legal* justice. Most modern philosophers still follow Aristotle in labeling the first type of justice “distributive” and the second “corrective.” Justice in the first sense, Aristotle taught, “is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution,” whereas justice in the second sense has to do with government officials using the legal system to rectify some of the wrongs that occur in day-to-day transactions among individuals.¹ In plain terms, distributive justice is about who gets access to what goodies in society, and corrective justice is about keeping and protecting whatever goodies you have managed to amass thanks to a given regime of distributive justice.

The word “distributive” in the concept of distributive justice may suggest to you that someone – perhaps a government official – decides from on high what you are entitled to get in your life according to some previously agreed-upon criterion such as need or merit. And it is true that most modern capitalistic economic systems, including our own, distribute at least some entitlements on this basis – think of Medicare and Medicaid, for example, which are distributed on the basis of age and need. But the net cast by the idea of distributive justice is actually much, much wider than the so-called “government safety net.” Safety nets can be shredded and even abolished. But *every* country, without exception, maintains *some* all-pervasive system of distributive justice in the most comprehensive sense of the term, for without such a system there would be no “countries” at all. The most basic unit of distributive justice in any given society

¹ 1130^b30 – 1131^a1.

does not consist of material goods such as money or food, for who's to say that you have a right to keep the money or food once you get your hands on it? No, the most basic unit of distributive justice in organized society is not a *thing* at all – it is a *legal right*, such as your right not to be punched in the nose by your neighbor, your right not to be arbitrarily arrested and thrown in jail, and your right to exclude unwanted visitors from your living room (assuming you have one). Distributive justice distributes what we law professors call *legal entitlements*, and corrective justice enforces them.

Both types of justice are “socialistic” in the largest sense of the word. The nature of legal rights such as property, privacy and liberty are always defined and guaranteed in advance by the unique social institution that we call “government.” That is why we refer to them as enforceable *legal* rights as opposed to, say, unenforceable moral claims that individuals are free to ignore if they want to. When it comes to distributive justice, it is the government, not the isolated individual, which decides whether or not to defend your alleged legal entitlements by explicitly or implicitly threatening to use public force against anyone who might want to take them from you without your consent. As Thomas Hobbes famously put it, in a condition of total social breakdown and anarchy there is “no Propriety, no Dominion, no Mine and Thine distinct; but ... [only what] every man can get, and for so long as he can keep it.”² Society, in the form of government, can be viewed as a sort of silent equity partner in whatever wealth individuals have been able to accumulate, since without the help of the law there would be precious few goodies *to* accumulate, and our lives, to quote Hobbes again, would be “solitary, poore, nasty, brutish and short.”³

The same thing holds true on the side of corrective justice – the kind that is administered by the police and the courts. It bears noting, as Barbara Ehrenreich did recently, that “when the bank decides to repossess your home, it is a public employee who will kick in the door.”⁴ Public employees are also the ones who will help you get your car back if it is stolen, and who set the poison flowing into the veins of convicted murderers on death row. Although it is undoubtedly a truism, it would still be useful to remind ourselves every now and again that the notion of a

² Thomas Hobbes, *Leviathan* (London: J.M. Dent, 1914), 66.

³ *Id.* at 65.

⁴ Barbara Ehrenreich, “Replies to Eric Alterman’s ‘Kabuki Democracy’,” *The Nation*, August 30/September 6, 2010, 17- 18, at 18.

private legal right unsupported by any public legal power is a contradiction in terms. When it comes to exercising and enjoying the legal rights that people take for granted every day, almost as if they were eternal features of the natural world, all citizens and all subjects of the law truly are in it together as co-makers and co-enforcers of their social world.

2.

One of the greatest problems confronting us as intelligent moral beings is to know what to do when the two forms of justice I have just described come into conflict with one another. What if politics distributes entitlements to people through laws that it would be unjust to enforce? The plot of Victor Hugo's famous potboiler, *Les Misérables*,⁵ invites a question that is as relevant today as it was in the nineteenth century: Why should stealing always be a crime that calls for the justice of punishment if the institutions on which a particular regime of property rights is based were unjustly determined from the very beginning? To be more precise, what does justice require us to do to a given flesh-and-blood debtor or thief if, to paraphrase the nineteenth century anarchist Pierre-Joseph Proudhon,⁶ we conclude that the rigorous enforcement of property rights in this *particular* instance would itself amount to a kind of theft?

I realize that the title of my lecture probably should read, "The Meanings [plural] of Justice," for it must be obvious by now that justice and its opposite, injustice, are by no means simple concepts. They cover a large number of different problems about the rightness or wrongness of the world we live in, and people can and do have very strong opinions about them. Not only that, people frequently clash with one another because of their different views on justice and injustice, sometimes tragically.

Deep down, we all know this, do we not? When a young couple was recently stoned to death in northern Afghanistan for having eloped against the wishes of their families, the mullah who sentenced them to death and the villagers who threw the stones did so in the name of justice – the very same word that is invoked by those who condemn this punishment, as I do now, as a barbaric violation of human rights and human dignity.⁷ Capital punishment, abortion, gay

⁵ Victor Hugo, *Les Misérables*, tr. Charles Wilbour (New York: Modern Library, 1992).

⁶ Pierre-Joseph Proudhon, *What is Property?*, eds and trs Donald Kelley and Bonnie Smith (Cambridge: Cambridge University Press, 1994), 13.

⁷ Laura King, "Young lovers killed by stoning in Afghanistan," *Los Angeles Times*, 22 August 2010, <http://articles.latimes.com/2010/aug/22/world/la-fg-afghanistan-stonings-20100822>.

marriage, the role of religion in public life, the constitutional rights of alleged terrorists, the policy challenges posed by global warming, the influence of corporate money on politics, the proper role of the state in promoting human rights and human flourishing here and abroad ... these few politically charged phrases, as well as countless others I could mention, should be sufficient to show that justice and injustice are nothing if not deeply contested concepts.

Historical experience teaches us that different peoples and different eras always seem to produce their own peculiar ideas about what is just and unjust. The readily verifiable empirical fact that when it comes to right and wrong the many peoples of the world have not always sung together in harmony led the seventeenth century French philosopher Blaise Pascal to wonder, tongue in cheek, about the strangeness of a justice that is “bounded by a river,” as he put it: “Truth on this side of the Pyrenees, error on the other side.”⁸ More recently, the brilliant twentieth century philosopher Ludwig Wittgenstein also threw up his hands in exasperation at the seemingly intractable inconsistency of the world’s many different moral norms: “The use of the word ‘good’ is too complicated,” he said, “Definition is out of the question.”⁹

Please do not misunderstand me. I am not quoting Pascal and Wittgenstein in an attempt to prove that there can be no basis for choosing among the world’s many competing conceptions of justice, and therefore that they must all be considered equal, morally speaking. It seems to me that crude cultural relativism of this sort is just as misguided, and just as intellectually sterile, as the cultural imperialism of those who believe that their own idiosyncratic conceptions of justice are infinitely superior to everyone else’s. Clinging to either form of dogmatism obscures a much deeper truth about the nature of justice. Although it will take me the rest of my allotted time to show what I mean by it, I will now break with convention and give you a hint about my conclusion at the beginning of my remarks rather than hiding it until the end.

The philosopher and Holocaust survivor Emmanuel Levinas once said: “The just person who knows himself to be just is no longer just. The first condition of ... [those who are] just is that their justice remains clandestine to them.”¹⁰ In other words, the surer you are that a given

⁸ Blaise Pascal, *Pensées and the Provincial Letters*, tr. W.F. Trotter (New York: Modern Library, 1941), 101 (*pensée* number 294).

⁹ O.K. Bouwsma, *Wittgenstein: Conversations 1949-1951*, eds J.L. Craft and Ronald Hustwit (Indianapolis: Hackett Publishing, 1986), 42.

¹⁰ Emmanuel Levinas, *Basic Philosophical Writings*, ed. Adriaan Peperzak, Simon Critchley and Robert Bernasconi (Bloomington: Indiana University Press, 1996), 17.

course of action is altogether just and righteous, the less just and righteous you are likely to be in pursuing it. The purpose of all abstract conceptions of justice is to absorb theoretically everything that can reasonably *be* absorbed, while ignoring all the rest. However, when it comes to justice, what is left over is reality itself: the messy, unruly, painful and sometimes glorious lives of real human beings. Only in reality can we find what Levinas evocatively calls “the tears that a civil servant cannot see” whenever and wherever the law holds sway.¹¹

Abstractions attempt to liquidate the particular from above, like high-level bombers. But I say that the idea of justice itself – justice as such, above and beyond all mere jabbering about it – is really quite simple. *The role of justice is to defy the world’s course, whatever that course may be. It is to recoil against the whole in the name of those countless particular instances of injustice that our official ideologies and abstractions have left unassimilated and forgotten.* Along with Levinas, I will contend that any human practice which thinks of itself as just and righteous – indeed all instances of self-certain justice whatsoever – are *a priori* unjust. What follows from all of this is a proposition that might strike you as surprising and even scandalous. Although justice denied is undoubtedly a tragedy, *so too is justice attained.* Something like this, at least, is the strange thesis I would like to consider with you this afternoon.

3.

Perhaps nothing is stranger, and yet nothing is more important for serious people to think about, than the difficult and enigmatic relationship that exists between justice and the law. By “the law” I mean those official norms, regulations and expectations that everyone has to submit to if they do not want to get in trouble with the Man – that is, if they do not want to risk incurring unpleasant consequences for themselves at the hands of those individuals who are responsible, as we say, for “enforcing the law.” And by “justice” I mean ... well, for now I will just say that I mean something that is related to, but nevertheless decidedly different from, the concept of law.

One reason why the relationship between justice and law is so difficult and enigmatic is because every known political regime in history has wanted its people to conflate the two – has wanted them to forget that the concept of justice and the concept of enforcing the law are not always the same. Machiavelli may have been correct when he said that the Prince’s longevity in office requires him to “learn how not to be good” when the practical necessities of governing

¹¹ *Id.* at 23.

others requires it.¹² You can't make an omelet without breaking some eggs, as the old saying goes. "Politics" is the word we use to describe the often sordid process of transforming people's competing conceptions of the right and the good into a workable social order. And as every sophisticated adult realizes, in politics compromises must be made, eggs must be broken.

Knowing that you must break eggs if you wish to pursue justice effectively is what the great German sociologist Max Weber meant when he referred to "the knowledge of tragedy with which all action, but especially political action, is truly interwoven."¹³ The idea that politics is at bottom a tragic enterprise does not sell very well, however. People like to imagine that their omelets have descended to their plates without cost or sacrifice, like manna from heaven. The idea that "there's someone's misery in all we earn," as the poet William Matthews put it,¹⁴ is a downer, and people generally don't like to be reminded of such things, even (or especially) if they are true.

As a result of the human longing to believe in the immaculate perfection of true justice, a depressing pattern keeps on repeating itself throughout history – a sort of bad or negative infinity, as the philosopher Hegel would have put it.¹⁵ It is well-known that those who dominate others in public and private life generally prefer their minions to remain compliant and docile, lest any increase in the popular feeling that the world is unjust lead to political instability and even revolt. Accordingly, every regime in history has encouraged the masses to believe that whatever legal order it happens to be peddling at the time constitutes the very incarnation of true justice. Kings and queens used to speak of their divine right to rule in the same way that today's politicians and billionaires speak of what is self-evidently good or right for America.

"As long as there is one beggar around, there will be myth," said Walter Benjamin.¹⁶ Our many political and moral mythologies are like mighty beams stuck in the eyes of anyone who

¹² Niccolo Machiavelli, *The Prince*, tr. W.K. Marriott (New York: Alfred A. Knopf, 1908), 70-71 (ch. 15).

¹³ Max Weber, "Politics as a Vocation," in H.H. Gerth and C. Wright Mills, eds, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958), 77-128, at 117.

¹⁴ William Matthews, "Grief," in *id.*, *Time & Money: New Poems* (Boston: Houghton Mifflin, 1995), 3.

¹⁵ G.W.F. Hegel, *Hegel's Logic*, tr. William Wallace (Oxford: Clarendon Press, 1975), 137.

¹⁶ Walter Benjamin, *The Arcades Project*, trs Howard Eiland and Kevin McLaughlin (Cambridge: Harvard University Press, 1999), 400.

cheerfully serves the given order of things without ever questioning the extent of its justice.¹⁷ One of the most enduring myths we have is that the beggary of so many of our fellow human beings around the globe is either justified or inevitable, at least so long as we ourselves do not become beggars. Most Americans have learned from experience that in a capitalist economy like ours the relationship between rewards and competence is loose at best, and that historical circumstances, not to mention good or bad luck, can play just as large a role in determining a person's fate as individual effort.

In an effort to compensate for this, many conservative political thinkers have told a bracing story that is meant to convince the disgruntled to buck up and quit whining. The market is the very apotheosis of distributive justice, they say, but not because of any discernable substantive justice to be found in the particular rewards and penalties that it distributes. The market is said to be just because the determination of outcomes in it lies beyond the control of any one person's or group's ideal of what a just world should look like.¹⁸ Distributive justice is purely procedural, they say: it gives everyone an equal chance to succeed or fail, but that is all it does and all it should do. The virtuous possession of individual freedom from the possibility that the government will stealthily acquire totalitarian powers by arranging substantively just outcomes in the name of "social justice" is the compensation that this story offers to everyone in society. As Anatole France ironically put it a century and a half ago, by means of this kind of justice the law, in all its majestic equality, forbids rich and poor alike from sleeping under the bridges, begging in the street, and stealing bread.¹⁹

Thus it comes to pass that the so-called "little people" of the earth suffer in silence most of the time, like mules in harness, so that someone else's mythical conception of justice and right can be enacted on the stage of world history. No myth is stable forever, however. As Theodor Adorno put it: "The smallest trace of senseless suffering in the empirical world belies all [philosophical or political theories] that would talk us out of that suffering."²⁰ Despite what our

¹⁷ Cf. Luke 6:42 ("Thou hypocrite, cast out first the beam out of thine own eye, and then shalt thou see clearly to pull out the mote that is in thy brother's eye.").

¹⁸ See, e.g., Friedrich von Hayek, *The Road to Serfdom*, ed. Bruce Caldwell (*The Collected Works of F.A. Hayek*, vol. 2) (Chicago: University of Chicago Press, 2007), 139.

¹⁹ John Bartlett, *Familiar Quotations*, 15th ed., ed. Emily Morison Beck (Boston: Little, Brown, 1980), 655.

²⁰ Theodor Adorno, *Negative Dialectics*, tr. E.B. Ashton (London: Routledge & Kegan, 1973), 203.

politicians may prefer, the eggs that politics breaks in order to make the omelet of the given social and economic order can and do complain about their plight when things get too bad for them. The philosopher Hannah Arendt referred to this phenomenon as “the eggs speaking up.”²¹ In speaking up to power, human beings have proven over and over again that the idea that justice equals law, taken as a general principle, is a pernicious lie.

It is a lie even though everyone understands that it is often necessary, as a matter of sheer self-preservation, to obey whatever powers and forces happen to be strongest at any given point in history.²² Who amongst us has never felt social pressure to agree on occasion with Voltaire’s character Pangloss, who famously maintained that this is “the best of all possible worlds”?²³ Perhaps it is true that a certain amount of dishonesty and pretense are the necessary grease that keeps the socio-economic machine lubricated and in good working order. Be that as it may, however, it is also true that those who kiss the lash out of sycophancy or fear never really love it, and often secretly despise it.

4.

That the Panglossian equation “justice equals law” is a lie can easily be demonstrated. Although as a law professor I probably support our constitutional system at least as much as the average American, there is a limit to how much unqualified praise I am willing to heap upon it. You may not be aware of this, but patriotic Americans are encouraged to celebrate “Constitution Day” every September 17th, the date on which the original constitution was signed. One of the official Constitution Day websites refers to the “thirty-five brave men” who signed the document in 1787, and invites us all to celebrate their glorious achievement.²⁴ But however brave the founders may have been, it is quite clear that their constitution was never meant to be a liberating achievement for everyone living in America at the time. Thurgood Marshall, the first African-American justice on the Supreme Court, rightly observed that the framers intentionally wrote our

²¹ Hannah Arendt, “The Eggs Speak Up,” in *Essays in Understanding: 1930-1954*, ed. Jerome Kohn (New York: Harcourt Brace, 1993), 270-84.

²² Cf. Blaise Pascal, *Pensées and the Provincial Letters*, tr. W.F. Trotter (New York: Modern Library, 1941), 103 (*pensée* number 298).

²³ Voltaire, “Candide,” in *The Portable Voltaire*, ed. Ben Ray Redman (New York: Viking Press, 1949), 229-328, AT 328.

²⁴ <http://www.constitutionday.com/>

founding document in such a way as to legally preserve and promote the loathsome institution of chattel slavery in the United States.²⁵ They even wrote a clause legally guaranteeing the continuation of the African slave trade until 1808.²⁶ These facts help explain why Marshall said publicly in 1987 that he could not participate in good faith in the celebration of the constitution's bicentennial.

But perhaps what I have just said is still too abstract for us to get a handle on the troubling phenomenon of legalized injustice. To remedy this, let me tell you about one particular case drawn from the annals of American legal history. In 1851, some sixty-four years after the framers laid down their pens, the well-known Massachusetts judge Lemuel Shaw ruled from a courtroom in Boston that an escaped slave by the name of Thomas Sims had to be forcibly returned to his master in Georgia pursuant to the Fugitive Slave Act.²⁷ Shaw did this even though he was known to be a deeply religious man and an ardent abolitionist in his "private" life. As the law professor Robert Cover noted in his book, *Justice Accused: Antislavery and the Judicial Process*, in each slave case that came before them, northern judges like Shaw had to make a choice between "a result that would condemn a man, fundamentally innocent, to undeserved slavery and the knowledge or belief that such an action was required by fidelity to role expectations and rules."²⁸ And it just so happens that in virtually every case they decided, these otherwise upstanding northern judges ignobly chose to enforce the rule of slave law rather than do what they knew to be morally right. The consequences for the human beings whom they sent south in chains were all too predictable.

²⁵ http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm

²⁶ U.S. Const. art. I, § 9, cl. 1.

²⁷ *In re Sims*, 61 Mass. (7 Cush.) 285 (1851).

²⁸ Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 229-29, 250.



American Slavery: Scars of a Whipping

Congress, the President, the Supreme Court, the literal text of the United States Constitution – indeed, even a large percentage of the American population – all sanctioned the Fugitive Slave Act as the binding law of the land in 1851. And there is something mysteriously hypnotic about the phrase “the law of the land,” no matter when and where it is uttered. To paraphrase Pascal again, since human beings are usually unable to make what is just strong, they tend to settle for calling whatever is strong just.²⁹ Thus, Judge Lemuel Shaw’s final judgment, although it was a legally authorized act of cruel injustice, was nonetheless rendered in the name of a certain *kind* of justice. The opinion he wrote explicitly prefers the (unquestionably valid) political value of national solidarity and stability to the (unquestionably valid) moral value of defending an innocent black man’s freedom and dignity. Property rights, then as now, were considered sacrosanct by most of the country’s elite, even if those rights did entail the power to own and exploit certain human beings as if they were animals or bales of cotton.

²⁹ Blaise Pascal, *Pensées and the Provincial Letters*, tr. W.F. Trotter (New York: Modern Library, 1941), 103 (*pensée* number 298).

I do not mention the case of Thomas Sims in an effort to prove that the institution of American chattel slavery was unjust, for I trust that such a proof is no longer necessary. Instead, I offer the sad particulars of this case to show how very weak and equivocating the *abstract rhetoric* of justice and the rule of law can be. In particular, the mantra “property rights should be enforced” is far too abstract, far too indifferent to the cruel particularities of those very real instances of “property” it contains at any given moment in history, to serve as any reliable guide to what is just and unjust. I hope I am right to think that no reasonable person today would be willing to defend the justice of the law of slavery in America before the Civil War simply on the ground that it could be and was supported by the abstract notion of a legally sanctioned property right.

The unholy relationship between justice and law in the case of our constitution’s treatment of antebellum slave legislation reminds me of a well-known saying on the lintel above the entrance to the United States Supreme Court in Washington, D.C. It reads “Equal Justice under Law.”



Photograph of Front Lintel of Supreme Court Building]

This saying was first chiseled into the Supreme Court building in 1932, at the height of the Great Depression, and I think it would be enlightening to remember what some of the features of the prevailing legal environment were at the time. In 1932, Jim Crow and racial segregation in schools and public accommodations were legally and constitutionally valid throughout much of the land, the legal right to join a union and engage in peaceful collective bargaining was denied by many state and federal courts, women were not allowed to participate in most professions, and the prospect of government-sponsored unemployment insurance and old age insurance were regarded by a significant portion of the mainstream legal establishment as self-evidently unconstitutional.

Of course, the noble-sounding statement, “Equal Justice under Law,” can still be found above the entrance to the Supreme Court building. You must literally walk beneath it, like a supplicant, to reach the living source of whatever justice our Supreme Court may provide. But

are we supposed to believe that all injustice has been purged from our world now that the vulgar bad old days of America's legal past are mostly absent from our law books and our courtrooms?

This question is obviously intended to be rhetorical. However, in reflecting on its innermost meaning, I would like us to retrieve and contemplate a nearly forgotten usage of the word "justice." It comes from the ancient Greeks. Unlike the situation in our language, their primary word for justice, *dikaiosune*, did not refer to this or that particular action or state of affairs. Rather, it referred to the condition of a person's soul, or what we would today call his or her character. To act unjustly in the Greek sense, as Aristotle said quite explicitly, did not mean just to behave badly, but to behave badly *because of a defect in one's character*.³⁰ The archaic idea that justice is first and foremost a human virtue rather than a political or legal outcome implies that each one of us has an obligation to cultivate justice *in ourselves* before we seek to enact it in the world. In short, the Greek notion that justice is a virtue suggests that the problem of justice in society is inextricably linked to individual responsibility and personal ethics – to the problem of what we owe, as moral individuals, to our fellow human beings.

Considered from this point of view, the existence and public enforcement of slavery, legalized racial apartheid, the disenfranchisement of women, and countless other instances of perfectly *lawful* injustice throughout American legal history, requires us to pose a question that is just as important now as it ever was. The question is quite simple, though I concede that the answer to it is not. *What is a virtuous person – a person who sincerely wants to live justly and ethically – supposed to do when the law, however evenly and impartially enforced it may be, remains indifferent to the persistence of rank injustice?*

5.

It is obvious that the word justice would be meaningless to us if we had no familiarity with injustice. The first clue to understanding how we use the word justice is know that its negation, injustice, is intimately connected to the feeling that something is wrong with the world. When injustice holds sway something is lacking. The world is out of joint, as the German philosopher Martin Heidegger put it,³¹ and this lingering disjointedness bothers and gnaws at the consciences of anyone who is willing to notice it.

³⁰ 1137^a21-23.

³¹ Martin Heidegger, *Early Greek Thinking*, trs David Krell and Frank Capuzzi (New York, Harper & Row, 1975), 41.

I say “anyone who is willing to notice it” because recognizing that something is wrong and unjust in the world requires an act of will. Injustice unnoticed is like the sound made by the notorious tree that falls in the forest when no one is around to hear it. Perhaps this is why Dr. Martin Luther King, Jr. famously maintained that injustice anywhere is a threat to justice everywhere.³² I agree with him. It seems to me that those of us whom fortune has favored with a comfortable and relatively stable way of life, myself included, really ought to experience a lot more discomfort than we do on account of the immense chain of unnecessary suffering that girds the earth, oppressing untold millions with violence, poverty, disease and despair. For as Theodor Adorno once remarked, “[p]erennial suffering has as much right to expression as a tortured man has to scream,”³³ whether or not our favorite theory of justice recognizes that suffering as worthy of attention. If you would like to cultivate the capacity to apologize for the given order of things, however horrible and degrading it may be, you need only believe in Saint Augustine’s thesis that on account of Adam’s fall humans beings are born without *caritas*, or the innate capacity for kindness, and therefore cannot choose to do good on their own.³⁴

It seems to me that people who are aware of injustice only when they themselves are treated unjustly are incapable of thinking about justice as such. The hardest thing about justice is not just to care about it when your own ox is gored, but to recognize and care about it when it remains absent from the lives of others. Perhaps this explains why Aristotle said that the truly just person “is no stickler for justice in a bad sense but tends to take less than his share [even] though he has the law on his side.”³⁵ I realize that this proposition must sound incredibly quaint and naïve to those who have become inured to the brutal struggle for competitive advantage that characterizes the twenty-first century global marketplace. Nevertheless, Aristotle’s implication that a just person is *other*-regarding before he or she is *self*-regarding remains to this day a strong indication of what the much disputed idea of “social justice” is, at bottom, really all about.

³² Martin Luther King, Jr., “Letter from a Birmingham Jail”, in id., *I Have a Dream: Writings and Speeches That Changed the World* (San Francisco: Harper, 1992), 83-100.

³³ Theodor Adorno, *Negative Dialectics*, tr. E.B. Ashton (London: Routledge & Kegan, 1973), 362.

³⁴ See Tatha Wiley, *Original Sin: Origins, Developments, Contemporary Meanings* (Mahwah, NJ: Paulist Press, 1992), 65-6.

³⁵ 1137^b35 – 1138^a1.

The influential conservative thinker Friedrich von Hayek once wrote that the idea of social justice is an oxymoron because it requires an unjust diminution in human freedom in order to be put into effect. “An [elite] authority instructed to achieve particular results for the individuals [entitled to so-called social justice] must be given essentially arbitrary powers to make the individuals do what seems necessary to achieve the required result,” he said, and this would inevitably result in “a government with totalitarian powers.”³⁶ Why, in a democratic society, it would necessarily and inevitably do so, I could never fully understand. Be that as it may, however, when considered from a Greek point of view the idea of social justice is not so much about big government programs for the poor or the redistribution of wealth. Rather, it refers first and foremost to the duty of virtuous individuals to *bear witness* to the suffering of others as a precondition for acting justly towards them.

Injustice and human suffering – I mean the sufferings of others and not just our own sufferings – are intimately linked to one another. If no one ever suffered – if everyone on earth were always supremely provided for, utterly happy and content with their lot in life – then the concept of justice would go completely out of currency, because in that event there would be nothing ugly or painful in existence to reproach as unjust. It is the particular that gives every abstract concept its weight; only the particular prevents the concept of justice from decaying into a farce, or worse.³⁷ Any thought on the theme of justice that is not measured by the countless concrete particularities of suffering that always seem to elude humanity’s many purely abstract concepts of justice is *a priori* unjust. Make no mistake about it: the bottommost origin of justice is the real sufferings of the flesh-and-blood human beings who live in the very same here and now that all of the rest of us do. Lose sight of their unique particularity and you lose sight of justice itself.

It turns out that all human sufferings are not created equal, however. Whatever form it takes, the idea of justice has never, in all of recorded history, presented itself as the enemy of *universal* human suffering. It has never sought to banish or cure *all* of mankind’s many woes. On the contrary, all known ideals of justice have tolerated and even demanded a certain amount of necessary violence and suffering so that “justice may be done,” as the saying goes. The wooden

³⁶ Friedrich von Hayek, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1978).

³⁷ Cf. Theodor Adorno, *Negative Dialectics*, tr. E.B. Ashton (London: Routledge & Kegan, 1973), 330.

scaffold that was specially erected in 1947 at Auschwitz to execute Rudolf Höss, the first commandant of that unspeakably evil place, remains to this day a sobering reminder of a profoundly simple truth. *Justice does not and cannot declare war on universal human suffering because the infliction of pain is one of its necessary instruments.*



Photograph of Gallows in Auschwitz Used to Hang Rudolf Höss]

As usual, Pascal managed to distil this important truth to its essence when he remarked that while might without justice is tyrannical, justice without might is helpless.³⁸ A justice that hesitates to cause people pain fears to intervene in the world. Such a justice is no more substantial than the “shadow in a dream” of which the Greek poet Pindar spoke in his beautiful meditation on the transience of human life.³⁹ To act at all is to become fully responsible for the consequences of one’s action. In this one respect, at least, modern conservatives who advise people to take greater personal responsibility for their actions are correct, though probably not in the way that they imagine. The sign and seal of original sin is neither an act of disobedience to God’s commands nor any other sort of personal wrongdoing. Original sin is the primordial guilt of those who go on living and acting in a world that remains unjust for others despite whatever measure of joy and contentment they may achieve for themselves.

6.

Perhaps you will recall that Justitia, the Roman goddess of justice, wears a blindfold in most modern artistic depictions of her. Her self-chosen sightlessness is usually taken to symbolize her impartiality as a neutral judge of the world, as the scales in her left hand might seem to imply.

³⁸ Blaise Pascal, *Pensées and the Provincial Letters*, tr. W.F. Trotter (New York: Modern Library, 1941), 103 (*pensée* number 298).

³⁹ Pindar, “Human Life,” in T.F. Higham and C.M. Bowra, *The Oxford Book of Greek Verse in Translation* (Oxford: Clarendon Press, 1938), 312 (“Man’s life is a day. What is he? / What is he not? A shadow in a dream / Is man”).



The Goddess of Justice]

But it seems to me that impartiality is not all that the blindfold symbolizes. I think it is noteworthy that Justitia's sister goddess Fortuna, or fate, also wore a blindfold. Given that fate is traditionally regarded as being indifferent to the distribution of pain and gain that it produces, I have always thought that Justitia's blindfold represents more than just a symbol of impartiality or a fashion statement. It also strikes me as being a supremely ironical gesture. Putting on a blindfold allows its wearer not to notice certain things, and yet at the same time being willing and able to notice things is a precondition of all plausible theories of moral responsibility. As the philosopher Ludwig Wittgenstein once said, in a chilling remark that I have never tired of quoting, "What the eye doesn't see the heart doesn't grieve over."⁴⁰ Justitia's blindfold prevents her from noticing a brutally simple fact: the sword that she wields in her right hand is eternally poised to cause pain in the name of alleviating it.

Illustrations of this point are not difficult to find in the sphere of historical efforts aimed at preventing injustice. Consider the problem raised by humanitarian interventions seeking to prevent or deter the commission of war crimes. When, for example, NATO warplanes started bombing targets in Kosovo, Serbia and Montenegro in 1999 in order to prevent the ethnic cleansing and genocide then being perpetrated by the Serbians on the Moslem population of

⁴⁰ Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics, rev'd edn*, eds G.H. von Wright, R. Rhees and G.E.M. Anscombe, tr. G.E.M. Anscombe (Cambridge, MA: MIT Press, 1978), 205.

Kosovo, this was done in the name of certain fundamental notions of justice that are embedded in international human rights declarations. However, in order to minimize allied casualties, NATO firmly rejected the use of ground troops and ordered its bombers fly at extremely high altitudes to put them beyond the reach of anti-aircraft fire. As a result of this precaution, the likelihood of civilian casualties increased significantly. And indeed, the calculation that the lives of allied pilots were worth more than the “collateral damage” caused by high-level bombing in the service of humanitarian values produced predictable results: not a single allied pilot was lost, but hundreds of innocent civilians were killed in trains, buses, TV stations and hospitals,

Included among these many civilian deaths were seventy-five Albanian refugees who were trying to return home in a convoy that was hit repeatedly by allied warplanes on April 14, 1999. As my friend and colleague Professor Costas Douzinas has noted, and as many of you in the audience will recall, part of NATO’s official explanation for the last-mentioned tragedy “was that tractors and trailers cannot be easily distinguished from tanks and armored personnel carriers at an altitude of 15,000 feet.”⁴¹ It would seem that when it comes to preventing injustice some innocent lives are worth more than others.



“Collateral Damage” Near Djakovica, Kosovo

Genocide is unjust and ought to be resisted. But the deliberate (albeit mistaken) killing of innocent civilians also seems unjust. On these two points, few of us would disagree. Nevertheless, the stark contradiction between these two statements that is shown in the particularly tragic case of the Albanians killed near Djakovica really ought to give us pause. To paraphrase St. Augustine’s remark about time, most of us know seem to know well enough how to identify and talk about justice and injustice if we don’t think too hard about it; but if we are

⁴¹ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000), 134.

asked to explain what we mean by these words, we are baffled.⁴²

The example of NATO's "humanitarian" bombing campaign in Kosovo raises an acute question that transcends the contradiction between opposing the evil of genocide and opposing the evil of killing civilians during wartime. *How are we supposed to know whether a particular instance of human suffering that cries out to us from the world, tugging at our heartstrings and our consciences, is unjust or at least reasonably avoidable, and what are we supposed to do about it?*

7.

The examples of slavery and genocide might strike you as relatively easy cases compared to the particular cases that I am going to tell you about now. In the fall of 2006, a 62-year-old Ohioan by the name of Timothy Bowers found himself out of work and unable to find a steady job. Worried about how he would make it through the next few years until he became eligible for Social Security, Bowers came up with a plan: he would rob a bank, hand the money to a guard, and then calmly wait for the police to arrest him. And that is exactly what he did, in the hope of being sentenced to prison: at least there his basic needs for food, shelter and medical care would be met. Bowers pled guilty and told the judge that a three-year prison sentence would suit him just fine; whereupon the judge obliged him.⁴³

Four years earlier, Victor Lopez, a homeless man from San Diego, had come up with a similar plan. In November of 2002, he robbed a gas station at knifepoint and then immediately told the clerk to call the police. Lopez, who had no criminal record before his arrest, believed, not unreasonably, that a stay in jail was better than living on the mean streets of the city during the winter. At least it is warm in jail and they give you a bed to sleep in, food to eat, and modicum of medical care if you get sick. But unlike the law's treatment of Timothy Bowers, the district attorney's office foiled Lopez's scheme by refusing to prosecute him, saying: "His intent was to get arrested, not to steal."⁴⁴

What did justice demand for Bowers and Lopez? The only choices the rule of law had constructed for itself in these two cases was to impose the lesser misery of a prison cell or to

⁴² Saint Augustine, *Confessions*, tr. R.S. Pine-Coffin (London: Penguin Books, 1961), 264.

⁴³ 'Just Asking to be Caught, Thief Solves Joblessness', *N.Y. Times*, 13 Oct. 2006, A16.

⁴⁴ 'Jail-Seeking Robber is Set Free', *San Diego Union-Tribune*, 3 Dec. 2002, B3.

impose the greater misery of poverty on the outside. Most of us would consider a jail sentence to be an unwelcome reduction in our circumstances – a kind of *punishment*. But not Messrs Bowers and Lopez. Indeed, no judge *could* have really “punished” these men by sending them to jail, since the lesser pain of imprisonment was exactly what they wanted for reasons having nothing to do with the punitive law’s stated goals of retribution, deterrence and atonement. On the other hand, if the legal system chose to return them to the streets, as it did with Mr. Lopez, then the system could claim that it was not responsible for their plight, even if they died there, since their degraded condition on the outside did not seem to be the law’s “fault.” In the precise legal context in which the rule of law found them, Timothy Bowers and Victor Lopez – who were guilty, above all, of the crime of extreme poverty – seem to have “owned” only what the philosopher Giorgio Agamben has called “bare life.”⁴⁵ See from the point of view of conventional jurisprudence, they were biological organisms in effect, like bugs, that the law could either tolerate and let live, in prison, or else exile to skid row, where they would be liable to extinction by un-punishable “natural causes.”

I should add that the facts of these two cases are not as unusual as one might suppose. Their unique tragicomic sadness resonates in periodic newspaper accounts of other desperately poor people who seek out the relative “comforts” of jail,⁴⁶ in editorials calling for the release of old and sick prisoners so as to spare taxpayers “the exorbitant cost of caring for very sick inmates behind prison walls,”⁴⁷ in stories about the starvation deaths in Japan of urban welfare recipients who have lost their benefits,⁴⁸ and in recent Census Bureau reports showing substantial increases in joblessness, homelessness and the poverty in the United States in the wake of the Great Recession.⁴⁹

⁴⁵ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, tr. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

⁴⁶ E.g., ‘Homeless Among Mansions: Aspen Man Talks about Life on the Streets’, *Aspen Times Weekly*, 11 Feb. 2007; ‘Homeless See Jail as Refuge’, *St. Petersburg Times*, 25 Dec. 1988, 1.

⁴⁷ ‘Old and Sick behind Bars’, *San Francisco Chronicle*, 27 Nov. 2005, E4. See also ‘As Prisoners Age, Terminally Ill Raise Tough Questions’, *Wall Street Journal*, 29 Sep. 2005; ‘Defender: State Balked at Heart Surgery’, *[Delaware] News Journal*, 27 Sep. 2005.

⁴⁸ ‘Starving Man’s Diary Suggests Harshness of Welfare in Japan’, *New York Times*, 12 Oct. 2007, A1.

⁴⁹ See, e.g., U.S. Census Bureau Press Release, 16 September 210, http://www.census.gov/newsroom/releases/archives/income_wealth/cb10-144.html

Paying close attention to the agonistic details of any one person's tragic encounter with the gears of our social and legal system is unbearable to an authoritarian way of thinking, for it strikes at the foundational principle of all dominion.⁵⁰ That principle is studied indifference. Hence, it seems to me that Adorno was right to say that a sense of shame bids politics and philosophy to repress George Simmel's great insight that their official histories show amazingly few indications of the sufferings of humankind.⁵¹

8.

I'm sure you will be glad to know that I am nearly at the end of my remarks. Let me return to the conclusion that I hinted at some time ago. The enemy of justice, and the source of all injustice, is the will to deny the particular. Everything that happens in the living world – indeed every moment of historical time – contains infinitely more than its conceptual determination could ever subdue in the form of a statement, or even a book full of statements. What is, is more than it is, as Adorno somewhere says. This implies that the merely correct is never the same as the real, and that what is real can never be impressed into a logical form without leaving a remainder. Abstract conceptual correctness about the nature of justice – or indeed about anything at all – is always immediately contradicted by the truth of the living reality it seeks to subdue.

Everyone knows, at some level, that this is so. Think, for instance, of who you yourself are as a real, living person. Don't you hate it when others casually or even professionally label and categorize you, reducing you to a mere example of a "type"? Simple self-reflection ought to suggest that each unique one of us contains infinitely more complexity than any amount of accurate words could ever say. This is the fundamental truth hinted at by the eponymous hero in T.S. Eliot's poem, whom I have never tired of quoting:

⁵⁰ Cf. Theodor Adorno, *Negative Dialectics*, tr. E.B. Ashton (London: Routledge & Kegan, 1973), 280.

⁵¹ *Id.* at 153.

*And I have known the eyes already, known them all—
 The eyes that fix you in a formulated phrase,
 And when I am formulated, sprawling on a pin,
 When I am pinned and wriggling on the wall,
 Then how should I begin
 To spit out all the butt-ends of my days and ways?*⁵²

That conceptual correctness is the enemy of a certain kind of truth is a proposition that is no less true in the sphere of justice than it is in the sphere of individual identity or selfhood. That is why any author or lecturer who tells you they know what is just, and know how to achieve it, is at bottom just trying to sell you something. Whether or not they are aware of it, theirs is at best a subtle politics of truth,⁵³ and you are their would-be constituency. In this auditorium, however, I ask that you refrain from voting for me or for any other huckster of ideas until you have really thought through *for yourself* what is at stake in the matter of justice.

In thinking about justice, facts surely matter. But what counts as a fact? There is a bad empiricism in public life that consists of the will to notice only those facts that our abstractions authorize us to notice. Mimicry is a form of apology, especially in the moral sphere. Without the distance from the given world that is provided by critical thinking, the ceaseless promotion of “law and order” for its own sake degenerates into dogmatism and mindless idolatry. I believe that the idea of justice requires a good sort of empiricism that resists any effort to bring the unreconciled injustices of daily life within the ambit of a unanimous interpretation.⁵⁴

It seems to me that the word “justice” does not and cannot name some end-state which, though different from the present, unjust, world, is nonetheless imaginable and attainable by human actions aimed at realizing the idea of it. Justice does not stand in relation to law as a blueprint does to a building. If true justice somehow managed to realize itself in the world, if it became “official policy” everywhere, then it would become indistinguishable from the law of the land. For when justice succeeds in abolishing unjust law and then takes law’s place on the altar

⁵² T.S. Eliot, “The Love Song of J. Alfred Prufrock,” in *id.*, *Selected Poems* (New York: Harcourt Brace Jovanovich, 1934), 11-16, qt 13.

⁵³ Cf. Michel Foucault, *Security, Territory, Population*, tr. Graham Burchell (Houndsmills, Basingstoke, UK: Palgrave Macmillan, 2007), 3 (defining philosophy as “the politics of truth”).

⁵⁴ Cf. Theodor Adorno, *Negative Dialectics*, tr. E.B. Ashton (London: Routledge & Kegan, 1973), 144.

of mere legality, it loses its capacity to criticize the existing order of things. I have claimed in this lecture that the ability to criticize what everyone else accepts as normal and necessary is the very essence of the idea of justice. If I am right about this, then we are met with a paradox that may sound disturbing, but is in fact absolutely necessary for any thought about justice that is worthy of the name: *justice achieved is at the same time justice annihilated*.

Philosophy and politics know too little about justice, but they nonetheless insist on telling you all about it. The real world, on the other hand, knows too much about injustice, and yet it remains sadly tongue-tied and mute. Let injustice be resisted, and let there always be hope that justice is possible. But may we never believe that justice has finally arrived.

* * * *

Thank you for listening so patiently to what I have had to say this afternoon.