

## 6

### Ideas of Justice

#### Positive<sup>1</sup>

Matthew Noah Smith

We use the term “justice” in many different ways. In this chapter, I consider justice only as it is used in Anglo-American political and legal theory. In this realm of discourse, all forms of justice consist of nonutilitarian *allocative principles*, that is, principles governing, to put it as broadly as possible, who gets how much of what. Some may wish to treat utilitarian principles as principles of justice. As a matter of nomenclatural pedantry, this is surely reasonable. Perhaps as a consequence of John Rawls’ arguments in *Theory of Justice*,<sup>2</sup> or perhaps as a result of Aristotle’s classifications of two forms of justice in the *Nicomachean Ethics*,<sup>3</sup> or perhaps as a result of John Stuart Mill’s appreciation of the need for reconciling utilitarianism with justice,<sup>4</sup> we generally think of justice as consisting of principles that are sensitive to factors to which most forms of utilitarianism are blind. Furthermore, thanks to Rawls, we generally think of distributive justice in particular as being primarily applicable to political and social institutions and not to individual actors (this, however, has been challenged by those who would still recognize a sharp distinction between utilitarianism and justice<sup>5</sup>). Regardless of whether this distinction between justice and utilitarianism is sustainable in the long term, I shall presume it, if only to make clear what is at stake if we are to treat utilitarianism as just one form of justice.

There is much more to the moral and ethical universe than allocative principles of justice. What makes for a flourishing and good life (e.g., peace and the development of one’s capacities), what makes an action or a character morally praiseworthy, and

<sup>1</sup> I thank Jenelle Troxell for her insights regarding literary theory. I thank Alex Galloway for comments on an early draft and Jules Coleman for his inestimable guidance.

<sup>2</sup> John Rawls, *A Theory of Justice*, 2nd ed (Cambridge, MA: Harvard University Press, 1999).

<sup>3</sup> Aristotle, *Nicomachean Ethics*, Terrence Irwin, trans. (Indianapolis, IN: Hackett, 1999), Book Five, esp. 1130b30 ff.

<sup>4</sup> John Stuart Mill, *Utilitarianism*, George Sher, ed. (Indianapolis, IN: Hackett, 1999) Ch 5.

<sup>5</sup> See, e.g., G.A. Cohen, “Where the Action Is: On the Site of Distributive Justice” *Philosophy and Public Affairs* 26 (1997) 3–30.

many ground floor moral principles (such as moral principles prohibiting intentional deception or torture) are not matters of justice even though they are deeply morally and ethically significant. For legal theorists, a focus on justice is particularly apt because there is a long tradition of seeing certain areas of both the civil and criminal law as realizing or promoting different forms of justice.

For example, many believe (*pace* the dominant law and economics theories) that criminal law realizes the requirements of retributive justice<sup>6</sup> or that tort law promotes conformity with principles of corrective justice.<sup>7</sup> According to these views, what criminal law is *for* and what tort law is *for* is to realize or promote certain forms of justice. If one wishes to eschew functionalist talk, one can say that the rationales that allow us to best make sense of these legal regimes is that they promote some form of justice. In both cases, though, if we are to understand some area of the law, we must grasp the relevant form of justice associated with that area of the law. On this view, then, prior to the question of evaluating the law's merits, we must understand what the law is for or the rationale that best allows us to make sense of the law. *This* requires understanding the character of some form of justice.<sup>8</sup>

There is, of course, much debate about whether norms of justice play this role in our law.<sup>9</sup> For a debate between those who defend what we might call a "justice-based" account and those who reject such an account of the law to be grasped, much less for such a debate to be fully engaged, all sides must have a shared understanding of the different concepts of justice that, according to the justice-based accounts of the law, define the functions of certain areas of the law. After all, how can one attempt to defend or attack the claim that what tort law is for is to realize corrective justice if one does not know what corrective justice is?

There is yet another reason why understanding different forms of justice is central to understanding the law: Considerations of justice can function as constraints on what form the law ought to take. For example, even if the aim of the law is to promote Pareto optimality in a range of human endeavors by providing incentives, we may still justifiably criticize the law on grounds of justice, thereby making a case for changing or disobeying the law. This would be to view justice as what Robert Nozick called a "side constraint."<sup>10</sup> It is no insult to the majesty of justice to view it as the most significant side constraint governing the law, even if what the law is for is to maximize efficiency in a variety of different human endeavors.

<sup>6</sup> See, e.g., H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968).

<sup>7</sup> See, e.g., Jules Coleman, *The Practice of Principle* (New York: Oxford University Press, 2001) Ch 2–5, and also Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) Ch 3.

<sup>8</sup> See esp. Jules Coleman, *The Practice of Principle*, especially Ch 1.

<sup>9</sup> See, e.g., Richard Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law," *Journal of Legal Studies* 10 (1981) 187.

<sup>10</sup> See Robert Nozick, *Anarchy State and Utopia* (New York: Basic Books, 1974), 33 ff.

## Ideas of Justice

163

In short, sorting out the relationship between justice and the law is complex and tricky work. If we are to perform this task, we must have a fair grasp of at least some of the major forms of justice. Thus, in this essay, I offer an overview of four forms of justice. To that end, I shall treat as posterior to this task complex questions about the relationship between the law and justice and instead focus exclusively on political morality itself. The following sections offer the reader an overview of three familiar forms of justice and a fourth emerging form of justice. These discussions are not meant to be an exhaustive overview of every possible form of justice. For example, I shall discuss neither procedural justice nor global justice (although global justice as it is debated today is more or less treated merely as a species of distributive justice). This lacuna is not accidental, as the four forms of justice I choose to discuss here are highly relevant to legal theory and have long histories of being at the centers of debates about the nature and justification of legal regimes.<sup>11</sup>

In the process of providing this overview, I offer a distinctive framework for understanding these forms of justice. This new method, which may appear merely suggestive to the analytic philosopher, is to understand justice in terms of different forms of *narrative*. That is, I shall try to make sense of forms of justice by showing how they embody different forms of narrative. I shall argue that, on the one hand, two forms of justice – retributive and corrective – embody the *character-driven story* (CDS) form, whereas another form of justice – distributive justice – embodies a different narrative form, namely what we might call the utopian form.<sup>12</sup>

Briefly, a CDS has a beginning, a middle, and an end. Additionally, a CDS has *characters* who, except in first-person narration, are usually distinct from the narrator.<sup>13</sup> The characters of a CDS experience or cause the events that make up the beginning, middle, and end of the story. The utopian form, on the other hand, does not require characters; it requires only a narrator. Additionally, the utopian form does not aim to relate chronologically, logically, or characterologically related events. Instead, stories in the utopian form articulate distinct spaces that are *geographically* related. The invention and exposition of these spaces is one of the aims of the utopian story form. We might say that the utopian form foregrounds the location of a story, whereas the CDS form backgrounds the location. A simple, although not failure-proof, test for distinguishing between the two is the following: would the narrative make sense in a different place? If the answer is “yes,” then the narrative is

<sup>11</sup> For example, John Locke saw the question of retributive justice as so important to the justification of the state’s legal order that he grappled with it in his *Second Treatise on Government* well before he dealt with the justification of private property. See John Locke, *Two Treatises of Government*, Peter Laslett, ed. (New York: Cambridge University Press, 1988) 271 ff. Aristotle, as mentioned previously, identified two forms of justice – corrective and distributive – and did so explicitly when discussing legal proceedings. See Aristotle, *Nicomachean Ethics*.

<sup>12</sup> The term “character-driven story” is invented. I owe it to Tanya Agathocleous.

<sup>13</sup> For more on this, see Dorit Cohn, *Transparent Minds* (Princeton, NJ: Princeton University Press, 1979).

a CDS, if “no” it is likely to be of the utopian form. For example, “Little Red Riding Hood” can take place in any forest or even outside of a forest in a city! The subject of Thomas More’s *Utopia*,<sup>14</sup> on the other hand, is Utopia itself. So, the story cannot take place anywhere else.<sup>15</sup>

The primary theme of this chapter, then, is to show how we can gain insight into different forms of justice by understanding them in terms of certain narrative forms. In the next section I offer a framework for pursuing this project. The sections on Retributive Justice and Corrective Justice employ this framework to argue that we can best understand retributive and corrective justice most naturally in terms of the CDS form, and the section on Distributive Justice argues that distributive justice is best understood as manifesting the utopian form of narrative. The section on Transitional Justice uses this approach to show how this form of justice is a deeply complicated and perhaps theoretically unstable form of justice, since it manifests features of both the CDS and the utopian forms of narrative.

### Justice and Narrative

When contemporary analytic philosophers write about justice, we write about norms, principles, reasons, and the like; stories do not play a central role. We nonetheless often do tell stories, although almost always as thought experiments intended to test particular principles against the intuitions elicited by the story.<sup>16</sup> That is, in the standard methodology of analytical political philosophy – insofar as there is a standard methodology – stories are instruments meant to elicit data (intuitions) that in turn play a role in theory construction.<sup>17</sup>

From a metatheoretical perspective, however, we might see another role for thinking in a literary manner when thinking about justice because our very concepts of justice answer to certain literary forms. In short, one deeply important way in which we can understand certain concepts of justice is *through* certain kinds of stories. In these cases, we do not treat the stories as thought experiments that elicit intuitions, but instead the stories serve as allegories for different forms of justice.

<sup>14</sup> Thomas More, *Utopia*, George M. Logan and Robert M. Adams, eds. (New York: Cambridge University Press, 1975).

<sup>15</sup> In fact, the narrators of *Utopia* are not in Utopia itself, but, the point here is that the subject of the story is a place and not a series of chronologically or characterologically related events. All of Shakespeare’s plays – and pretty much all plays – are CDSs (arguably, though, some of Beckett’s plays are not). Plato’s *Republic* is a Utopian narrative as is, to some degree, Ridley Scott’s famous film, *Blade Runner*. My arguments do not depend upon there being many pure forms of either CDSs or Utopian narratives, although there clearly are enough pure forms for my distinction to be sensible.

<sup>16</sup> The most striking example of this is found in Frances M. Kamm’s work. See, e.g., Frances M. Kamm, *Intricate Ethics: Rights, Responsibilities and Permissible Harm* (New York: Oxford University Press, 2007).

<sup>17</sup> See, e.g., Tamar Szabo Gendler, *Thought Experiment: On the Powers and Limits of Imaginary Cases* (New York: Routledge, 2000).

## Ideas of Justice

165

The most well known instance of this is Plato's discussion of justice in the *Republic*. Plato does not identify norms or principles but instead makes an argument by analogy when asked to explain what justice in the soul is.<sup>18</sup> He asks us to see the city as a direct analogy to the soul and then, at what is surely the dramatic zenith of the *Republic*, describes in great detail five different *poleis*, moving from the ideal *kallipolis* (the beautiful city) to the tyranny. Plato does not offer to us and then defend what we would recognize as competing principles of justice. Rather, he tells us a story about a city, leaving the reader with the responsibility of *recovering* ethical–political norms or principles from the elaborate travelogue from the *kallipolis* to each of the other four increasingly degraded cities. Yet another famous (and already mentioned) instance of this methodology is found in More's *Utopia*, which is explicitly presented as a travelogue and whose message is not literary but is instead overtly political, as is the travelogue that is Dante's *Divine Comedy* (this has elements of a CDS, although it remains primarily a utopian – and dystopian – narrative).<sup>19</sup> On the other hand, CDS's transparently serve ethical and political masters all the time. The most obvious cases are, of course, found in the Bible, and especially the New Testament, which expresses ethical and political positions almost entirely through parables. The story of the Good Samaritan, for example, illustrates a moral principle, namely that we have a duty of care owed to those who are in need and whom we can also help.

In all these cases, we can see that principles of justice are represented, for whatever reason, through narratives and not through philosophical argument. This is not to say that philosophical argument can be replaced by narrative in political theory. Rather, my point here is that we can access or appreciate concepts of justice by way of stories just as we can access and appreciate them by way of philosophical exposition. Thus, if we find that a certain narrative form is best suited for accessing, appreciating, or understanding a certain form of justice, then that will surely reveal something about that form of justice, namely a certain kind of deep structure of that form of justice. The deep structure would not vary across the different principles that might constitute principles constituting these forms of justice. Rather, this structure would be implicit in the way we think about that form of justice itself.

We can articulate this point more clearly if we borrow a distinction made famous by Rawls. Rawls distinguished between the concept of justice and different conceptions of justice.<sup>20</sup> Generically speaking, the concept of justice can be understood as posing a particular question about allocation. Thus, different concepts of justice simply pose questions about different problems of allocation: how to allocate the benefits and burdens produced within a system of cooperation; how to allocate the costs associated with misfortune; how to allocate punishment when there is a

<sup>18</sup> Plato, *Republic*, C. D. C. Reeve, trans., 3rd ed (Indianapolis, IN: Hackett, 2004).

<sup>19</sup> Dante Alighieri, *The Divine Comedy*, John Ciardi, trans. (New York: New American Library, 2003).

<sup>20</sup> Rawls, *A Theory of Justice*, 4.

crime, and so forth. Conceptions of justice can be understood as principles that *answer* these questions. For any one concept of justice, there can be many possible conceptions of justice, that is, many answers to the question posed by that concept of justice, and it is (part of) the work of political philosophy to determine which answer is best.

My thesis is that the narrative form that best suits the form of justice reveals something about the relevant *concept* of justice, which of course has an impact on the various conceptions of justice: By understanding the narrative form immanent in any concept of justice, we gain deep insight into the question posed by that concept of justice and the forms and limits of the principles that might answer those questions. In particular, we gain a sense of the perspective on human affairs that is presupposed by that concept of justice. As we shall see, talk of visual perspective is appropriate here because each concept of justice presupposes a kind of visual vantage point. In some cases, the story form is a CDS, and so always involves actors experiencing (or causing) a series of events that are linked together into a beginning, a middle, and an end. The CDS form draws us into the feverish grasp of the cascade of events. In other cases, the narrative form is the utopian form (which, as mentioned previously, is also found in travelogues but also often in science fiction), in which one has the perspective of a “solar eye” looking down on geographical space, holding its entirety in one’s imagination instead of, we might say, our imagination being possessed by that space.

Let me summarize, now, the two key points of this section. First, concepts of justice can be articulated in many ways, and one way in which they can be articulated is through different story forms, in particular through the CDS and the utopian story forms. Second, the most apt narrative form for grasping the concepts of retributive and corrective justice is the CDS form, whereas the most apt form of narrative for grasping the concept of distributive justice is the utopian form.

### Retributive Justice

We are perhaps most familiar with retributive justice, which consists of the principles governing required punishment of wrongs committed by others within one’s community. The most famous principle of retributive justice is the Biblical requirement of *lex talionis*, which requires exacting equal retribution for each wrong (thus “an eye for an eye, a tooth for a tooth” is an iconic enthymatic formulation of *lex talionis*). Immanuel Kant advocated this very principle, famously remarking:

“Even if a civil society resolved to dissolve itself with the consent of all its members – as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world – the last murderer lying in prison ought to be executed before the resolution was

## Ideas of Justice

167

carried out. This ought to be done in order that everyone may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they will all be regarded as participators in the murder as a public violation of justice.”<sup>21</sup>

This strict form of retributive justice has seemed to some to enshrine as morally principled a deeply primitive and objectionable form of revenge. On these grounds, some have rejected all forms of retributive justice as sources of justification for *any* kind of punishment, much less state-sanctioned and state-imposed punishment. Surely this moves too quickly: Other more reasonable principles of retributive justice are available. For example, we might have a principle requiring that those guilty of committing wrongs must be punished in some humane fashion that embodies the very moral principles that were violated. Thus, we can imagine a call for humane imprisonment, or a stiff financial penalty, or some other form of punishment. Even if these responses to wrongs are understood as forms of revenge, they, because embodying the very moral principles that were violated by the individual who committed the wrong, are neither brutal nor dehumanizing. Thus, the question of whether this form of punishment as morally-restrained revenge is morally objectionable is hardly settled.

Furthermore, it remains an open question whether we even want to understand retributive justice as expressing a commitment to *any* kind of revenge. The problem with revenge seems to be the way that it fails to be public in so many ways that it does not seem to be manifest – an implicit demand of any principle of justice that practices justified by those principles be accessible and assessable within the public sphere. This is typically accomplished in modern states through public trials presided over by (supposedly) neutral parties, the availability of appeals, and finally, punishment meted out in the name of all the citizens and not simply the person who suffered the wrong. Revenge, however, lacks these features. There is no publicly accessible method for accounting for the wrong done; the kind and extent of the punishment seems to be a matter of the private judgment of the individual seeking revenge, and the punishment itself is a private affair between the wronged agent (or his proxy, be it an authorized proxy or a vigilante) and the agent who committed the wrong. These reflections strongly recommend abandoning any systematic objection to retributive justice on the grounds that it embodies a morally offensive form of revenge.

Au: Please read the above para carefully. Edited as meant?

So, assuming the viability of retributive justice as a form of justice governing the allocation of punishment in response to definite wrongs, what general form do the principles of retributive justice take? To answer this question, it is useful to contrast retributive justice with consequentialist theories of punishment (of which utilitarian theories of punishment are a species). Consequentialist theories of punishment

<sup>21</sup> Immanuel Kant, *The Philosophy of Law*, W. Hastie, trans. (Edinburgh, 1887) 198.

justify punishment by articulating a relationship between punishment and future goods. Retributive justice justifies punishment by articulating a relationship between punishment and past wrongs. Thus, it is natural to describe consequentialist justifications of punishment as *forward looking*, in the sense that the particularities of the commission of the original wrong drop out of view and punishment is understood as a means to promote some end, whereas it is natural to describe retributive justice as *backward looking*, in the sense that retributive justice requires that the particularities of the original wrong play the central role in determining both who is punished and how that person is punished, largely regardless of the connection any such punishment has to the promotion of unrealized goods. This contrast reveals the following formal constraint on all theories of retributive justice: It is contrary to retributive justice (however it is cashed out) to punish just *anyone* to promote some unrealized good, such as bringing people to view committing crimes as so risky that they no longer commit them.

We can now see how distinct retributive justice is from any consequentialist theory of punishment. Consequentialist theories of punishment do not operate according to the logic of retribution because retribution succeeds only when the one who has in fact committed the crime is punished. Standard consequentialist theories of punishment, on the other hand, succeed only when those who *would* commit a wrong are deterred by the present imposition of a punishment. The success of punishment according to a consequentialist theory of punishment is therefore dependent upon the truth of a counterfactual, namely: Had this punishment not been meted out, then such-and-such wrongs would have occurred. On the other hand, the success of punishment according to any theory of retributive justice depends upon the truth of a historical claim, roughly: So-and-so committed such-and-such a wrong.<sup>22</sup>

Does retributive justice have an aim, then? In an important sense it does, although this aim does not provide teleological justification for punishment. Rather, the aim is constitutive of retributive justice itself: The imposition of the punishment is meant to bring to an end the course of events instigated by the commission of the crime.<sup>23</sup> Within the context of retributive justice, punishment brings what is often colloquially called closure. Thus, unlike any consequentialist approach, retributive justice operates within the framework of a CDS, in that there is an actor, who engages in or experiences a series of events, which are in turn coherently ordered into a

<sup>22</sup> These propositions characterizing the success conditions of punishment as seen from two competing theories are schematic and therefore are meant to leave open the addition of a many further conditions.

<sup>23</sup> This does not rule out principles of retributive justice being limited by some considerations associated with deterrence. But, the aim of deterrence must be understood as a kind of side constraint, e.g., punishments that reliably have the opposite effect of deterring crime might be ruled out from the menu of available punishments.

## Ideas of Justice

169

beginning, a middle, and an end: the commission of the crime, the determination of guilt, and then the punishment.<sup>24</sup>

That is to say, the concept of retributive justice is best understood when we view the commission of a wrong as the beginning of a story, and in particular, a story that has a very specific kind of ending. Furthermore, there are not just any old actors in the story of retributive justice. Rather, there are the following central characters: the wrongdoer and the wronged. The omnidirectional temporality of this narrative is crucial because unlike any consequentialist narrative of the justification of punishment, according to any theory of retributive justice, the wrong must have been committed *prior* to the punishment, or else the punishment would be, as a formal matter, in violation of any possible principle of retributive justice. That is, the focus on a specific wrongdoing character is crucial. Even if A has committed a wrong just like the wrong committed by B it would be a violation of retributive justice (whatever specific form it takes) for A to be punished for B's wrong, or, for that matter, for B to be punished for A's wrong.<sup>25</sup>

There is a final and critical constraint on the CDS established by retributive justice. This constraint is that the broader narrative context must *take the world as it is*. That is, principles of retributive justice require that punishment is *contained* and not systematic. This last constraint on retributive justice requires that the punishment focus on the wrongdoer and not on any external (e.g., social, cultural, familial, etc.) conditions that may be connected, in some sense, to the wrong committed. These conditions may be admitted as mitigating factors in judging whether or how much to punish the wrongdoer, but taking action to change these conditions *in the name of retributive justice* is not permitted. For example, suppose that A murders B, and part of the explanation for A's violent behavior is that years before A's father had beaten A mercilessly (e.g., consider this factor as a matter of counterfactual dependence: had A's father not mercilessly beaten A all those years ago, A would not have murdered B). Retributive justice cannot require that A's father be punished as well as A, or that the state's child welfare system, which through its negligence allowed A to stay in a home where he was beaten mercilessly by his father, somehow be subjected to punishment because A committed some wrong. Conversely, such an extension is possible, but only if it is accompanied by a rereading of the past such that A's father or the state welfare system somehow becomes complicit in A's crime, thereby no

<sup>24</sup> For a general definition of a narrative, consider the following: a narrative consists of a story, which is a "fabula that is presented in a certain manner[; a] *fabula* is a series of logically and chronologically related events that are caused or experienced by actors[; an] event is the transition from one state to another state[;] *Actors* are agents that perform actions. . . . *To act* is defined here as to cause or to experience an event." (from Mieke Bal, *Narratology*, 2nd ed. (Buffalo, NY: University of Toronto Press, 1997) 5.).

<sup>25</sup> Although one might defend some principle of retributive justice allowing simultaneous symmetrical error – A being punished for B's wrong, and B being punished for A's wrong – such a principle would be a perverse form of retributive justice.

longer putting A at the center of the narrative about the commission of the wrong action, but instead putting A and his father, or A and the child welfare system at the center of the narrative of the commission of the wrong action.

We can therefore see that retributive justice is best understood as a CDS, where the central character is the *wrongdoer*, and in which there are, roughly, three acts. First, there is the commission of the crime by the wrongdoer. Then, there is the pursuit and trial of *that* wrongdoer for the commission of *that* crime. Finally, there is the punishment of the wrongdoer for *that* crime, but only as a consequence of the pursuit and/or the trial of the wrongdoer (sometimes the pursuit can lead to the wrongdoer suffering in some appropriate manner, which is “read” as the proportionate punishment for the wrongdoer given *that* crime). The victim of the crime plays a role in this CDS, but is a central character only at the initial stages. After that point, the wrongdoer is the narrative center-of-gravity around whom swirls all the events.<sup>26</sup> Of course, as represented in some text, the CDS of retributive justice may focus on the police or lawyers, but even then the wrongdoer (and the crime) looms silently in the foreground: It is the wrongdoer who is the target of the chase or the focus of the trial.

It is no accident, then, that the most common contemporary enactments of retributive justice are police and courtroom procedurals, dramas that begin with a crime, turn to drawn-out police investigations or lawyerly debates before a judge or jury, and then close with the wrongdoer being caught or, after having been caught, convicted. Importantly, in all these cases, the social, political, and economic context is presented as both given and immutable (i.e., as not constructed by the actors, and as not changeable by the actors); the story is woven within and according to the logic of this much broader tapestry without any meaningful querying of the constraints so imposed.

Perhaps one of the purest examples of this is an early police procedural, the great 1948 film, *The Naked City*, which begins with a dramatic aerial shot moving north over Manhattan, beginning at its southern tip. In a startling voiceover, the director announces to his audience that the story in this film is just one story within the great American metropolis of New York City and that this story, although fictional, is shot entirely on location in the city. Then, we almost immediately are shown the murder, the investigation of which is the focus of the film. The film ends with the murderer having been caught and a raw punishment meted out. *The Naked City* self-consciously takes New York City, and in particular its architectural, political, and social structures, as an immutable background against which the totally contained, and highly controlled and targeted police investigation unfolds. This is a near-perfect enactment of retributive justice: Against an utterly stable and given background, the

<sup>26</sup> Insofar as the wronged plays a role in later “acts,” it is always within the context of the pursuit/trial or the punishment, and therefore becomes not only the wronged but also the pursuer or the punisher, which is a different kind of character.

## Ideas of Justice

171

story follows *only* the wrong act, the wrongdoer, and the agents who mete out retribution. These components are then knit together within a simple temporal structure involving the linear passage of time.<sup>27</sup>

Retributive justice, then, can be understood formally in terms of a highly constrained and traditional CDS. Two of the most significant defining features of this structure are its temporality (there is a beginning, a middle, and an end) and its highly limited range of characters and actions. It is very important to recognize that who does the punishing is a matter *external* to the story. That is, as a matter of retributive justice, it does not matter *who* does the punishing; it only matters that the appropriate punishment is meted out to the correct party for the correct crime. That the state, for example, is the punishing agent only means that the state is responsible, in some sense, for realizing retributive justice, and *that* is a matter of the unquestioned background conditions.

In sum, the allocation of punishment required by retributive justice involves a small cast of characters operating against a stable, given background and once the allocation of punishment is completed (or rendered impossible due to bad luck), the book is closed.

## Corrective Justice<sup>28</sup>

Corrective justice consists of principles regulating the reallocation in light of harms caused by one party and suffered by another. These harms need not require retribution and so the response to them need not be governed by norms of retributive justice. In particular, because the harms with which corrective justice is concerned are often due to “mischief,” they are just as often due to misfortune and so are, on their face, beyond the bounds of retributive justice, which focuses on harms intentionally inflicted by one agent on another. Conversely, as in cases in which retributive justice is applicable, the harms must be, in some sense, “owned” by some agent or other, and not be due solely to some uncontrollable force of nature such as a tornado or a tsunami. Thus, even as we strive to preserve a distinction for the purposes of corrective justice between harms due to misfortune and harms due to mischief, both harms are of the sort that are owned by an agent.<sup>29</sup> Additionally, how

<sup>27</sup> Of course, Fyodor Dostoevsky’s *Crime and Punishment* is perhaps the purest and most remarkable example of retributive justice portrayed as a CDS (and *The Brothers Karamazov* is a close second!). Another valuable film representing retributive justice as a CDS is Jean-Pierre Melville’s great film, *Le Samourai*. One text that mercilessly probes the immutability of the social structures within which the retributive narrative unfolds is Franz Kafka’s “The Trial.”

<sup>28</sup> This section draws on Jules Coleman, *Risks and Wrongs*, Jules Coleman, *The Practice of Principle*; Arthur Ripstein, “Equality, Luck, and Responsibility,” *Philosophy and Public Affairs* 23 (1994) 3–23; Arthur Ripstein, “Torts,” in *The Oxford Handbook of Jurisprudence and Legal Philosophy*, Jules Coleman and Scott Shapiro, eds. (New York: Oxford University Press).

<sup>29</sup> See Jules Coleman and Arthur Ripstein, “Mischief and Misfortune” *McGill Law Review* 41 (1995) 91 ff.

and where to draw the line between retributive and corrective justice is another quite difficult question to resolve. Are the harms associated with each different in kind? Or are they merely different in magnitude?<sup>30</sup> Although resolving these questions are central to any theory of corrective justice, I shall, due to space restrictions, address them only in passing below.

In the most general sense, corrective justice consists of principles governing how to *reverse* harms due to mischief or misfortune and so are *reallocative* principles. For example, if A steals B's car and then wrecks it, it may be a matter of retributive justice what punishment A must suffer, but it is an entirely different matter – a matter of corrective justice – whether and how A ought to reverse B's loss of her car (and as with retributive justice, there may be agent-neutral reasons to ensure that what is required by corrective justice is realized). A quick and dirty way to characterize corrective justice, then, is to say that, *as a matter of corrective justice*, if A harms B, then A owes a duty of repair to B. To capture the notion of A's ownership of the harm suffered by B, we can use Tony Honoré's turn of phrase and refine our quick and dirty characterization as follows: As a matter of corrective justice, if A is *outcome responsible* for a harm suffered by B, then A owes a duty of repair to B.<sup>31</sup>

This notion of outcome responsibility is meant to cast a wider net than the notion of moral blameworthiness. Thus Honoré writes, "people are responsible for their actions and the unintended outcomes of their actions even when not morally to blame."<sup>32</sup> So, while retributive justice squarely tracks moral blameworthiness, corrective justice tracks only outcome responsibility. As mentioned, some hold that the two may converge when it comes to some actions (although this is complicated: suppose A intentionally assaults B, and so it is the case that A is liable to be punished for assaulting B, but if A owes B a duty of repair for the harm B suffered as a result of the assault, it is not clear that this repairable harm is the same thing as the punishable assault). In most cases, however, the two do come apart (as in the familiar case in which A is blasting nearby B's domicile, and, although A takes precautions, as a result of the blasting A nonetheless unintentionally damages B's domicile, and so A is *not* liable to be punished for damaging B's domicile, although A does owe a duty of repair for the harm B suffered as a result of the damage to his domicile).

There are many complications associated with both the concepts of harm and outcome responsibility. Most importantly, we should note that not all harms are

<sup>30</sup> It should be noted that we can draw a bright line between retributive justice and corrective justice if we eliminate talk of harm and treat corrective justice as the form of justice that mandates certain responses to *wrongful transactions*. If we do this, we would need to appeal to some norm other than a norm of corrective justice to determine what counts as a wrongful transaction. For ease of exposition, however, I will talk only of harms. This is not meant to indicate that I am taking a stand on the question of whether we must understand corrective justice in terms of harms instead of wrongful transactions, though.

<sup>31</sup> Tony Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999).

<sup>32</sup> Tony Honoré, *Responsibility and Fault*, p 7.

## Ideas of Justice

173

the same. Some harms are not wrongful, and it seems that corrective justice would require repair of only wrongful harms.<sup>33</sup> For example, when a surgeon performs surgery on a patient, there will be substantial postsurgery harmful side effects (swelling, bleeding, pain, etc.); however, these harms are not wrongful harms, even though the surgeon is outcome responsible for them. So, it seems that one necessary condition for A to owe B a duty of repair is for A to have *wrongfully* harmed B, and not just for A to have harmed B.

Turning now to outcome responsibility, we must ask whether being the “nearest” link in the causal chain is sufficient for being outcome responsible – or must one intentionally contribute to the occurrence of the harm? If we accept any form of strict liability, then merely being a nearby link in the causal chain may be sufficient. Even if we reject strict liability, we may accept that intentional harming is not a necessary condition for a duty of repair, but then we can ask what else must be present in addition to mere causal proximity. Perhaps foreseeability of the harm is a necessary condition for a duty of repair to be owed. If so, what is a standard of foreseeability? Any complete theory of corrective justice will answer this question.

Finally, we must keep in mind that this approach seems to give luck a central role in determining who bears a duty of repair. Consider two individuals who are both very careless in their driving and who both know that their carelessness may lead to a dreadful accident causing grave harm to others. One, as a matter of brute luck, manages to avoid ever causing an accident, whereas the other, as a matter of brute luck, causes a dreadful accident. Why should one be liable for the harm caused when the other is not when the only difference between the two is a matter of sheer, brute luck?<sup>34</sup> Again, any complete theory of corrective justice will have to resolve questions regarding the role of luck.

Turning now to broader reflections about corrective justice, we can see that it, like retributive justice, is backward-looking, in the sense that it requires allocations in response only to harmings that have already occurred and not preemptively to harmings that are merely likely to occur. To see the significance of this, consider an alternative to corrective justice: a norm requiring everyone to pay into an insurance scheme that would in turn pay out to those who have suffered a relevant kind of harm regardless of the circumstances of the harming. This alternative norm is rather more complicated than corrective justice because it involves both forward-looking and backward-looking components. It is forward looking in the sense that it requires payment into an insurance scheme that is meant to respond to events that have not yet occurred and may never occur. An apt analogy here is vaccination: one is vaccinated only because it is possible that at some point in the future one might be

<sup>33</sup> See Coleman, *Risks and Wrongs*, *passim*.

<sup>34</sup> See Jeremy Waldron, “Moments of Carelessness and Massive Loss” in *Philosophical Foundations of Tort Law*, D. Owens, ed. (New York: Oxford University Press) 387–408.

exposed to the relevant virus. The vaccination would have been reasonable even if, at the end of one's life, it turned out that one was never exposed to the virus. The analogy breaks down, though, if this alternative insurance scheme requires payout only in cases in which there have been wrongful harms, for in this case it would be backward-looking. If the insurance scheme was such that everyone received regular payments out of the scheme based upon actuarial calculations of the likelihood of his or her being harmed regardless of whether they had in fact suffered a harm, then it would be purely forward-looking. But both schemes – the janus-faced insurance scheme and the purely forward-looking scheme – are forward-looking in ways that the norms of corrective justice are not, and so neither would embody (or meet the demands of) the norms of corrective justice.

As with retributive justice, the purely backward-looking character of corrective justice, along with its focus on determinate characters bonded together by a single event – the wrongful harming – invites us to understand corrective justice in terms of the CDS form of narrative. The narrative begins with a wrongful harm to B for which A is outcome responsible. Consequently, A owes a duty of repair to B until that duty is satisfied by some form of appropriate reallocation from A to B. A makes the reallocation and the duty of repair owed to B is discharged. At this (temporal) point, the story ends.

Importantly, the reallocation required by the duty of repair cannot be accomplished by just anyone. Rather, the reallocation must be performed by the party that is outcome responsible for the harm in the first place. Thus, even if a third party, out of a desire to help B out, fully makes up the losses suffered by B, A still owes B a duty of repair. In short, the story cannot end with just any reallocation; it ends only with the agent outcome responsible for the harm making up for the loss suffered by the harmed agent. As we can see, then, corrective justice requires well-defined characters linked together, with their actions driving a story that has a beginning, a middle, and an end: These features are hallmarks of the CDS form of narrative.

Turning now to the final feature of the CDS form of narrative, namely the presumption of a fairly broad set of background conditions, it turns out that corrective justice meets this criterion as well. To see this, note that a familiar objection to corrective justice is that it allows for the reallocation of X from A to B even when A never had a justified entitlement to X (e.g., suppose A is incredibly wealthy as a result of stealing from C and then after harming B must, as a matter of corrective justice, hand over most of his (stolen) fortune to B). This surely is a matter of concern. Corrective justice, however, is not the sovereign form of justice (if there even is a sovereign form of justice). Whether A has an entitlement to X is beyond question in matters of corrective justice. The implementation of norms of corrective justice requires the presumption that A has some initial entitlement to X and, insofar as A owes X to B as a matter of corrective justice, then B is entitled to X.

## Ideas of Justice

175

As a result of cases such as the one just mentioned, one might go in for metanorms of corrective justice – norms governing corrective justice – that rule out reallocation when the original allocation is morally dubious. Such a norm, though, would not be a norm of corrective justice, but would instead be a norm determining when and how to apply norms of corrective justice, such as, where there are not morally suspect allocations, norms of corrective justice apply. Such a metanorm predicates the application of norms of corrective justice on both a standard theory of justified entitlement and a factual finding that the entitlement in question is sufficiently grounded by that theory. Resolving these matters has little to do with the matters at the heart of corrective justice because the issue with respect to these matters is not how to repair a wrongful transaction (or, if you think that duties of care are grounded by principles of corrective justice, what duties of care we owe to others' with respect to their entitlements), but whether the prior allocation of X to A meets an independent justificatory standard. This latter question is *presumed settled* at the point at which arises any moral problem that principles of corrective justice are meant to address.<sup>35</sup>

Thus, we find the other hallmark of CDS, namely the presumption of certain conditions that constitute the space within which the drama of the harm, the claim for repair, and then the repair unfold. In the case of corrective justice, the presumed and unchangeable condition is the initial allocations of goods. That is, corrective justice operates over entitlements under the presupposition that they are as they ought to be (*modulo* the harm that triggers the duty of repair) and does not offer prescriptions on how entitlements ought to be distributed from the get-go. So, just like retributive justice, norms of corrective justice require taking the world as it is.

Consequently, the norms of corrective justice can neither require that agents who are not outcome responsible for the harm to repair the harm nor require those who do not suffer the harm to receive compensation for the harm. Only if *harmers* repair the wrong will the harmed no longer have against the harmer a claim-right grounded by a duty of repair.<sup>36</sup> For others' actions counting as discharging the duty of repair owed to the harmed, it would have to be shown that these others were, in fact, part of the story *all along*. That is, they were the harming parties from the get-go, and so were characters in the narrative from the start. We have seen this before in the case of retributive justice.

<sup>35</sup> Everyone in a community may be required to build legal-political institutions that realize corrective justice, although if this were the case, parties would have agent-neutral reasons for action and not the agent-relative reasons of corrective justice. Nor is it to deny that we all have reasons to be morally outraged at existing or past misfortune. These facts are, in important ways, external to facts over which corrective justice operates.

<sup>36</sup> For more on duties grounding claim-rights, see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1996) Ch 7.

Unfortunately, there are no examples in literature or film of corrective justice that are quite as clear as *The Naked City* or *Crime and Punishment*. But, films such as *Philadelphia*, which is about a wrongful termination lawsuit, and *The Rainmaker*, which is about an insurance bad faith lawsuit, nonetheless demonstrate how corrective justice is best understood in terms of a CDS. Both films, insofar as they are about corrective justice, focus, usually via attorney proxies, on characters who have been wronged and the characters who have committed the wrongs. The films begin with the wrong, focus mostly on the process of seeking a reallocation from the wronging agent(s) so as to secure discharge of the duty of repair borne by the wronging agent(s), and conclude with the state ordering that those duties be discharged. Finally, the very logic of the films presupposes a static background allocation of rights and goods that allows viewers to make sense of the claim that a wrong has occurred. As a matter of the principles of justice governing this background allocation, the lawyer in *Philadelphia* was owed his job and the child in *The Rainmaker* was owed medical care and neither these principles nor their broader context could be questioned without kicking the feet out from under the moral logic of the films. So, in very straightforward ways, these films demonstrate how natural it is to treat corrective justice using the CDS form.

In sum, then, corrective justice is best understood on the model of the CDS. This model involves distinct characters bearing a special kind of causal–historical relationship to one another (one is outcome responsible for a harm borne by the other) – a relationship that corrective justice picks out as normatively significant – and that has a beginning (the harming), a middle (the claim for repair), and a conclusion (the repair being made). A background allocative “geography” is presumed and it is within this landscape that the narrative of corrective justice unfurls itself.

### Distributive Justice

Distributive justice is most famously articulated by John Rawls as “a set of principles for assigning basic rights and duties and for determining . . . the proper distribution of the benefits and burdens.”<sup>37</sup> More concretely, principles of distributive justice govern the distribution of state-backed rights, duties, liberties, liabilities, and immunities (all hereafter referred to as “rights”) as well as goods – either a list of “primary goods,” or some metrics of welfare, opportunity, or resources – across a population unified in some manner, for example, as in Rawls’ theory’s case a population unified by mutual cooperation (although there may be other considerations that determine the boundaries of the community over which the principles of distributive justice

<sup>37</sup> Rawls, *A Theory of Justice*, p. 5. The other central texts of contemporary philosophical reflections on distributive justice are Ronald Dworkin, “What is Equality? Part 1: Equality of Welfare,” *Philosophy and Public Affairs* 10 (1981) 185–246; and Ronald Dworkin, “What is Equality? Part 2: Equality of Resources,” *Philosophy and Public Affairs* 10 (1981) 283–345.

## Ideas of Justice

177

operate<sup>38</sup>). Broadly speaking, then, distributive justice consists of a set of principles that determine the baseline allocation of rights and goods within a community. Importantly, distributive justice is not limited in scope with respect to over whom in the community it operates: Principles of distributive justice apply to the whole community and not to proper subsets of the community (although the principles can govern distribution at a coarse-grained level, as Rawls famously did when he presumed that the principles of distributive justice operated over individuals understood as heads of *families* and not understood simply as individuals). Every individual (or in Rawls' case, every head of a family) has claims by virtue of principles of distributive justice. This is why Rawls talks of principles of distributive justice determining the "basic structure" of a society, that is, those foundational institutions that govern every feature of the lives of those who live in that society.<sup>39</sup>

There is, therefore, a kind of anonymity in distributive justice: it immediately shapes the lives of all who are members of a society and not simply those who have particular histories. Each person is to be understood as a blank space in which a certain bundle of rights and goods is placed. There may be other principles of distributive justice governing the society, such as principles governing transactions between the members of the society, or principles governing interactions between social institutions and members of the society. Even in these cases, however, the principles of distributive justice shape the lives of *all* members of the society and therefore do not play any unique role in shaping the life of any particular member.

To get a clearer grasp on distributive justice, let us consider one unusual proposal for a principle of distributive justice: "finders-keepers." According to finders-keepers, the distribution of goods in society is fixed by the historical-causal relationships between individuals and the available goods, namely if A bears the historical-causal relationship to X of having found X, then A has claim to X. Even though this principle governs original allocation of goods, it fails as a principle of distributive justice because no basic structure (or even a less-than-basic structure) could be continuously ordered according to this principle. Consequently, such a principle of justice does not in fact determine the distribution of goods in general but only freezes in perpetuity whatever is given by chance at some arbitrary moment. Such a principle, therefore, cannot apply diachronically, that is, it cannot deal with the introduction into the society of new members, intestate goods, or the creation of new goods by the members of the society. But these are key functions that any principle of distributive justice must perform. Furthermore, insofar as distributive justice involves the distribution of rights and liberties and not just of concrete goods,

<sup>38</sup> See, e.g., Michael Blake, "Distributive Justice, State Coercion and Autonomy" *Philosophy and Public Affairs* 30 (Summer 2001) 257–296.

<sup>39</sup> Rawls defines the basic structure as "the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation." See Rawls, *Theory of Justice*, 3.

finders-keepers turns out to be a non-sequitur: How does one “find” a claim-right to political speech unfettered by government interference?

What does this reveal about the narrative form immanent in distributive justice? It renders clear that a causal-historical representation of a principle of distributive justice will not do. Principles of distributive justice govern geographical spaces timelessly and so cannot be responsive to local changes in the causal-historical order. This is not to say that principles do not demand response to changes – it is to say that the principles cannot assist in determining how to respond to changes. But, the principles are fundamentally to be understood as descriptions of static states of affairs. So, we can clearly see that although conscientious members of the political community might be guided by principles of distributive justice in all their transactions with one another, distributive justice does not require such conscientious interaction. Regardless of whether we (rightly) abandon libertarian principles of distributive justice in favor of some “patterned” form (e.g., some egalitarian principle like Rawls’ Difference Principle or Dworkin’s resource egalitarianism), the point of a theory of distributive justice is to provide principles that determine how society as a whole will be ordered *via some institutional “technology”* (e.g., via tax law, property law, civil rights law, takings jurisprudence, etc.) and not by virtue of the moral fiber of the individual members of that society.<sup>40</sup> Either way, principles of distributive justice will be *systematic*. That is, they provide a broad framework governing the overall order of a society.

Thus, distributive justice is best understood not in terms of histories of concrete individuals or even in terms of the relationships between concrete individuals, but instead in terms of standing rules governing relations between all members of a community. In short, nothing out of the ordinary needs to happen for the principles of distributive justice to apply, rather, they are meant to *define* the ordinary. Thus, deviations from the principles of distributive justice are what merit response, distributive justice is not itself responsive.

In many ways, principles of distributive justice give us the required normative background such that principles of retributive and corrective justice can apply. What counts as a theft, as a violation of liberty, and as a wrongful transaction requires a stable normative background. This has already been suggested in the discussions of retributive and corrective justice. For example, if we are to apply norms of corrective justice (and it is an open question whether we ought to do so), then we must assume that the entitlements prior to the wrongful transaction are

<sup>40</sup> For a challenge to this claim, see Cohen, “Where the Action Is” and Liam Murphy, “Institutions and the Demands of Justice,” *Philosophy and Public Affairs* 27 (Fall 1999) 251–91. For objections to this challenge see David Estlund “Liberalism, Equality, and Fraternity in Cohen’s Critique of Rawls,” *Journal of Political Philosophy* 6 (1998) 99–112; and Andrew Williams, “Incentives, Inequality, and Publicity,” *Philosophy and Public Affairs* 27 (Summer 1998) 225–47.

## Ideas of Justice

179

grounded in some way. One way in which they may be grounded is by virtue of principles of distributive justice (although this is not the only way to ground these allocations – some nonjustice-based principle of utility may govern entitlements).

Additionally, if one component of corrective justice is a duty of care owed by each to all others, then what it is each must care for will be determined by the principles of distributive justice. Most principles of distributive justice presume some *currency* of distributive justice, that is, some list of what is to be distributed (primary goods, welfare, opportunity, resources, etc.), even if this list is a product of overlapping consensus. This, in turn, determines the minimal domain of objects for which we all have a duty of care and, in turn, a corrective justice grounded duty of repair if we cause harm to those objects.<sup>41</sup>

Ultimately, even if a theory of distributive justice is minimalistic in the sense that it does not specify what is to be distributed, theories of distributive justice are, in a deep way, static: They do not contain principles stipulating how to respond to changes in allocation; they only contain principles stipulating how to allocate goods in a society, that is, how to organize society (and so contain principles stipulating how to respond to changes in the overall amount of goods available for distribution).

Because principles of distributive justice are realized via institutional technologies, they treat as given some account of human nature. For, it is presumed that all that is needed are the appropriate institutional technologies that can generate and sustain a proper distribution of goods.<sup>42</sup> These technologies are presumed not to be impossible to construct and maintain. Thus, there is both a distinctively non-Manichean character to principles of distributive justice – in the sense that there is no Evil threatening the Good, but instead regular humans living morally nuanced lives – and a very “scientific” character to distributive justice – in the sense that institutional technology is what we rely on to create the just order.

So, when Rawls argues that his theory of distributive justice is an “ideal theory,” he is not claiming that his theory presumes some societies are full of fantastical human-looking organisms capable of heretofore-unseen feats of altruism. Rather, as Rawls explains in *Law of Peoples*, an ideal theory is a theory of a “realistic utopia” in that, following Rousseau, the theory requires no more than “taking men as they are” (that is the realism) but “laws as they might be” (and that is the utopianism), where the latter – laws as they might be – is just another way of referring to institutional

<sup>41</sup> It would be very odd if we had a duty to care for that which is simply not valuable, and, it would be very odd if retributive justice required punishment for actions that had no effect on anyone’s interests or that did not affect anything valuable. This does not rule out, by the way, some form of interaction between corrective and distributive justice such that the value of the distributive shares is partially shaped by the regime of corrective justice. Interaction does not signal sameness.

<sup>42</sup> For a powerfully put dissenting view, see G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008).

technologies.<sup>43</sup> Thus, Rawls explicitly identifies the project of constructing ideal theories of justice with the utopian form, with Plato's *Republic*, or Thomas More's travelogue to Utopia, or with Dante's *Paradiso*, but also with science fiction, which takes "men as they are" but "technology as it might be."<sup>44</sup>

Three central features of the utopian literary form are the presumption of a reasonably stable human nature, the imagination of a complete and technologically possible sociopolitical space, and the anonymity of those who inhabit that space. An illustrative example of this is Fritz Lang's great film *Metropolis*, and in particular the city that it imagines. Plot points aside (and we can do this because the plot of the film is not its only or even its primary narrative), the city of *Metropolis* is a filmic representation of a certain distributive scheme: the blessed few at the top of the city and the miserable thrown together at the bottom, with certain principles governing who gets the spoils of the labors of the many. There is no need to meet the main character, Freder Frederson, or to understand the Oedipal drama being played out between him and his father to appreciate the political significance of the city itself.<sup>45</sup> This is to be contrasted with aforementioned police procedural, *The Naked City*, which does not imagine an alternative space but instead explicitly locates itself in a space – New York City – whose characteristics, the director notes in his magisterial narration, are established by factors entirely external to the narrative itself. The imaginative project of *The Naked City* is, in short, profoundly limited. The imaginative project of *Metropolis*, on the other hand, is extraordinarily ambitious. The film aims to represent any entire society as an alternative to the existing one. The story of *Metropolis* can be understood as an imaginative snapshot of an entire (and entirely invented) city. We can, from the vantage point of the film, possess the eponymous Metropolis in our imagination. On the other hand, from the vantage point of *The Naked City*, New York City possesses our imagination, and the drama unfolds within those confines.

The upshot of this is that implicit in principles of distributive justice is the imagination of a complete space. It is a static and anonymous space – one with characters that lack what Frederic Jameson called "concrete existential density"<sup>46</sup> – but it is

<sup>43</sup> For Rawls, see John Rawls, *Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 11. For Rousseau, see Jean-Jacques Rousseau, *On The Social Contract*, Donald Cress, trans. (Indianapolis, IN: Hackett, 1988) 17.

<sup>44</sup> Contrast this with fantasy fiction such as the *Lord of the Rings* trilogy or the *Harry Potter* series, which both focus on the possible differences in the biological order (hobbits, dwarfs, dragons, and wizards all being different *biological* categories), while presuming a retrograde technological state of affairs. My comments here draw from Frederic Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (New York: Verso, 2005).

<sup>45</sup> The ultimate aim of the film is primarily to articulate a vision of a community governed by a kind of Christianity-inflected socialism – one that bears a striking resemblance to Fascist ideology of the time. Thus, it fits quite squarely within the utopian form of narrative.

<sup>46</sup> Frederic Jameson, "The Politics of Utopia," *The New Left Review* 25 (January–February 2005) 35–54, 39.

## Ideas of Justice

181

nonetheless complete and completely ordered. We can also see that distributive justice is atemporal. Distributive justice offers principles that fix allocation and the relationships between fixed allocations. Principles of distributive justice, however, cannot guide responses either to misallocations or to changes in the relationships between fixed allocations. Distributive justice points to where we must go – the city on the hill, the promised land, the utopian island – but it does not imagine where we were before, much less imagine a route that would take us from here to there, or even how to stay there if we ever arrived. In a slogan, principles of distributive justice tell us what the sunken treasure is, but do not provide the map to that treasure.

In light of this line of thinking, we must reject the attempts by some to unify distributive and corrective justice.<sup>47</sup> There is a distinct difference in the narrative forms most apt for each. Corrective justice gives us the bare bones of a CDS with a beginning, a middle, and an end, along with distinct characters playing canonical roles in the CDS. Distributive justice, on the other hand, makes no sense as a CDS but instead can be understood only in terms of the utopian narrative. Distributive justice is a theory of place, that is, a description of a settled allocation, and not a theory of transit, that is, an account of how to get from one allocation to another. Retributive justice and corrective justice, on the other hand, are theories of transit, that is, theories articulating the movement from one allocation to another. This is not to say that theories of retributive justice and corrective justice are insulated from distributional concerns – as already mentioned, they take as a given background *some* allocation, and perhaps a metaprinciple applying to each of these two forms of justice is that the background allocation must meet some minimum standard of justice; however, neither retributive justice nor corrective justice is *hived off* from distributive justice. These three forms of justice are qualitatively distinct, and we can see that quite naturally when we understand justice in terms of their narrative form.

## Transitional Justice

In 1994, more than 800,000 Tutsis and moderate Hutus were murdered in an organized genocide led by a group called “Hutu Power.” This genocide, like the Nazi genocide of Jews and the Khmer Rouge’s genocide of the Cambodian community, was an organized massacre. It was not an accident. Philip Gourevitch, a journalist who has written extensively on the Rwandan genocide, writes,

Genocide, after all, is an exercise in community building. A vigorous totalitarian order requires that the people be invested in the leaders’ schemes, and while genocide may be the most perverse and ambitious means to this end, it is also the most comprehensive . . . the genocide [in Rwanda] was a product of order,

<sup>47</sup> For more, see Jules Coleman and Arthur Ripstein, “Mischief and Misfortune.”

authoritarianism, decades of modern political theorizing and indoctrination, and one of the most meticulously administered states in history.<sup>48</sup>

The problem of responding to totalitarian regimes and genocide is the problem of *transitional justice*.

How do we respond to these atrocities? Do we follow the model of retributive and corrective justice and take as unchangeable givens the political, economic, and social structures as they happen to be postatrocities? Do we hunt down the perpetrators and put them on trial, thereby bringing the story to a close? Is this just *The Naked City* writ large? Or do we identify some reallocation that can repair the loss of the families of the murdered hundreds of thousands? Dragging political leaders to court might satisfy some norm of retributive justice, and paying out monetary reparations might give survivors a chance to cobble together a life after the genocide. But, as Gourevitch writes, genocide has profound effects that reveal these responses to be tragically incomplete:

Hutu Power's crime was much greater than the murder of nearly a million people. Nobody in Rwanda escaped direct physical or psychic damage. The terror was designed to be total and enduring, a legacy to leave Rwandans spinning and disoriented in the slipstream of their memories for a very long time to come, and in that it was successful.<sup>49</sup>

Trials and corrective justice-based reparations reorient people one by one. They are, by design, not systematic. Therefore, there is no obvious reason to believe, as the legal scholar Ruti Teitel notes some believe, “[post-atrocity] trials operate not solely or even primarily for retribution but, rather, to effect change to end conflict and to bring about reconciliation.”<sup>50</sup> Trials – at least the kinds of trials associated with retributive and corrective justice – are, by their very nature, technical, drawn-out, and better if less prone to spectacle. If trials are going to be the sorts of things that “effect change to end conflict and to bring about reconciliation,” then they would have to be spectacular and systematic, that is, the sorts of things that can shape the perspectives and attitudes of everyone in the community and not just of those who happen to be directly involved in the trial. Trials of this sort always risk trending toward what Leon Trotsky dubbed a “Thermidorian degeneration” in which a reverse purge occurs and the streets once again end up flowing with blood, albeit not at the level of a genocide. Even if the trials do not degenerate into a White Terror, repairing wrongs and compensating losses can, when the background allocation is deeply unjust, involve wronging others in deeply profound ways, thereby perpetuating the cycle of

<sup>48</sup> Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families* (New York: Picador, 1999) 95.

<sup>49</sup> *Ibid.*, 224.

<sup>50</sup> Ruti Teitel, “The Law and Politics of Contemporary Transitional Justice” *Cornell International Law Journal* 38 (2005) 857.

## Ideas of Justice

183

injustice. Thus, if we reflect on the discussion above about revenge, we can conclude that, although it is natural to associate transitional justice with the various trials and purges that have erupted in response to totalitarian and murderous upheavals, it is hard to see how such practices, however legalistic, amount to forms of justice instead of forms of revenge.<sup>51</sup> Here Trotsky's worry about Thermidorian degeneration cuts deeply: we must have a theory of what it would be to have morally successful trials and purges, that is, trials and purges that were just and not simply cathartic for those who have managed to survive and to have come to power after the genocide.

The roots of transitional justice are firmly located in the Nuremberg Trials of 1945, and this strongly suggests that transitional justice has at its core a kernel of retributive justice, but for really, really awful crimes.<sup>52</sup> As just argued, however, this seems unlikely. The transition from Nazism to a post-Nazi Germany did not occur as a result of a (relatively) brief trial, a few hangings, and Herman Göring's suicide. That the story ends there, which is what we would expect given our reflections on the narrative form of retributive justice, turns out not to have been the case in any way. The moral sickness of the Nazi regime was not cured upon the deaths of those who infected German society. In particular, the conditions that allowed the Nazis to take power cannot be summarized in terms of particular wrongs committed at particular historical points prior to which there were *no* wrongs. Rather, the social order prior to the rise of the Nazis suffered from deep systematic ills. There was, consequently, no acceptable state of affairs that the Nazis disrupted or, concomitantly, that acts discharging the demands of retributive justice or corrective justice could have re-established. It takes generations of reflection and struggle to achieve a complete restructuring of a society in which genocide and totalitarianism has reigned – reparations and memorializations dedicated to those who suffered are simply not enough for any genuine form of *societal transition* to occur. Transitional justice, it seems, requires something more than a trial and a sentencing or a repairing of harms: it requires the *reimagination of a society* that has been grotesquely transformed by genocide and totalitarianism.

So, is transitional justice more like distributive justice? According to many views, it is. On these views, what a theory of transitional justice describes is an ideal situation in which men are as they are and the law is as it might be. Thus, we are invited to imagine, for example, a Rwanda in which human rights are respected and the rule of law predominates. How we achieve this end depends upon the particular conditions of the wrongs that were committed: in South Africa, it is through Truth and Reconciliation commissions; in the Balkans, it is through international criminal courts; in Germany, it is through reparations, communal introspection, support for

<sup>51</sup> See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004).

<sup>52</sup> See Teitel, "The Law and Politics of Contemporary Transitional Justice."

Israel, and strict rules governing hate speech. But, these routes are not specified by transitional justice; only the endpoint is (whatever that endpoint might be). What determines the routes is entirely a matter of the contingent historical conditions of the community in which the atrocities occurred and the atrocities themselves.

On this view, transitional justice is to be understood primarily as articulating what a just state of affairs following from a disastrous history would look like. The specific characters involved in the historical injustices are, in some sense, irrelevant to the project. We might imagine, for example, a norm of transitional justice requiring that those who were at one point at each other's throats achieve some form of reconciliation (which itself would have to be theorized!). The aim of truth and reconciliation commissions, for example, is not retributive justice (after all, most truth and reconciliation commissions grant some form of immunity to most of those who testify) but to reveal the truth of hidden crimes and then achieve reconciliation within the community.<sup>53</sup> Others might believe that the aim of transitional justice is for newly "liberated" states or communities to repossess the sources of economic power that lay in the hands of wrongdoers. We could imagine a norm requiring expropriation or nationalization to respond to past injustice, thereby making a norm requiring recognition of social and economic rights a central component of transitional justice. Two theorists of transitions from African colonialism to liberation describe this norm when they write, "[there] must be a new beginning toward the restructuring of African societies on the basis of economic equality and social justice."<sup>54</sup> The reason why is not to rectify some wrong, but to establish a kind of stable political order given the rather broad-gauge rage of the descendants of the colonized. Thus, the theorists write, "[it] would be unwise for Western students of Africa to underestimate the lingering sense of outrage at the heritage of exploitation and inequality."<sup>55</sup> That those in power in the West today instigated or supported and that many of the Africans alive today did not suffer under the colonial experience is unimportant here. What is important is that the vestiges of colonialism remain and the conditions produced by these vestiges fall afoul of the norms of transitional justice. Thus, what transitional justice requires is full transformation, by whatever contingently available means, into a state shaped by contemporary norms of sovereignty, democracy, the rule of law, and the international human rights regime and that no longer bears the horrid scars of European colonialism.<sup>56</sup>

<sup>53</sup> For more on the tension between reconciliation and justice, see the essays collected in Robert I. Rotberg and Dennis Thompson, *Truth V. Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000).

<sup>54</sup> Prosser Gifford and William Roger Lewis, "Introduction," in Prosser Gifford and William Roger Lewis, eds. *Decolonization and African Independence: Transfers of Power, 1960–1980* (New Haven: Yale University Press, 1988).

<sup>55</sup> *Ibid.*, xxv.

<sup>56</sup> See, e.g., A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997).

## Ideas of Justice

185

And yet this seems to miss something deeply significant about the kinds of historical events that are governed by transitional justice. These are not merely objectionable politically and morally prescribed orders. They are profound *disruptions*. These disruptions are temporal and they involve discrete and fully formed characters. After all, particular individuals committed identifiable wrongs that were truly horrifying. Some form of targeted response is surely morally apt – would it not be a travesty of justice for those who committed these wrongs to escape punishment? Furthermore, there is also a definite need for closure – the kind of “closing of the book” that allows people not merely to be productive but to “have the lives back.” At this point we might consider the words of Bruno Schulz, a Polish author and illustrator:

Ordinary facts are arranged within time, strung along as on a thread. There they have their antecedents and their consequences, which crowd tightly together and press hard one upon another without any pause . . . Yet what is to be done with events that have no place of their own in time . . . events that have been left in the cold, unregistered, hanging in the air, errant and homeless?<sup>57</sup>

The atrocities – the mass public murdering, the rapes, the torturing – have left their deep impressions on the lives of those who experienced them. If the events are not incorporated both into the histories of the people who have committed and suffered these atrocities and into the collective understanding of the society in which the atrocities were committed, then the awful series of events is “left in the cold, unregistered, hanging in the air . . .” And what do people do with searing pains that they cannot integrate into the narratives of their lives? This is where Gourevitch’s comment that genocide can leave people “spinning and disoriented in the slipstream of their memories” strongly suggests that prosecutions, purges, and truth commissions have their place in transitional justice. Justice that fits some kind of traditional “plotted” narrative form is appropriate here because it is how people can “replot” their lives, making sense of these atrocities without ceasing to make sense of themselves.<sup>58</sup>

We must also reckon with the systematicity of genocides and totalitarian regimes. For, genocide and totalitarianism create society-wide disasters that rip any sense of control over one’s community out of one’s hand. Some systematic form of collective reclamation is necessary to overcome the consequences of this vast moral tumult. There is a poor fit between individual trials occurring here and there and the kind of ambitious reimagining of a society that is required to overcome the profound disorientation and dislocation associated with postgenocidal and posttotalitarian conditions. The required systematic reimagination itself requires the capacity to see

<sup>57</sup> Bruno Schulz, *Sanatorium Under the Sign of the Hourglass*, translated by Celina Wieniewska (New York City: Mariner Books, 1977), p 200.

<sup>58</sup> For more, see Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006).

oneself as part of a moral order again – to see oneself as motivated by moral ideals and not merely as trapped in another iteration of another epicycle of revenge and flight from revenge – and this new moral order is not something that existed prior to the atrocities. The kind of society-wide reimagination required here is actually hindered by individual, catch-as-catch-can trials, reallocations of stolen goods from one individual to another, and other individualized reparations. These procedures do not provide the opportunity to ascend above one’s community – to achieve the aerial perspective – so that one may see oneself as a member of a community governed by systematic principles of justice. A series of trials and reparations alone would still allow the atrocities to possess the imaginations of those who suffered them, instead of facilitating the reappropriation of the moral and political sphere by the imaginations of the victims of genocide.

Given this fact, it seems that the principles of transitional justice would best be captured by the utopian story form. For those “spinning and disoriented in the slipstream of their memories for a very long time to come” to reorient themselves as members of just society, the citizens must repossess their political imaginations, that is, they must repossess their capacity to imagine their society as organized in a variety of different ways according to a variety of different moral and political ideals with which they can identify. What has been ruptured and scrambled is society itself, so the members of the society cannot take as *given* the existing background against which criminal trials aiming at retributive justice or civil trials that resolve tort claims proceed. In short, if there is ever a moment when the practical imagining a complete society is the appropriate thing to do, it is after systematic atrocities associated with totalitarianism and genocide. Those who suffered, those who committed the wrongs, and those who stood by and did nothing must realize their capacity to imagine a new political and social order in which they see themselves living lives that are not rent by systematic wrongdoing but are instead ordered by moral and political norms expressed by some principle of transitional justice. Thus, the narrative required is not a temporal one that has closure as its aim, but instead the god’s-eye, static narrative characteristic of distributive justice.<sup>59</sup>

We can therefore see that there is a deep tension in transitional justice: on the one hand, it seems to cry out for the closed, temporal narratives of retributive justice; on the other hand, this seems too simplistic, too limited in scope, and the requirement for some more deeply systematic response to systematic atrocity suggests an approach more akin to the method used by theorists of distributive justice. This deep tension may explain why theorizing about transitional justice is so fraught:

<sup>59</sup> Thus, we should expect anyone to accept norms of transitional justice that overrode human rights norms (e.g., norms that allowed for vicious revenge) or norms that allowed for the construction of a regime that failed to be governed by the rule of law. What seems required by transitional justice is the imagination of something more like More’s fantastic Utopia or Rousseau’s impossible Social Contract.

## Ideas of Justice

187

those who view themselves as working through these problems cannot agree upon a single way to understand the issue. In this section, I have diagnosed the philosophical underpinnings of this disagreement, namely (to put it far too simplistically) that on the one hand we understand the warranted response in terms of a traditional CDS, and on the other hand we understand the warranted response as a utopian project. A further and perhaps even more serious problem that emerges is that transitional justice begins to sound like some ugly hybrid of the three forms of justice already discussed. Is there really a distinctive norm of transitional justice?

Conversely, perhaps what this most clearly reveals is that a renewed imaginative effort on the part of political theorists is called for. The fantastical political stories that characterized Plato's reflections on justice, More's imagination of Utopia, Rousseau's Social Contract, Marx's inchoate theory of human emancipation, and Rawls' theory of justice all are characterized by their imaginative inventiveness. Although yoked to certain "scientific" conceptions of the human (in particular, to certain conceptions of human psychology), these theories provide us with systematic fantasies of justice that can serve as political ideals. The ideals can be achieved through institutional technologies operating on our stable human nature (e.g., constitutions that can create stable governments even from the materials of the crooked timber of humanity). The danger of Thermidorian excesses notwithstanding, our current efforts to face up to some of the darkest human practices – genocide and totalitarianism, for example – may require a radical form of political and narrative invention, namely an invention that synthesizes temporal and geographical narratives in a single form of justice.<sup>60</sup>

## Conclusion

In this chapter, I have attempted to give the reader an overview of four forms of justice that play central roles in much of our legal theorizing. My aim has been to offer a new approach to thinking about justice, namely in terms of different narrative forms. Hopefully, this allows us to think more creatively when attempting to articulate principles of justice and resolve problems of justice even if it may not assist us in the analytic project of defending principles of justice. So, while I have not attempted to demonstrate that this is the sole or even the best way to understand different forms of justice, I do hope that it has allowed us to gain some insights into the deeper structure of these different concepts of justice.

<sup>60</sup> The following comment by Frederic Jameson is therefore quite apt: "It seems easier to imagine the thoroughgoing deterioration of the earth and of nature than the breakdown of late capitalism; perhaps that is due to some weakness in our imaginations." Frederic Jameson, *The Seeds of Time* (New York City: Columbia University Press, 1994), p xii.