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Louis E. Wolcher

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## THE ETHICS OF THE UNSAID IN THE SPHERE OF HUMAN RIGHTS

LOUIS E. WOLCHER\*

*The concept of human rights reacts to a world that is adikia ("unjust"), as the ancient Greeks put it, or out of joint. However, like the sound made by the tree that falls in the forest when no one is around to hear it, the disjointedness of the world remains invisible unless someone notices it as adikia, as unjust. "What the eye doesn't see the heart doesn't grieve over."<sup>1</sup> Thus, the ethical intentionality of noticing and caring about the very real sufferings of others constitutes the living origin of human rights. Only when concrete suffering is noticed can the abstract concepts and pragmatic maneuvers associated with human rights discourse be brought to bear on it. But there is a paradox here: since the concepts expressing the true do not and cannot express the totality of the real, intentionality's aim is never completely on target. Although an excess of unsaid haunts every event of saying, the ignoble desire to forge a unanimous interpretation tempts us to ignore this excess. This Essay claims that the role of ethics in connection with the justice of human rights is to defy the world's course, whatever that course may be. Only by means of a relentless critique that always attends to the particular can the many abstractions of human rights discourse be prevented from becoming a farce, or worse.*

### I.

The discourse of human rights reacts to a world that is *adikia* ("unjust"), as the ancient Greeks described it, or out of joint.<sup>2</sup> However, at any given moment the disjointedness of the world remains invisible to us unless we notice it as *adikia*, as unjust. As

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\* 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. LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 205 (G. H. von Wright et al. eds., G. E. M. Anscombe trans., MIT Press rev. ed. 1978) (1956).

2. See MARTIN HEIDEGGER, *The Anaximander Fragment*, in HOLZWEIG (5th ed. 1972) (1946), reprinted in EARLY GREEK THINKING 13, 41 (David Farrell Krell & Frank A. Capuzzi trans., Harper & Row 1975).

Ludwig Wittgenstein put it, “What the eye doesn’t see the heart doesn’t grieve over.”<sup>3</sup> The individual will *to see* thus links the sphere of ethics to the sphere of human rights. In short, before there can be something called “human rights” there must transpire the subjectively singular ethical event of noticing and bearing witness. Indeed, the ethical intentionality of noticing and caring about the very real sufferings of others—and not just representing them in words—constitutes the living origin of any regime of human rights that is worthy of the name.

The word “ethics” comes from *ethos*, an ancient Greek term that had a double meaning. *Ethos* originally signified both individual moral character and community custom. This ancient identification of personal morality with social custom is not really as incongruous as it might seem. For the Greeks, ethics displayed itself as right action by citizens whose characters had been molded from birth through education (*paideia*) in the moral customs of the community (the *polis*) in such a way that it became natural, habitual, and even instinctual for them to behave appropriately—that is, to behave with *ethos*, or ethically.

The essential meaning of “ethics” has changed radically since antiquity, at least within the modern Western philosophical tradition. The word no longer popularly signifies collectively-molded character or custom, at least not primarily. Instead, ethics seems to designate a sort of grudging sacrifice that individuals ought to make to others because of the existence of this or that moral norm. According to convention, the right ethical *questions* are supposed to lead to the right *answers*, and these in turn are supposed to lead to the right *behavior*. An ethical *practice*, on this view, consists in permanently linking four terms in such a way that the behavior governed by that practice becomes lawful in the Kantian sense of being rule-governed.<sup>4</sup> Ever since Kant’s day, many (if not most) of us have come to believe that the only plausible ethical equation reads as follows: *right question* → *right answer* → *right norm* → *right behavior* = *right ethical practice*. Modern human beings crave clear answers to the question of what limits there are, both legal and ethical, on their pursuit of their interests, whatever those interests might be. They want to understand in advance the rules of the game they are playing, just like players

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3. WITTGENSTEIN, *supra* note 1.

4. IMMANUEL KANT, METAPHYSICAL FOUNDATIONS OF MORALS (1785), reprinted in THE PHILOSOPHY OF KANT: IMMANUEL KANT’S MORAL AND POLITICAL WRITINGS, 154, 162 (Carl J. Friedrich ed. & trans., Modern Library 1993) (1949) (“[A]n action done from duty derives its moral worth, *not from the purpose* which is to be attained by it, but from the maxim by which it is determined.”) (emphasis in original).

in a game of Monopoly want to know exactly what is supposed to happen when someone passes "Go" or lands on the square marked "Go to Jail." People want to know the answers, or at least the rules that will give them the answers, because existing social institutions reward them according to how well they play their various economic and social roles.

The impulse to legalize ethics in the foregoing way, though born of a psychologically understandable motive, aims at making ethical rules enforceable, like law is, through socially imposed penalties, the cost of which can be calculated in advance. The person who *only* cares about what limits others will impose on his behavior conceives of ethics as an "external" constraint, like the threat of a legal sanction. If, in any given case, such a person behaves in a way that other people would call "ethical," he does so *in conformity* with ethical rules and expectations, but not *because of* ethics. To put it bluntly, external ethics today means an otherwise self-interested ego having an obligation to care for others even though that egoistical self does not already want to care for them. Indeed, if somebody already has an affective inclination and desire to care for someone else, then it is not possible, strictly speaking, for him to act ethically in the modern sense of the term. At best, such a person acts *in conformity* with ethics—from instinct, like a dog wagging its tail in the presence of its master—rather than *because of* an ethical norm, in the manner of a so-called "rational human being."

Intimately related to the distinction between acting because of ethics and acting in conformity with ethics is the logical difference between a standard of conduct and a standard of review. A standard of conduct is the criterion that a decision maker consults explicitly, or is guided by implicitly, *before* he makes a decision. This standard determines or helps determine his real subjective motive for acting before the fact. In ethics, a standard of conduct is what is seen or experienced from the inside rather than from the outside. Seen from the outside by a third person (a referee), a decision maker is always a "what." He is interpreted as a mere Other: an entity to be judged and then praised or condemned for what he has done.

Seen from the inside, however, a decision maker is always a "who." He is a self, not some indifferent person or other: he is a Me who inevitably must keep on answering by his decisions and conduct that most fundamental of all ethical questions: *Who am I?*<sup>5</sup> For in the matter of ethics we do not in fact experience our-

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5. For more on the distinction between "what" and "who," see MARTIN HEIDEGGER, LOGIC AS THE QUESTION CONCERNING THE ESSENCE OF LANGUAGE

selves as machines that are merely the sum of their past determinations and inputs. Genuine ethical problems are experienced as personally *intimate* in a way that no mere objective relation between cause and effect could ever be. In ethics, each one of us is always a Me Myself confronting a future that is, existentially speaking, a *tabula rasa* that we are always just on the verge of filling up with the scribble of our deeds.

## II.

The philosopher 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.”<sup>6</sup> In other words, the surer you are that a given 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 and human rights 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 (including legalized conceptions of ethics) holds sway.<sup>7</sup>

In ethics, as elsewhere, concepts classify facts in the way wrenches turn nuts and bolts: both instruments are premade to accommodate only certain types of other premade objects. Every practicing human rights lawyer knows that what the law calls “facts” are not just out there, in the world, waiting to be picked up like a nugget of gold on the ground. Facts are selected and crafted by human beings out of something that precedes them in reality, something messily particular that always leaves an unclassified remainder when pressed into the Procrustean bed of a juridical statement that formally relates “the facts” to “the law.”

The relationship between an abstract legal or ethical concept and the *particular* situation that confronts it on any given occasion is therefore fundamentally different than the relationship between the law and the facts of a case. The word “particular” gestures at something that has yet to be subdued in the form of any sort of statement—something that might very well surprise

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32–36 (Wanda Torres Gregory & Yvonne Unna trans., State Univ. N.Y. Press 2009) (1998).

6. EMMANUEL LEVINAS, *Transcendence and Height*, reprinted in BASIC PHILOSOPHICAL WRITINGS 11, 17 (Adriaan T. Peperzak et al. eds., 1996).

7. *Id.* at 23.

us and cause us to rethink the standard conceptions we have hitherto used to organize and express our experiences. To ignore the continuing emergence of the particular in reality in favor of a single-minded quest to subsume premade facts into premade concepts is to engage in what Theodor Adorno called "peephole metaphysics."<sup>8</sup> A system of human rights thinking afflicted by unwavering attachment to this sort of metaphysics would be inherently sclerotic: it could never bring itself to respond sensitively to changes in the world around it.

If we conceive of an ethically centered human rights discourse dialectically, there is a sense in which it *always* postpones the real work of definition, and it is probably a good thing that it does. The concept of dialectics, though it has a complex philosophical history, will be used quite simply and non-technically in this Essay. I do not intend to tell you about dialectics, but rather to adopt a dialectical point of view on the relationship between ethics and the justice that is attempted by the discourses and practices of human rights. Adorno's definition of dialectics will suffice to get us on our way: "The name of dialectics says no more . . . than that objects do not go into their concepts without leaving a remainder, that they come to contradict the traditional norm of adequacy."<sup>9</sup> Even a robot can learn to copy analytic categories.<sup>10</sup> But only a human being is capable of noticing that a legal concept, just like every abstraction, "does not exhaust the thing conceived."<sup>11</sup>

The legal philosopher H. L. A. Hart once said: "Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances."<sup>12</sup> To believe otherwise is to commit the philosophical error of conflating an abstract concept with the concrete particulars to which it is or may be applied. Such an "identitarian" theory of law risks becoming pure ideology,<sup>13</sup> for any thought that automatically identifies reality with its concept "depreciates a thing to a mere sample of its kind or species only to convince us that we have the thing as such, without subjective addition."<sup>14</sup>

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8. THEODOR W. ADORNO, *NEGATIVE DIALECTICS* 138 (E. B. Ashton trans., Seabury Press 1973) (1966).

9. *Id.* at 5.

10. *Id.* at 29–30.

11. *Id.* at 5.

12. H. L. A. HART, *THE CONCEPT OF LAW* 123 (1961).

13. ADORNO, *supra* note 8, at 148.

14. *Id.* at 146.

Abstractions attempt to liquidate the particular from above, like high-altitude bombers. But I say that the idea of an ethical justice in the sphere of human rights itself—an ethical 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 contend that any human practice which thinks of itself as just and righteous—indeed all instances of self-certain justice whatsoever in the sphere of human rights—are *a priori* unjust. What follows from all of this is a proposition that might strike the reader 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 in this Essay.

### III.

Ever since Kant's day we have been taught to believe that something called "being principled" constitutes the very essence of being ethical. To be principled in Kant's sense means to act on the basis of a textual ground as opposed to yielding to merely transient influences such as passion and instinct. He called this textual ground the Categorical Imperative, according to which rational human beings are not supposed to do anything that they would not want everyone else to feel compelled to do under similar circumstances.<sup>15</sup> For Kant and his intellectual descendents a good will is a law-governed will, and virtue is defined as a struggle against any natural inclinations that threaten to lead individuals away from doing what the moral law requires. On this view, if the prevailing political arrangements at a particular place and time somehow happen to be right or just as measured by the moral law, then willing disobedience to these arrangements is essentially the same as willing disobedience to the moral law. And as popular opinion would have it, those who disobey what is right and good must be held to account; *they must be punished.*

It would seem that the definition of an ethical justice in such circumstances must always come down to threatening and inflicting pain on "bad" (or unlucky) transgressors regardless of any irrational feelings of pity or compassion our tender hearts may experience on their account. Even the most ethical justice

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15. KANT, *supra* note 4, at 187 ("Therefore there is only one categorical imperative, namely this: *Act only on a maxim by which you can will that it, at the same time, should become a general law.*") (emphasis in original).

imaginable coerces and must coerce the unwilling. But who should be coerced, and who left alone?

During his trial in Jerusalem, the former SS officer Adolph Eichmann “declared with great emphasis that he had lived his whole life according to Kant’s moral precepts, and especially according to a Kantian definition of duty.”<sup>16</sup> In trying to make sense of this statement, which she called “outrageous on the face of it, since Kant’s moral philosophy is closely bound up with man’s faculty of judgment, which rules out blind obedience,”<sup>17</sup> Hannah Arendt interpreted Eichmann’s enthusiastic and extraordinarily effective wartime efforts to help destroy the Jews of Europe as having been grounded in an unconscious distortion of Kant’s Categorical Imperative. As Kant had originally formulated it, the Categorical Imperative requires each individual to “[a]ct as if the maxim of your action were to become by your will a general law of nature.”<sup>18</sup> But Eichmann seemed to interpret it to read, “[a]ct in such a way that the Führer, if he knew your action, would approve it.”<sup>19</sup> Arendt’s analysis of the way in which Eichmann pre-constructed the intellectual environment in which he made his moral choices sharpens to a fine point what has to be the one ethical question that by its very nature precedes all others: *Who will I let control my moral actions—me or someone else?*

#### IV.

One of France’s most celebrated artists, Eugène Delacroix, once remarked that genius does not consist in the production of new ideas, but rather in continuing to advance the one dominant idea that what has already been said once or twice, or even many times, has not yet been said enough.<sup>20</sup> His most famous painting is *La Liberté guidant le peuple* (1830), the original of which hangs on an honored wall in the Louvre. But there is one particular image in this painting that conveys an idea that is, I regret to say, as old as humanity, and I ask you to contemplate it with me for a moment.

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16. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 135–36 (rev. ed. 1964).

17. *Id.* at 136.

18. KANT, *supra* note 4, at 187 (emphasis omitted).

19. ARENDT, *supra* note 16, at 136 (quoting HANS FRANK, *DIE TECHNIK DES STAATES* 15–16 (1942)).

20. ALBERT CAMUS, *Notebook VI*, in *NOTEBOOKS 1942–1951*, at 189, 237 (Justin O’Brien trans., First Rowman & Littlefield 2010) (1964).





Figure 1—Eugène Delacroix, *La Liberté guidant le peuple* (1830)

The idea to which I refer is *not* the one represented in the top half of the picture. There French Romanticism, at the very height of its power and influence, celebrates the hopes and ideals of the Revolution and the *Déclaration des droits de l'Homme et du Citoyen*—namely, *liberté, égalité, fraternité*—in a manner that could not be more stirring to the emotions. No, the idea to which I refer is not about glory and transcendence—it is about suffering and death. It peers out at the viewer malignantly from the *bottom* part of the painting, where the ghastly, half-naked bodies of the dead are lying. Liberty and her companions are just about to trample these bodies under foot, and it would appear that they *must* trample them under foot to get where they are going.

Who are the dead and dying in this picture? Whatever the historical facts may be, I, for one, cannot bring myself to believe that as sensitive an artist as Delacroix intended to depict only heroes and martyrs at the bottom of his painting. The sufferings of heroes and martyrs are redeemed by the future success of their cause: eventually marble monuments and bronze statues will raise them from the dead, so to speak, like Lazarus. The anonymous millions whose sufferings and deaths are merely deemed necessary or useful for the great and glorious cause of justice to succeed, or who just happened to be at the wrong place

at the wrong time, have no such luck. The memory of *their* sufferings is lost to history. Which of them will be counted as noble victims of human rights abuses, and which as indifferent “costs” of progress? Either way we count them, *their* shattered lives become the cobblestones over which history’s survivors and winners march in triumph.

These lowly cobblestones include not only history’s long list of failures and also-rans, but also the countless innocents—the so-called “little people” of the earth—who always seem to get caught in the crossfire of historical change. I mean not only the *literal* crossfire of wars and revolutions, but also the *figurative* crossfire of economic crises and upheavals, social dislocations, and environmental catastrophes. Military officers have given an antiseptic name to these sorts of victims—“collateral damage”—and just like quicklime thrown into a mass grave, this terrible term is intended to sanitize and hide what lies beneath 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 Muslim population of 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. 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 Professor Costas Douzinas has noted, part of NATO’s official explanation for the last-mentioned tragedy “was that tractors and trailers cannot be easily distinguished from tanks and armoured

personnel carriers at an altitude of 15,000 feet.”<sup>21</sup> The irony contained in NATO’s explanation is rich: it would seem that when it comes to preventing injustice some innocent lives are worth more than other innocent lives.



REUTERS/Coran Iomasevic. Reprinted with permission.

Figure 2—Corpses lie on the road near the Kosovo village of Meja, near Djakovica

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 now 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 asked to explain what we mean by these words, we are baffled.<sup>22</sup>

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

21. COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 134 (2000).

22. SAINT AUGUSTINE, *Book XI, in CONFESSIONS* 253, 264 (R.S. Pine-Coffin trans., Penguin Books 1980) (c. 397).

consciences, is unjust or at least reasonably avoidable, and what are we supposed to do about it? More importantly, *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?*

## V.

I would now like 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*.<sup>23</sup> 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.

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 knowing 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,<sup>24</sup> and this lingering disjointedness bothers and gnaws at the consciences of anyone who is willing to notice it.

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 “[i]njustice anywhere is a threat to justice every-

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23. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V 1137a21–23, at 173 (Christopher Rowe trans., Oxford Univ. Press 2002) (c. 384 B.C.E.).

24. HEIDEGGER, *supra* note 2.

where.”<sup>25</sup> 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 Adorno once remarked, “[p]erennial suffering has as much right to expression as a tortured man has to scream,”<sup>26</sup> whether or not our favorite theory of justice recognizes that suffering as worthy of attention under the name “human rights.”

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 simply to care about it when your own ox is gored, but also 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 not a stickler for justice in the bad sense but rather tends to take a less strict view of things, even though he has the law to back him up.”<sup>27</sup> 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.

In ethics it is the particular that gives every abstract concept its weight. Only the particular (e.g. the dead Albanians at Djakovica) prevents the concept of justice in the sphere of human rights from decaying into a farce, or worse.<sup>28</sup> Any thought on the theme of human rights 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 bottom-most origin of justice is the real suffering of the flesh-and-blood human beings who live in the very same here-and-now that all of the rest of us do. Losing sight of their unique particularity is to lose sight of justice itself.

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25. MARTIN LUTHER KING, JR., *Letter From a Birmingham Jail*, in *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 83, 85 (James Melvin Washington ed., 1992) (1986).

26. ADORNO, *supra* note 8, at 362.

27. ARISTOTLE, *supra* note 23, at 1137b35–1138a1, at 175.

28. *Cf.* ADORNO, *supra* note 8, at 330.

## VI.

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 always more than it is, as Adorno says.<sup>29</sup> 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 that 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 *The Lovesong of J. Alfred Prufrock*:

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?<sup>30</sup>

That conceptual correctness is the enemy of a certain kind of truth is a proposition that is no less true in the sphere of ethics and justice in relation to human rights than it is in the sphere of individual identity or selfhood. That is why anyone who says that they know what is just, and know how to achieve it, is at bottom just trying to sell something. Whether or not they are aware of it, theirs is at best a subtle politics of truth,<sup>31</sup> and their audience includes potential customers.

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29. *Id.* at 148–51.

30. T. S. ELIOT, *The Love Song of J. Alfred Prufrock*, in *SELECTED POEMS* 11, 13 (1964).

31. Cf. Michel Foucault, *Lecture One: 11 Jan. 1978*, in *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–78*, at 3 (Michel Senellart ed., Graham Burchell trans., 2007) (defining philosophy as “the politics of truth”).

In thinking about the possibility of an ethically-centered human rights discourse, 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, or even for the sake of furthering the cause of human rights, 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.<sup>32</sup>

It seems to me that words like “justice,” “ethics,” and “human rights” do not—and cannot—name some end-state that, though different from the present, unjust world, is nonetheless imaginable and attainable by human actions aimed at realizing the idea of it. Justice and ethics do 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 of mere legality, it loses its capacity to criticize the existing order of things. I have claimed in this Essay 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 in the sphere of human rights that is worthy of the name: *justice achieved is at the same time justice annihilated.*

Jacques Derrida once defined the “unrescindable essence” of ethics to be the unending process of “casting doubt on responsibility, on decision, [and most especially] on one’s own being-ethical.”<sup>33</sup> To live in ethical doubt, to shun the comfort of certainty, is a difficult task. For there is a particularly potent form of anguish that can come only to those people who realize that they might actually be increasing injustice, even as they hope and believe that they are serving justice. No one *wants* to live in anguish. It would be so very nice, so very pleasant, to believe, completely and without doubt, in the true value of the pretty fairy tales that our politicians and our ethicists keep on telling us,

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32. Cf. ADORNO, *supra* note 8, at 144.

33. JACQUES DERRIDA, *THE ANIMAL THAT THEREFORE I AM* 126 (Marie-Louise Mallet ed., David Wills trans., 2008).

and that we keep on telling ourselves. But some of us cannot believe this way anymore. Some of us cannot close our eyes to the spectacle of rags that the world keeps on producing, whether or not there is anyone else there to behold it. Some of us have begun to suspect, with Michael Löwy, that “[r]edemption requires the integral remembrance of the past, without distinguishing between ‘major’ and ‘minor’ events or individuals.”<sup>34</sup>

Philosophy and politics know too little about the justice of human rights, but they nonetheless insist on telling us 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.

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34. MICHAEL LÖWY, *FIRE ALARM: READING WALTER BENJAMIN'S 'ON THE CONCEPT OF HISTORY'* 34 (Chris Turner trans., 2005).



