

# The Execution of Ah Cho: Jack London's Footnote to Justice Theory

DOUGLAS LIND<sup>†</sup>

---

Jack London's short story *The Chinago*<sup>1</sup> presents a simple tale with a foregone outcome. A perfunctory trial followed by a judge's ministerial error leads to the beheading of an innocent man. Though the mistake is discovered before the execution, inertia and indifference in the administration of justice destines the untoward conclusion. Despite this unspectacular storyline, *The Chinago* provides a quite spectacular indictment of Western culture, from the sorry moral weakness of the individual to the inglorious heritage of colonialism. The story also illustrates powerfully certain concealed and knotty aspects in the philosophical concept of justice. It is the latter I wish to address in this paper, offering some thoughts on how London's story helps reveal and unravel those knots.

## I. Trial and Execution

*The Chinago* is set in colonial Tahiti near the turn of the twentieth century. Several cultures awkwardly intersect on the South Pacific island

---

<sup>†</sup> Professor, Department of Philosophy, University of Idaho; PhD, University of Pennsylvania; JD, Washington University in St Louis. The ideas expressed in this paper were first presented in a series of judicial education workshops for the Family Court of Australia and the Federal Magistrates Court of Australia, Canberra, ACT, October 2010. I would like to thank the participants of those workshops for their critiques and creative insights. I am also grateful for helpful comments of the paper in draft from Paul S Davies, Jennifer Perevodchikov, Brendan Lind, Janice Capel Anderson, and Graham Hubbs.

<sup>1</sup> Jack London, 'The Chinago' in *Tales of the Pacific* (first published 1909, 1989 ed) 16.

where a large cotton plantation dominates the economy. The colonial government is French. The cotton masters are English. A ruthless German, Karl Schemmer, serves as the plantation's overseer. Five hundred Chinese men work the fields, each indentured for five years. To the native Tahitians, these workers they call 'Chinagos' are as unwelcome as the European invaders.

The trial that starts the miscarriage of justice London unfolds concerns the murder of one of the Chinese labourers. The worker Chung Ga died following a skirmish in a barrack. He suffered two stab wounds. Hearing an altercation, Schemmer entered the barrack shortly after the murder. Five Chinese workers were present. Schemmer apprehended them all, branding two with lashes from his brutal whip.

All five of the workers nabbed by Schemmer were charged with Chung Ga's murder. One of the five was Ah Cho, the story's key figure. At the trial of the five together, Ah Cho sat quietly, bemused and disgusted. He found the French uncannily stupid. Their court procedure was pompous yet silly, decorated in formal markings yet woefully inefficient. How could they charge five men for Chung Ga's murder, he wondered. There were only two knife wounds. At most two men could have been involved. Back home in China, he reflected, the authorities would easily have determined the murderer. Torture. But the French were too weak to extract the truth that way. Instead, they employed a pretentious procedure of asking circuitous questions. It was as if they expected the defendants to tell them what had happened. Of course the five on trial knew. All of the Chinese workers knew that one among them, Ah San, had alone killed Chung Ga. And they all knew that Ah San had fled the barrack before Schemmer entered. But no one would speak, not even Ah Cho or the others on trial. For they were innocent and had nothing to fear. So they 'lied and blocked and obfuscated' in their testimonies.<sup>2</sup> Let the French figure out the truth by themselves.

Only the French were incapable. Their trial procedure kept the truth at bay when none of the Chinese men would play along. All the French court had was the testimony of Schemmer identifying the five defendants as being present at the scene of the crime. They each testified to no role in the killing. Yet a murder could not go unatoned. The Chinese workers had to respect the virtues and majesty of French law. They could not be allowed to think that wasting the resources of human capital owned by the English company would go unpunished. They had to bow before the rules and excellences of their European masters. So the court issued a verdict against all five of the defendants. After all, mused the magistrate, the Chinagos

---

<sup>2</sup> Ibid 16.

'must learn that the law would be fulfilled in Tahiti though the heavens fell.'<sup>3</sup>

The defendant named Ah Chow bore the biggest scar from Schemmer's whip. That mark of infamy, though circumstantial, provided sufficient evidence for the court to deem him the most guilty. The magistrate accordingly sentenced him to death by guillotine. Schemmer's scourge had left its second most prominent imprint on Ah Cho. From that the court inferred his guilt to be second most, worthy of twenty years imprisonment. The other defendants, present at the scene but unblemished by Schemmer's whip, received lesser terms. Schemmer's whip had an uncanny knack for divining culpability.

Disbelief at the sentences shook Ah Cho out of the bemused, aloof disinterest from which he had observed the trial. No logic could support the magistrate's rulings. But then, the ways of the French, like the rest of the Europeans, struck Ah Cho as odd in every respect. He could not understand them. They were devils – inscrutable, gluttonous, intemperate, wild and beastly. Their minds moved mysteriously. They were inconsistent and unpredictable. Yet they were efficient; more than anything the white devils were terribly efficient.

Twenty years. Ah Cho was reflective and philosophical. Twenty years marked only time. He accepted his sentence without protest or distress. He would still return home to China a relatively young man, young enough to take a bride, build a garden and a family. 'The Garden of the Morning Calm' would harbor his tranquillity and repose behind a high wall. He could abide his sentence in stride.

Just a short time passed, however, before one day a jailer took Ah Cho from his prison cell. The jailer turned Ah Cho over to a gendarme, Cruchot. The two alighted in a wagon to begin the twenty-mile journey to the town of Atimaono, the commercial centre of the English cotton operation. Ah Cho felt relief, inferring that the overseer Schemmer must have determined that he could better serve his sentence labouring in the fields than languishing in prison. Yet soon it became apparent from Cruchot's rambles that Ah Cho was not destined for the fields but fated for the guillotine.

Ah Cho protested. 'It is a mistake,' he insisted.<sup>4</sup> Cruchot told him to be quiet. But there had been a mistake. The order for Ah Chow's execution had been brought that morning for completion to the Chief Justice of the French colonial court. Hung over from a bawdry evening, the Chief Justice scrawled the name of the condemned man less one fateful letter. Instead of

---

<sup>3</sup> Ibid 21.

<sup>4</sup> Ibid 24.

*Ah Chow*, the order of execution instructed the jailer to hand over the wrong prisoner, *Ah Cho*.

The wagon laboured on toward Atimaono. Gently, Ah Cho prodded Cruchot. 'I saw you in the court room, when the honourable judge sought after our guilt,' he said. '[D]o you remember that Ah Chow, whose head is to be cut off ... – was a tall man? Look at me', Ah Cho pleaded, standing.<sup>5</sup> Cruchot looked and paused. He could not tell one Chinago from another. Their faces were all alike. 'But between tallness and shortness he could differentiate'.<sup>6</sup> He knew he had the wrong man on the seat alongside him.

Ah Cho smiled, relieved. The mistake would now be rectified. Only Cruchot was troubled. He now knew the man beside him was not the defendant sentenced to death by the magistrate. But he was ignorant of the Chief Justice's error. Perhaps it was not a mistake after all. He could not account for the ways of his superiors. A middle-aged peasant from the South of France, Cruchot was 'slow-witted and stupid' and driven by 'discipline and fear of authority'.<sup>7</sup> He knew his duty was to obey, not think. If he turned back to right the wrong, he risked reprimand for delaying the execution. His superior, the sergeant of the gendarmes, was awaiting his arrival in Atimaono. And the sergeant, fearsome and intolerant, 'bulked bigger in [Cruchot's] mind than God'.<sup>8</sup> So whipping the mules to a faster pace, he stubbornly resisted Ah Cho's pleas. Yet he did so under the distress of moral guilt:

The knowledge that he had the wrong man did not make his temper better. The knowledge that it was through no mistake of his confirmed him in the belief that the wrong he was doing was the right. And, rather than incur the displeasure of the sergeant, he would willingly have assisted a dozen wrong Chinagos to their doom.<sup>9</sup>

Cruchot and Ah Cho thus continued their journey in agitated silence. The frightened and the contrite, each incapable of charting a different course, pressed on toward Atimaono. Once there, Cruchot presented Ah Cho to Schemmer and the sergeant. Schemmer – overseer, engineer, and executioner – was proudly testing the guillotine he had just constructed. The horde of Chinese workers stood by idly, awaiting Ah Chow's execution. Schemmer had given them time off to witness the event. For it shone deterrence.

---

<sup>5</sup> Ibid 25.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 22.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 26.

Ah Cho politely raised his protest. The sergeant and Schemmer both immediately saw the merit of the appeal. Schemmer cursed. The sergeant pondered the dilemma. He weighed the time it would take to return the mistake to prison and bring back the rightfully condemned. He thought wistfully of the beautiful half-caste daughter of the pearl-trader in whose arms he would tarry once this ugliness was over. Schemmer likewise weighed and thought. He weighed the time and labour he would lose by keeping the workers idle another half day just to execute the right man. He thought wistfully of his beautiful guillotine.

Ah Cho thought too. He thought of home. He imagined himself in the Garden of the Morning Calm, the high wall separating him from the world outside. He remembered maxims: 'forgive malice' seemed apt. But then again it did not. For Ah Cho realised that the white devils' vice was not malice, but indifference. He reflected:

there was no malice to forgive. Schemmer and the rest were doing this thing without malice. It was to them merely a piece of work that had to be done, just as clearing the jungle, ditching the water, and planting cotton were pieces of work that had to be done.<sup>10</sup>

Indifference. Ill-will did not drive Schemmer and the sergeant in their brief deliberation. They harboured no ill-feelings toward Ah Cho. Concluding the execution was, just as Ah Cho understood, a piece of work that could not be left undone. '[W]e can't postpone this affair', Schemmer grumbled.<sup>11</sup> For as Ah Cho well knew, the white devils' chief attribute was efficiency. Time for them was labour wasted, profits foregone; time was happiness unfulfilled, pleasure deferred. Reassuring themselves that the wrong likely would never be discovered and if it were, others – Cruchot or the jailer – would be blamed, Schemmer and the sergeant decided to press ahead. 'They can't blame us', Schemmer reasoned. 'Who can tell one Chinago from another? We can say that we merely carried out instructions with the Chinago that was turned over to us.' The sergeant concurred; after all, 'He is only a Chinago.'<sup>12</sup>

Strapped to a board below the glistening blade, Ah Cho heard the sergeant shout the ultimate command. A moment later, he found repose from the world, not behind a high wall but beneath a big knife.

## II. Act-Centred Theories of Justice

The execution of Ah Cho disturbs. London's story affronts our sensibilities of rightness and justice. It seems incontrovertible that Ah Cho's sorry fate,

<sup>10</sup> Ibid 29.

<sup>11</sup> Ibid 28.

<sup>12</sup> Ibid 29.

from conviction for a crime he did not commit to wrongful execution on account of juridical error and indifference, amounts to a gross miscarriage of justice. If anything falls into the category of the unqualifiedly unjust, Ah Cho's execution does.

Yet how can we account philosophically for these arguably incontestable intuitions of justice misbegotten? Tradition would have us look to theoretical systems fashioned to provide, *inter alia*, necessary and sufficient conditions for determining whether an act or course of action is just or unjust. The history of philosophy is adorned with an impressive gallery of such systems. Yet their abundance disguises a relatively few compositional styles. Two of the most prominent are consequentialist and rights or duty-based theories of justice. Consequentialist theories appeal to the highly reasonable intuition that justice is associated with good outcomes. Utilitarianism, the most plausible consequentialist approach, aligns justice with the principle of utility, the familiar moral standpoint that the rightness of an act turns on the goodness or badness of the consequences it effects.<sup>13</sup> To John Stuart Mill, justice stands at the heart of that utilitarian principle. Mill considered justice to be the highest requirement of social morality, an obligation fulfilled through maximising social expediency.<sup>14</sup> Rights-based theories of justice spurn such consequentialist considerations. Without so much as a nod to the common good, Immanuel Kant, in the case of Ah Cho, would have us ask whether he and all others concerned were accorded the basic dignity and respect owed every human being.<sup>15</sup> If not, no wealth of social advantages could justify the events at Atimaono.

Despite the formal appeal and aspirational power each of these act-centred systematic approaches offers, neither satisfies. For neither can give an adequate account of the tragic injustice borne by Ah Cho.

## A. UTILITARIANISM

Utilitarianism stipulates that determinations of right conduct turn on the principle of maximising the common good. While utilitarian theorists often disagree over how to apply the principle of utility,<sup>16</sup> they share the

<sup>13</sup> See Rolf Sartorius, *Individual Conduct and Social Norms: A Utilitarian Account of Social Union and the Rule of Law* (1975) 1; R G Frey, 'Introduction: Utilitarianism and Persons' in R G Frey (ed), *Utility and Rights* (1984) 3, 4.

<sup>14</sup> See John Stuart Mill, *Utilitarianism* (first published 1861, 1979 ed) 58, 62.

<sup>15</sup> See Immanuel Kant, *Foundations of the Metaphysics of Morals* (first published 1785, Lewis White Beck trans, 1969 ed) 428-9.

<sup>16</sup> Certain important theoretical differences have historically separated utilitarian philosophers, resulting in what has come to be seen as a few distinct forms of utilitarianism. See David Lyons, *Forms and Limits of*

conviction that the right course of action is that which 'would issue in the obtaining of the best total outcome.'<sup>17</sup> Everything that matters, morally speaking, receives its due measure of consideration on the scale of utility. That includes justice. Hence, while Mill praised justice as 'incomparably the most sacred and binding part, of all morality,'<sup>18</sup> he cautioned that 'particular cases may occur in which some other social duty is so important as to overrule any one of the general maxims of justice.'<sup>19</sup> The noble status he accorded justice does not exclude it, that is, from the utilitarian calculus. For utilitarianism attributes all that is moral in the concept of justice to its social expediency. Justice may 'stand higher in the scale of social utility ... [as a] more paramount obligation than any others,' yet its obligatory status – its 'character of indefeasibility' – depends entirely upon its position on that scale.<sup>20</sup>

So understood, the principle of utility would just as likely endorse the counter-intuitive conclusion that Ah Cho's execution was morally permissible as issue a call for clemency. To see this, it is necessary to consider separately the two distinct occurrences leading to Ah Cho's demise: the trial culminating in the false conviction of five labourers and the Chief Justice's ministerial error followed by the knowing decision to execute the wrong prisoner.

The trial would seem to withstand utilitarian scrutiny as a just legal process. The presiding French magistrate followed standard (Western) court procedure. Witnesses were called, the defendants had opportunity to speak, and the judge rendered judgment on the basis of the evidence before him. That evidence consisted almost exclusively of Schemmer's description of the murder scene, augmented vividly by two defendants bearing the brand of his tell-tale whip. The defendant Chinese workers could have set the story right. Instead, they 'lied and blocked and obfuscated,'<sup>21</sup> a strategy that only enhanced the weight of Schemmer's testimony. Given the facts before

---

*Utilitarianism* (1965). Three forms predominate: act-utilitarianism, rule-utilitarianism, and utilitarian generalisation. See Sartorius, above n 13, 11-18. The characteristic features I mention are those generally associated with utilitarianism, though some are less endemic to certain forms of utilitarianism than to others. See, eg, Frey, above n 13, 5 (suggesting that certain forms of utilitarianism (rule-utilitarianism and utilitarian generalisation) are not really even consequentialist). But see Richard Brandt, *A Theory of the Good and the Right* (1979) 278-85 (critiquing utilitarian generalisation as a consequentialist theory).

<sup>17</sup> Judith Jarvis Thomson, 'Goodness and Utilitarianism' in *Proceedings and Addresses of American Philosophical Association* (1994) 7.

<sup>18</sup> Mill, above n 14, 58.

<sup>19</sup> *Ibid* 62.

<sup>20</sup> *Ibid*.

<sup>21</sup> See London, above n 1, 10.

him, it is hard to see how the magistrate's ruling could be considered unjust from a utilitarian point-of-view. Utilitarianism endorses deterrence as sound justification for punishing criminal wrongdoing.<sup>22</sup> The sentences imposed by the magistrate resonated deterrence. They were designed to dissuade the five defendants from future wrongdoing (specific deterrence) while sending the unequivocal message to the rest of the Chinese workers that 'the law would be fulfilled in Tahiti though the heavens fell' (general deterrence).<sup>23</sup>

Now, one could take issue with the wisdom of the magistrate's deterrent foresight. It could be argued that instead of firm and certain punishment with the attendant risks of hasty and arbitrary judgment, the long-term deterrent interests of the French would have been better served by ensuring that all of the intersecting cultures in colonial Tahiti perceived the law as applied cautiously in a fair and evenhanded manner. More broadly, it could be argued that the trial procedure and court ruling should be weighed in the context of the entire political and legal system France put in place in colonial Tahiti, a system fraught with institutional injustice. Certainly such arguments can be made. And they carry substantial merit. But they do not carry the day for utilitarian analysis. For utilitarianism is intended as a rule of decision or formula for active ethical decision-making. Assessing conduct (here the trial and judicial ruling) as just or unjust from a utilitarian point-of-view requires measuring it against the alternative courses of action available at the time of the trial, given the resources, knowledge, and foresight of consequences that could reasonably be attributed to the agents involved. By our lights today, European colonialism seems (to many) a tarnished chapter of Western history marked by cruelty, economic exploitation, and invidious cultural hegemony. The injustice we intuit in Ah Cho's case reflects that attitude. But the force of utilitarianism lies not in critiquing actions and states of affairs long after the fact. Rather, the principle of utility is meant as a rule of decision to guide moral deliberation and explain to agents how one course of action they could choose is preferable, in terms of overall social consequences, compared to the available alternatives. The second counterargument here does not employ utilitarianism as a decision rule or principle for action, but only as a method of historical critique. The first does treat it as a principle of action. But the alternative reasoning it suggests does not stand out as better, in terms of foreseeable social consequences, than the deterrent reasoning of the magistrate. Hence, it does not show his ruling to be consequentially infirm or in any respect clearly unjust.

Utilitarianism can better account for our intuition that Ah Cho was treated unjustly based on the second occurrence – the set of events

---

<sup>22</sup> Jeremy Bentham, *The Principles of Morals and Legislation* (first published 1781, 1988 ed) 173-88.

<sup>23</sup> London, above n 1, 21.



beginning with the Chief Justice's administrative error and ending in the deliberate decision by the sergeant and Schemmer to proceed with the wrongful execution. For as he approached the hastily constructed scaffold, Ah Cho did have the paramount good of justice on his side. And the interest he held was in the preservation of human life, arguably the most weighty of social goods. Yet even here utilitarianism fails to support unequivocally our intuitive distress over Ah Cho's execution. For utilitarianism notoriously underdetermines how much weight to assign the various social goods that come to be placed on the scale of utility. Every form of utilitarianism insists that in calculating the overall common good, the interests and preferences of every person must receive full weight and consideration.<sup>24</sup> Now, the interests of the colonial masters and their lackeys like Cruchot can certainly be discounted as lesser in kind than the life and death interest held by Ah Cho. But Ah Chow shared that interest. So did Ah San and all the other Chinese workers who hoped the rectificatory wrath of the foreign devils would fall elsewhere than on their necks. Ah Cho thus stood very lonesome on the guillotine side of the utilitarian scale. Furthermore, it is the collective weighting of all those individual interests that matters. For utilitarianism strives to maximise the general social advantage.<sup>25</sup> It is thus not unreasonable, all things considered, to think that the overall well-being of the French colonial society then in place in Tahiti was better served by sacrificing Ah Cho than not. For the well-being of Ah Cho seems trifling measured against the welfare and demands of justice owed the other workers, together with the colonial masters' interests in security, efficiency, and general deterrence.

## B. KANT

A rights-based Kantian analysis seemingly would not so unsettle our intuitions. Contrary to the utilitarians, Kant refused to countenance considerations of social advantage as a reliable measure of right conduct. The 'best total outcome' for a society could never, on his account, render a person so picayune as to justify a sacrificial execution. For Kant posited that every person possesses intrinsic value simply by virtue of his or her humanity. This inherent worth sets an absolute prohibition against using a person simply as a means, no matter the end.<sup>26</sup> Hence, by his humanity-as-an-end-in-itself formulation of the categorical imperative, Kant would

---

<sup>24</sup> See Mill, above n 14, 16-17. Accord Henry Sidgwick, *The Methods of Ethics* (7<sup>th</sup> ed, first published 1907, 1981 ed) 416-17; Rolf Sartorius, 'Persons and Property' in R G Frey (ed), *Utility and Rights* (1984) 196, 197.

<sup>25</sup> See Mill, above n 14, 11, 16, 30-3; Sidgwick, above n 24, 411, 413-16.

<sup>26</sup> Kant, *Foundations of the Metaphysics of Morals*, above n 15, 429. See Paul Guyer, *Kant's Groundwork for the Metaphysics of Morals* 87-90 (2007); Allen Wood, *Kantian Ethics* 85-8 (2008).

appear to give solid philosophical grounding to our intuitive discomfit with the execution of Ah Cho.

Yet applying Kant's practical philosophy is not so straightforward. In the case of Ah Cho, the ethical command of the categorical imperative not to treat any human simply as a means would seem to beg the question. For as Paul Guyer convincingly argues, Kant's formula of humanity rests on tenuous philosophical footing.<sup>27</sup> Kant premised that formula to a great extent on our subjective perceptions. He assumed that every person sees him or herself as of intrinsic worth. From that, he inferred that as moral legislators we of necessity would convert that subjective representation into an objective principle applicable to all.<sup>28</sup> Yet such an objective principle cannot be deduced validly from a merely subjective principle. Kant's assertion that humans have inherent worth as ends in themselves thus is ultimately something he just presupposes.<sup>29</sup> While the truth of that supposition cannot be said to turn on empirical considerations, the ragtag characters in London's story do serve as counter-examples to Kant's speculative subjective premise. No one in the story manifested respect for human dignity. Everyone, European and Chinese alike, stood in hushed self-interest before the terror of Schemmer's guillotine. Even Ah Cho evinced no principled opposition to anyone, including himself, being treated simply as a means. He snickered at the French court officials for not extracting the truth by torture. Though he found the European ways odd, he breathed no opposition to Ah Chow's execution. In fact, he encouraged it to save himself, although he knew Ah Chow was equally innocent.<sup>30</sup>

Beyond this concern about the philosophical merit and hence practical weight owed Kant's categorical prohibition against anyone being treated merely as a means, further worries arise when we turn to his express extension of the categorical imperative to the concept of justice in *The Metaphysics of Morals*.<sup>31</sup> There Kant maintained that justice concerns the

<sup>27</sup> See Guyer, above n 26, 90-1, 103-14, 171.

<sup>28</sup> See Kant, *Foundations of the Metaphysics of Morals*, above n 15, 429. While this provides Kant's main support for the humanity-as-an-end-in-itself formulation of the categorical imperative, it is, as many Kant scholars argue, an obscure and questionable argument. See, eg, Guyer, above n 26, 90-1; H J Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (1947) 176-7; Wood, above n 26, 90-3.

<sup>29</sup> See Guyer, above n 26, 91; Wood, above n 26, 93.

<sup>30</sup> See London, above n 1, 24-5, 28.

<sup>31</sup> Immanuel Kant, *The Metaphysical Elements of Justice* (Part I of *The Metaphysics of Morals*) (first published 1797, John Ladd trans, 2<sup>nd</sup> ed, 1999). See Wolfgang Kersting, 'Politics, Freedom, and Order: Kant's Political Philosophy' in Paul Guyer (ed), *The Cambridge Companion to Kant* (1992) 342, 342-3 (discussing how Kant's political philosophy,

external, practical relations of persons, insofar as the actions of one touch upon the freedom of another. Freedom from external constraint in such relationships forms the basis of what he called the 'universal principle of justice'.<sup>32</sup> He defined that universal principle as stipulating that – 'Every action is just that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law.'<sup>33</sup>

To Kant, this universal law of justice or juridical freedom underlies the formation of civil government and justifies 'public lawful coercion'.<sup>34</sup> As to criminal conduct, Kant argued that justice requires punishment according to an unwavering 'principle of equality' or 'Law of retribution'.<sup>35</sup> Like for like, punishment must equal the crime. Any undeserved evil one person inflicts upon another is an evil the agent wills upon himself as well.<sup>36</sup> In the case of murder, Kant accordingly insisted that capital punishment is the only form of punishment morally justified. 'Anyone who is a murderer ... must suffer death.'<sup>37</sup> This follows strictly from the 'retributive principle of returning like for like.'<sup>38</sup> Deterrence is never a sound penal justification.<sup>39</sup>

Oddly, this Kantian framework confounds more than it clarifies when applied to *The Chinago*. The French magistrate and others involved in the trial, such as Schemmer, did seem committed to delivering a deterrent message. On Kant's account, that is a mistaken juridical motive. Nonetheless, the French court arguably tried to hand down a just sentence. The magistrate, consistent with Kant's principle of equality, was convinced

---

including his theory of justice, is structurally interconnected with his ethical philosophy).

<sup>32</sup> Kant, *The Metaphysical Elements of Justice*, above n 31, 230-1.

<sup>33</sup> Ibid 230.

<sup>34</sup> Ibid 312.

<sup>35</sup> Ibid 332. For a sympathetic yet highly critical reading of Kant's retributivist view of punishment, see Wood, above n 26, 206-23.

<sup>36</sup> See Kant, *The Metaphysical Elements of Justice*, above n 31, 332-4.

<sup>37</sup> Ibid 334.

<sup>38</sup> Ibid 332.

<sup>39</sup> See *ibid* 331-3. I am not unmindful here of the recent important work by some Kant scholars suggesting that he held an integrated retributivist/deterrent theory of punishment. See, eg, Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009) 300-24; Thomas E Hill, Jr, 'Kant's Theory of Punishment: A Coherent Mix of Deterrence and Retribution' in *Conduct Respect, Pluralism, and Justice: Kantian Perspectives* (2000) 173-99; B Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution' in *Law and Philosophy* 8 (1989) 151-200. Like some others, however, I find those suggestions unsupported by Kant's texts. Eg, Wood, above n 26, 212-3.

that only a sentence of death could recompense Chung Ga's murder. Though the court failed to identify the actual killer, it followed an arguably fair procedure. The magistrate rendered judgment according to the evidence he had before him. By striking paradox, the fairness of the trial, or lack thereof, lay just as much if not more under the control and discretion of the defendant Chinese workers as with the Europeans. For the workers knew the truth. Had they been good Kantian moral agents, they would have ratted on Ah San. That would have fulfilled their duty under the categorical imperative to tell the truth.<sup>40</sup> Instead they toyed with and deliberately deceived the French court, all the while compromising both their characters and the juridical procedure. To a degree, Kant would seem even to suggest that, because of their deliberate lying, some of the blame for the false convictions should be imputed to the defendants themselves.<sup>41</sup>

One further paradox troubles the Kantian framework. Duty is fundamental for Kant's understanding of justice, as it is for his ethics more generally. In *The Metaphysics of Morals*, he averred that 'Duty is that action to which a person is bound.'<sup>42</sup> If so, then members of a civil state have a duty to act in furtherance of its well-being, as that is a 'condition that reason through a categorical imperative obligates us to strive after.'<sup>43</sup> Yet in *The Chinago*, duty in this very sense becomes an excuse for injustice. Each of the Europeans who became aware of the case of mistaken identity rationalised by way of duty his refusal to intervene on Ah Cho's behalf. For Schemmer and the sergeant it was just pretence. But for the servile Cruchot it was something more complicated. A dull-witted man browbeat by life, Cruchot felt under a duty to carry out the orders of his superiors, especially

<sup>40</sup> See Kant, *Foundations of the Metaphysics of Morals*, above n 15, 422, 429-30. See also Immanuel Kant, *The Metaphysical Principles of Virtue (Part II of The Metaphysics of Morals)* (first published 1797, James W Ellington trans, 1983 ed) 429-31 (arguing that intentional untruth is the greatest violation of a person's duty to him or herself). See generally Wood, above n 23, 240-58 (discussing the high priority Kant placed on truthfulness).

<sup>41</sup> See Kant, *The Metaphysical Principles of Virtue*, above n 40, 431, where Kant provides an example that stands as a telling analogy to the trial in *The Chinago*. Kant's example reads:

For instance, a householder has instructed his servant that if a certain person should ask for him, the servant should deny knowing anything about him. The servant does this, but in doing so is the occasion of the master's slipping away and committing a great crime, which would otherwise have been prevented by the watchman who was sent out to take him. Upon whom (according to ethical principles) does the blame fall? To be sure, also upon the servant, who here violated a duty to himself by lying, the consequence of which will now be imputed to him by his own conscience.

<sup>42</sup> Kant, *The Metaphysical Elements of Justice*, above n 31, 222.

<sup>43</sup> Ibid 318.

the sergeant who 'bulked bigger in his mind than God'.<sup>44</sup> While he unquestionably came to realise he was transporting the wrong man to Atimaono, Cruchot convinced himself by agitated reasoning 'that the wrong he was doing was the right.'<sup>45</sup> In no respect was he doughty. Yet Cruchot's lack of mettle merged inseparably with his sense of duty, a sense of promissory compliance to do the bidding of his political superiors. This is a form of duty that Kant expressly endorsed.<sup>46</sup> Hence, in this respect too the considerable theoretic vigour of Kant's practical philosophy leads to an ambiguous analysis when called upon to come to grips with *The Chinago*.

### III. Virtue-Centred Theories of Justice

The sharp knife of injustice that felled Ah Cho thus seems as well to sever his worrisome tale from philosophical analysis under standard act-centred principles of rightness or justice. Yet the concept of justice has frequently come under a different style of philosophical treatment. Since ancient times, many philosophers have treated justice as a virtue. Plato first introduced this approach in his dialogues *Gorgias*<sup>47</sup> and *Republic*.<sup>48</sup> Aristotle devoted an entire book to the virtue of justice in the *Nicomachean Ethics*<sup>49</sup> and addressed it further in his *Politics*.<sup>50</sup> The canonical natural law theorists from Thomas Aquinas into the early modern era followed Aristotle's virtue-based approach.<sup>51</sup> Though writing in a different and secular key, the British moral sense philosophers equally revered justice as a virtue.<sup>52</sup> Even Mill, as mentioned above, set justice apart in his utilitarian framework because he considered it a social virtue above all others.

<sup>44</sup> London, above n 1, 22.

<sup>45</sup> Ibid 26.

<sup>46</sup> See Kant, *The Metaphysical Elements of Justice*, above n 31, 319 ('Furthermore, if the organ of the sovereign, the ruler, proceeds contrary to the laws ... the subject may lodge a complaint (*gravamina*) about this injustice, but he may not actively resist.')

<sup>47</sup> See Plato, *Gorgias* in *Plato Gorgias and Aristotle Rhetoric* (Joe Sachs trans, 2009 ed) 503C3-511A6, 527A6-527E7.

<sup>48</sup> See Plato, *Republic* (Francis MacDonald Cornford trans, 1941 ed).

<sup>49</sup> See Aristotle, *Nicomachean Ethics* (Martin Ostwald trans, 1962 ed) bk 5.

<sup>50</sup> See, eg, Aristotle, *Politics* (C D C Reeve trans, 1998 ed) 1253a14-18, 30-40, 1259b31-1260a22, 1282b14-22, 1283a37-9.

<sup>51</sup> See Thomas Aquinas, *Summa Theologiae* in William P Baumgarth and Richard J Regan (eds), *On Law, Morality, and Politics* (first published 1265-1274, 1988 ed) Q 90 art 2, 4, Q 96, art 1, Q 97, art 2.

<sup>52</sup> See, eg, David Hume, *An Enquiry Concerning the Principles of Morals* 20-34 (revised ed, first published 1777, 1983 ed); Francis Hutcheson, *A Short Introduction to Moral Philosophy* (first published 1747, 2007 ed) 71-4, 99-100; Adam Smith, *The Theory of the Moral Sentiments* (6<sup>th</sup> ed, first published 1790, 1976 ed) 78-91, 166-7.

Does conceiving of justice as a virtue align philosophical theory with our intuitions that the execution of Ah Cho was unjust? To answer this question we should consider the exemplar of virtue-centred understanding of justice. Aristotle.

## IV. Aristotle

### A. JUSTICE UNIVERSAL AND PARTICULAR

In Book V of the *Nicomachean Ethics* Aristotle distinguished two senses of justice: universal (or complete) justice and particular (or partial) justice.<sup>53</sup> Universal justice corresponds with what is 'lawful'.<sup>54</sup> It provides an evaluative measure of civil government, tracking how well a state's formal enactments, social rules, and customs produce and preserve the end of social and political happiness. It also measures the character of the citizen. There the focus is two-fold: whether an individual tends to be law-abiding (just in relation to the state) and whether he or she is virtuous (just in relation to other people). Aristotle treated justice in this universal sense as the 'highest of all virtues'<sup>55</sup> – 'complete virtue or excellence, not in an unqualified sense, but in relation to our fellow men.'<sup>56</sup>

The second sense of justice Aristotle delineated in the *Nicomachean Ethics* is particular justice. Like universal justice, particular justice concerns our relations with others. Yet its scope is narrower. Particular justice concerns only the distribution of social goods such as wealth, material things, honour, and security.<sup>57</sup> Aristotle perceived these goods as divisible and frequently zero-sum, insofar as when some people acquire more of one, others usually receive less. Particular justice addresses the fairness or equality of the distributions. Merit supplies the determining criterion. When the division of social goods is equal or fair in relation to the proportion each person deserves, it is just. When it is not proportionately equal or fair, it is unjust.<sup>58</sup>

<sup>53</sup> Many commentators on Aristotle employ the terms 'universal' and 'particular' to describe his two senses of justice. See W F R Hardie, *Aristotle's Ethical Theory* (1980) 185; Sir David Ross, *Aristotle* (1923) 209; J A Stewart, *Notes on the Nicomachean Ethics* (1892) vol 1, 401. The terms 'complete' and 'partial' are used by Martin Ostwald in his translation of the *Ethics*. See Aristotle, *Nicomachean Ethics*, above n 49, 1129b26-1130a3, 1130a32-5, 1130b9-16. While all quotations from the *Ethics* in this essay will be from the Ostwald translation, I will follow the more conventional nomenclature, universal and particular.

<sup>54</sup> See Aristotle, *Nicomachean Ethics*, above n 49, 1129a32-4, 1130b10.

<sup>55</sup> Ibid 1129b28.

<sup>56</sup> Ibid 1129b26-7.

<sup>57</sup> See ibid 1130b1-4.

<sup>58</sup> See ibid 1130b30-2, 1131a10-1131b24.

In this way Aristotle brought justice, in its particular sense, within his doctrine of the mean. Like all other moral virtues, he thought justice 'is realized in a median amount,'<sup>59</sup> midway between the vices of excess and deficiency. Excess in the case of justice refers to having too much, ie, enjoying a disproportionately large allocation of social goods relative to what one deserves. Deficiency is having less than one's proportionate share, as determined by merit. Both states of affairs are unjust. Excess denotes acting unjustly; deficiency depicts suffering unjustly. In either case, injustice results because proportionality is violated.<sup>60</sup>

Aristotle was primarily concerned in the *Nicomachean Ethics* with particular justice and its singular influence on individual virtue. Universal justice is not, on his account, a moral virtue *per se*. He conceived of it as a political and legal concept – a 'communal virtue, which all the other virtues necessarily accompany.'<sup>61</sup> As such, it stands on a different plane from the several individual moral virtues, including particular justice, enumerated in the *Nicomachean Ethics*.<sup>62</sup> It is not so different, however, in terms of how it comes to be realised. In the *Politics* Aristotle expressly extended his conception of justice from 'what has been determined in those philosophical works of ours dealing with ethical issues' to justice in the legal and political realm.<sup>63</sup> Hence, as argued by Paul Vinogradoff, the best way to understand Aristotle's sense of universal justice is by extension from the particular.<sup>64</sup>

For purposes of assessing whether Aristotle's virtue-centred approach to justice can account for the injustice our intuitions so unambiguously tell us was suffered by Ah Cho, universal justice clearly is most relevant. London's story has nothing to do with the distribution of material social goods, the concern of particular justice. Rather, London offers a caustic indictment of the legal administration of justice. This is the domain of universal justice. Yet what Aristotle had to say about the individual virtue of justice remains highly pertinent, since he fashioned universal justice on that particularised structure. As noted, Aristotle conceived of particular justice in terms of proportional fairness. Inquiry into universal justice accordingly requires assessing, in terms of proportionality, the distribution

<sup>59</sup> Ibid 1133b35-1134a1.

<sup>60</sup> See ibid 1131a21-1131b24, 1133b30-1134a15.

<sup>61</sup> Aristotle, *Politics*, above n 50, 1283a39.

<sup>62</sup> Aristotle's list of individual moral virtues includes courage, self-control, generosity, magnificence, high-mindedness, gentleness, truthfulness, wittiness, friendliness, modesty, and righteous indignation. See Aristotle, *Nicomachean Ethics*, above n 49, 1107a28-1108b10, 1115a6-1128b35. See also Aristotle, *Eudemian Ethics* (Michael Woods trans, 1982) 1220b37-1221a12.

<sup>63</sup> Aristotle, *Politics*, above n 50, 1282b19-20.

<sup>64</sup> See Paul Vinogradoff, *Outlines of Historical Jurisprudence* (1920) vol 2, 43-71.

of legal benefits and burdens. Further, since merit supplies the determining criterion for proportional fairness in the particular sense, so too must merit or just desert provide the basis for measuring just allocations of distributive shares in the universal realm of legal justice.

It follows that for Aristotle distributive justice obtains, in the universal sense, when a society allocates its full range of benefits and burdens so as to ensure that each person receives a share proportionate to what he or she deserves. Injustice results from any deviation from the mean of proportionality by ‘admit[ting] of a more and a less,’<sup>65</sup> that is, by permitting allocations to some that amount to more than they deserve, while others receive less. When distributions deviate from the mean, the distributive principle gives way to its correlative, rectificatory or remedial justice.<sup>66</sup> The purpose of remedial justice is simple: to remedy or correct any inequities so as to restore distributive proportionality.<sup>67</sup>

## B. DISTRIBUTIVE SHARES

Can Aristotle’s virtue-centred conception of justice account for the wrong done Ah Cho? Not adequately. For two points of dissonance mar the alignment of Aristotle’s theory with our intuitions regarding *The Chinago*. First, as with so many theories of justice, Aristotle treated the proportional distribution of social goods as the core of justice.<sup>68</sup> He thought it axiomatic to conceive of justice as proportional fairness, positioned at a contextually relative midpoint between having more than one’s fair share and receiving less than one’s due. That may or may not be sufficient for understanding justice in the particular sense. As to the realm of universal or legal justice, it is not. This is not to deny that fairness in the distribution of social advantages is a centrally important consideration in assessing the justice of legal institutions. John Rawls’ *Justice as Fairness* demonstrates this vividly.<sup>69</sup> Further, as to certain types of social goods, distributive justice may well be enough. Property rights are paradigmatic. So is access to natural resources, from forest or mineral resources desired for profit to basic

<sup>65</sup> Aristotle, *Nicomachean Ethics*, above n 49, 1131b17.

<sup>66</sup> Ibid 1132a3-19. Ostwald uses the term ‘rectificatory’ for Aristotle’s second empirical principle of particular justice. See ibid 1130b34-1131a1, 1131b25. Hardie concurs. See Hardie, above n 53, 192-5. Ross calls it ‘remedial’ justice. See Ross, above n 53, 211.

<sup>67</sup> Aristotle, *Nicomachean Ethics*, above n 49, 1132a7-1132b9.

<sup>68</sup> Others who notably have considered distributive shares to be a central feature of justice include Brandt, above n 16, 306-26; J R Lucas, *On Justice* (1980) 163-84; John Rawls, *A Theory of Justice* (1971) 4-11, 60-108, 258-332. On the differences between what Aristotle and Rawls each mean by distributive justice, see Paul Ricoeur, *The Just* (David Pellauer trans, 2000) 36-8, 44-6, 52.

<sup>69</sup> See Rawls, above n 68, 258-84.



needs like potable water sought for life. But distributive justice does not encompass the whole of legal justice. Theories that attempt to describe criminal justice on a distributive model strain credulity. Fair punishment for criminal wrongdoing often may reflect proportionality. But the decision to impose punishment in the first place cannot be justified by appeal to distributive considerations. As stated by Rawls, 'To think of distributive and retributive justice as converses of one another is completely misleading and suggests a different justification for distributive shares than the one they in fact have.'<sup>70</sup>

Aristotle nonetheless treated remedial justice, including rectification by way of criminal punishment, as derivative from distributive justice. The goal of remedial justice on his account is to restore distributive proportionality.<sup>71</sup> This, as Rawls notes, provides a misleading account of justice. *The Chinago* highlights this. Ah Cho's execution was obviously disproportional punishment. He did no wrong. Any punishment was more than he deserved. Even if his conviction and twenty-year sentence were seen to result from a fair (if misguided) trial, his beheading went beyond the magistrate's determination of a just sentence. His execution warrants condemnation as a sad mockery of justice under law. Yet to frame that condemnation in terms of distributive justice sounds hollow and irrelevant. It places an insensitive actuarial value on both human life and justice's virtue.

### C. MOTIVE

The second difficulty in using Aristotle's virtue-centred theory of justice to assess *The Chinago* comes from Aristotle's insistence that acts of injustice be accompanied by a specific motive. In the *Nicomachean Ethics* Aristotle argued that a specific motive or emotion must be understood to accompany every moral virtue.<sup>72</sup> The motive that attends desire for social goods and hence underlies all acts bearing on particular justice is 'the pleasure that comes from profit.'<sup>73</sup> When that desire is properly in check and a person takes for himself and gives to others a fair share, he is just. Conversely, the person who divides goods unfairly and disproportionately is unjust. His motive is not the pleasure that attends receiving a fair profit, but *pleonexia*, a desire for gain unchecked, avarice. Aristotle wrote:

<sup>70</sup> Ibid 315.

<sup>71</sup> See Aristotle, *Nicomachean Ethics*, above n 49, 1131b25-1132b12.

<sup>72</sup> On the importance for Aristotle's doctrine of the mean that he identify a specific emotion to characterise every moral virtue, and the adequacy of his discussion of justice in this regard, see J O Urmson, 'Aristotle's Doctrine of the Mean' in Amelie O Rorty (ed), *Essays on Aristotle's Ethics* (1980) 157.

<sup>73</sup> Aristotle, *Nicomachean Ethics*, above n 49, 1130b4-5.

if one man commits adultery for profit and makes money on it, while another does it at the prompting of appetite ... the latter would seem to be self-indulgent rather than grasping for a larger share, while the former is unjust but not self-indulgent ... Further, we usually ascribe all other offenses to some particular wickedness, eg, adultery to self-indulgence, deserting a comrade-in-arms to cowardice, and assault to anger; but making unjust profit is not ascribed to any wickedness other than injustice.<sup>74</sup>

The unjust person thus violates proportionality through deliberately taking more than his fair share. Yet '[d]oing unjust things', Aristotle argued, 'is not the same as acting unjustly'.<sup>75</sup> Every instance of injustice implies an unjust action; but not every unjust action implies injustice.<sup>76</sup> Only unjust acts performed by a person of unjust character, driven by the motive of *pleonexia*, can be said without qualification to produce injustice.

This is to say that on Aristotle's account judgments going to justice and injustice address two dimensions – the outcome of the action and the character of the agent, including his motives. The first dimension identifies the broad, unfiltered category of actions that produce unfair distributive outcomes. The second dimension narrows the categorical reach of the first by taking into consideration the character of the agent and the conditions under which he acted. Aristotle thought, first of all, that injustice is realised only in unjust acts that are voluntarily performed.<sup>77</sup> The act must have been (i) within the agent's power to perform, (ii) done in full knowledge of the circumstances, and (iii) free of compulsion or constraint.<sup>78</sup> Some unjust distributions result from involuntary actions. A person acts involuntarily if he acts in ignorance (without knowledge), under compulsion (without power to do otherwise), or otherwise without choice.<sup>79</sup> Although involuntary acts may create unjust distributions, Aristotle did not consider them unjust, except in an incidental sense.<sup>80</sup> Other unjust distributions derive from actions performed not strictly in ignorance – hence not fully involuntary – yet where the agent acted without full knowledge of the consequences. Aristotle distinguished here between mishaps and mistakes. Mishaps include injuries (unjust distributions) that run contrary to reasonable expectations.<sup>81</sup> Mistakes are injuries that do not directly oppose

<sup>74</sup> Ibid 1130a24-32.

<sup>75</sup> Ibid 1136a27.

<sup>76</sup> See *ibid* 1134a31-2.

<sup>77</sup> Ibid 1135a16-17, 20.

<sup>78</sup> Ibid 1135a23-8.

<sup>79</sup> Ibid 1135a31-4.

<sup>80</sup> Ibid 1135a17-19.

<sup>81</sup> Ibid 1135b17.

reasonable expectations, but nonetheless are not the product of intentional desire to create an unjust distribution.<sup>82</sup> Aristotle does not appear to consider acts precipitated by mishap or mistake to be unjust.

Further, to Aristotle the degree of injustice depends on premeditation. Some unjust acts are performed without prior deliberation. A person may, for example, be so driven by sexual desire as to knowingly bring about an unjust distribution. Because the outcome is unjust and the agent acts knowingly and by choice, the act is unjust. But Aristotle did not consider the agent, as a result of the action, to be an unjust person.<sup>83</sup> For while his act is unjust, it is so only incidentally. His motive is physical self-indulgence. This is to be contrasted with those unjust acts that follow deliberation motivated by desire to get more than one's due share.<sup>84</sup> Such premeditated acts are not only performed voluntarily (knowingly and by choice), but also for the purpose of achieving an unjust distribution.<sup>85</sup> To Aristotle, this last category of acts – unjust actions deliberately chosen – are wicked, and their agents essentially unjust.<sup>86</sup> An unjust person, that is, is one who *chooses* to act unjustly.<sup>87</sup> It is here that Aristotle attributed the motive of *pleonexia*. The choice the unjust person makes is purposefully to act against proportion in hopes of receiving unfair gain, more than his share, or to give to another less than he or she deserves.

Now the difficulty comes in the gradations of wrong Aristotle assigned to acts of injustice. True injustice on his account only results from actions that are unjust both in outcome and motive. The act must result in a proportionately unfair distribution of social advantages and be the product of the untoward motive of *pleonexia*. Yet as Bernard Williams argues, Aristotle's focus on *pleonexia* seems unnecessary.<sup>88</sup> Williams contends that no one motive should be required (or can account) for the character vice of injustice. It is enough for a person to display the disposition of 'settled indifference' to injustice.<sup>89</sup> While unjust acts often are accompanied by a troublesome motive, whether *pleonexia* or some other such as fear, lust, or anger, Williams maintains that such motives are unnecessary. They do not add to or take away from the essential justice or injustice of an act. Settled indifference suffices for injustice.

---

<sup>82</sup> Ibid 1135b18.

<sup>83</sup> See *ibid* 1135b19-24.

<sup>84</sup> See *ibid* 1135b9-10.

<sup>85</sup> *Ibid* 1135b8-9.

<sup>86</sup> See *ibid* 1135b24-5.

<sup>87</sup> *Ibid* 1135a16-17; 1136a1-2.

<sup>88</sup> See Bernard Williams, 'Justice as a Virtue' in Amelie O Rorty (ed), *Essays on Aristotle's Ethics* (1980) 189, 198-9.

<sup>89</sup> *Ibid* 199.

Aristotle's mistake, according to Williams, came from thinking that justice could be brought within his doctrine of the mean as one among all the other character virtues. It became at best a forced fit. To make it work, Aristotle needed a specific motive to associate with acts of injustice. Yet on Williams' account, no one motive accompanies unjust action. For injustice is a vice different in kind from all others, in that it stands for a disposition that cannot be identified with any specific emotion or motive. Hence, Aristotle's insistence on the motive of *pleonexia* was bound to lead to an unsatisfying theory of justice.

Williams' argument appears sound. Yet it goes to particular justice only. Nonetheless, it bears importantly on universal justice. As noted above, Aristotle thought that justice in the legal realm should be understood by reference to the ethical notion of particular justice. It would seem to follow that injustice in the legal sense, as in the ethical, thus requires deliberation, choice, and an unseemly motive. The wrongful motive, however, need not be *pleonexia*. Since universal justice embraces all the moral virtues, it is not tied exclusively to the motive that Aristotle associated with particular injustice. Any of the motives of vice that he linked with immoral conduct could count. The point remains, though, that there must be *some wrongful or unethical motive* that prompts the deliberative choice underlying actions that would be said to constitute legal injustice.

Williams' criticism of Aristotle thus seems fully applicable to universal justice. And it exposes a serious weakness in Aristotle's theory and, more generally, with the virtue-centred approach to understanding justice. For requiring a wrongful motive and focusing on the character of those who act unjustly seems inapposite to assessing injustice in the legal realm. The injustice of Ah Cho's execution does not depend on the motives of his antagonists. Their lack of an untoward motive matters not a whit. Ah Cho noted that himself. On the scaffold he recalled the maxim: 'Forgive malice'. Yet he dismissed it, recognising its irrelevance. None of those involved in his demise – the Chief Justice, Schemmer, the sergeant, Cruchot – acted from a wanton motive or deliberate desire to harm him. 'Schemmer and the rest', Ah Cho mused, 'were doing this thing without malice. It was to them merely a piece of work that had to be done'.<sup>90</sup>

Within the framework of Aristotle's virtue-centred system, the execution of Ah Cho thus would count only as a most mild act of injustice. The Chief Justice did not deliberately misspell Ah Chow's name. He was not even aware of his error. An Aristotelian would classify his act as either involuntary due to ignorance or an unintentional mistake. Either way, it would sound in injustice only incidentally. Schemmer, the sergeant, and Cruchot all acted voluntarily and with knowledge that a mistake (of some

---

<sup>90</sup>

London, above n 1, 29.

*unknown* origin) had occurred. None of them acted from prior deliberation though. None acted maliciously. Schemmer was driven by responsibility – perhaps misplaced, but a sense of duty nonetheless. He epitomised the chief attribute of the ‘white devils’: efficiency. The sergeant, less duty-bound, was moved by impatience and lust (self-indulgence). Ah Cho was to him an inconvenience. Yet no noxious motive directed toward Ah Cho stirred him to proceed with the execution. The only driving force, if it can be considered that, was indifference.

Williams’ suggestion that settled indifference to injustice is just as worrisome as the reprobate motive of *pleonexia* thus seems borne out by *The Chinago*. Yet Williams does not state strongly enough the weakness in Aristotle’s theory. For it is not just that Aristotle erred in requiring the malicious motive of *pleonexia* when settled indifference to injustice is enough. Rather, any emphasis on dispositional state or motive is misplaced. And it is unfortunate. For it marginalises the victims of injustice by treating them as mere objects. Their identities, characters, and moral desert count for nothing in evaluating the injustice of an act, even though the characters and motives of the agents of injustice do influence the assessed measure of social condemnation. Such an approach stands counter to our intuitions. The fact that the Chief Justice acted without intent does not mitigate the injustice *as to Ah Cho* caused by his mistaken scrawl. That Schemmer and the sergeant acted from settled indifference rather than malice aforethought did not lessen the sharpness of the guillotine’s blade as it struck Ah Cho. Further, Cruchot did not even manifest an indifferent dispositional state. He was troubled by the wrong he helped perpetrate. He felt remorse. Yet he also felt powerless. Disturbed, he reasoned through his moral dilemma to a resolute whipping the horses to a faster gait. Neither *pleonexia* nor indifference tightened his grip on the reigns. Fear and self-preservation did. His role in the execution of Ah Cho was the product of a weak, all-too-human will incapable of rising above the sorry colonialist norms of economic exploitation, racial inequality, and cultural superiority.

Still, these considerations bearing on the dispositional states of these agents of wrongdoing do not lessen the injustice borne by Ah Cho. For as Paul Ricoeur puts it, ‘The cry of injustice is the cry of the victim.’<sup>91</sup> We can agree with Ah Cho that Schemmer and the sergeant acted from indifference, not malice. We can and should feel sympathy toward Cruchot as a pawn in a cruel colonial world. But no such considerations diminish the outrageousness of Ah Cho’s execution. If anything, they exacerbate it. For they highlight how routine injustice can become and how readily we rationalise on behalf of its casual perpetrators.

---

<sup>91</sup> Ricoeur, above n 68, 54.

## V. Fallacy of Flawed Intellectualism

Whether the approach is act-centred or virtue-based, philosophic analysis of the execution of Ah Cho thus results in theoretic dissonance. Standard philosophical accounts of justice cannot align with or provide adequate theoretical explanations for the injustice that our intuitions so readily perceive. How can we account for this failure of philosophical theory? I suggest that the answer lies in what the early pragmatist philosophers characterised as the fallacy of flawed intellectualism.

The early pragmatists, particularly William James and John Dewey, put great stock in theoretical concepts. They thought abstract concepts – such as the concept of justice – possess great practical and epistemic value. Though they were robust empiricists, the pragmatists saw theoretical concepts as intellectual tools for the ‘straightening of the tangle of our experience’s flux and sensible variety’.<sup>92</sup> James declared that, ‘Both theoretically and practically this power of framing abstract concepts is one of the sublimest of our human prerogatives.’<sup>93</sup> As Dewey put it, abstract thinking ‘is necessary ... to the *emancipation* of practical life’.<sup>94</sup> Theoretical concepts allow us to assimilate past experiences, anticipate the future course of experience, and live and interact with one another under the orderly structure of general rules. That is, concepts begotten of ‘the sensible flux of the past’ provide inestimably useful knowledge for predicting in the ‘future flux ... what particular thing is likely to be found there’.<sup>95</sup>

Yet the early pragmatists warned that concept formation can lead to abuse and error. From the time of the ancient Greeks, Western philosophy has been captivated by the notion that reality is comprised of essences, not appearances, and that there exists a realm of ideal supersensible objects accessible only through the gateway of pure thought. The pragmatists did not consider belief in essences problematic *per se*. Philosophical error arises when essences become juxtaposed to the concrete data of experience as pure, immutable, and definite structures designed to sanitise the ‘muddy

---

<sup>92</sup> William James, *Pragmatism* (first published 1907, 1975 ed) 87.

<sup>93</sup> William James, *A Pluralistic Universe* (1909) 217.

<sup>94</sup> John Dewey, *How We Think* (first published 1910, 1991 ed) 139, reprinted in John Dewey, *The Middle Works, 1899-1924* (1978) vol 6, 289 [hereinafter references to this and other works by Dewey that are readily available in a common original edition as well as in a scholarly edition of his collected works will be by parallel citation, first to the original version, followed by the scholarly edition using the standard convention of volume and page number]; John Dewey, *How We Think: A Restatement of the Relation of Reflective Thinking to the Educative Process* in John Dewey, *The Later Works, 1925-1953* (first published 1933, 1986 ed) vol 8, 296 [hereinafter Dewey, *How We Think: A Restatement*].

<sup>95</sup> James, *A Pluralistic Universe*, above n 93, 246.

particulars of experience'<sup>96</sup> that constitute our 'world of low grade reality.'<sup>97</sup> The error is aggravated when the relationship between concept and percept is inverted – that is, when data from the originally rich phenomena out of which an essential ideal was abstracted is 'relegated to a position inferior in every way to that of [theoretical] knowledge,'<sup>98</sup> and expurgated from the concept's extension as lying outside its rigid definitional boundaries.<sup>99</sup> James described this fallacy, which he labelled 'vicious abstractionism',<sup>100</sup> as follows:

The misuse of concepts begins with ... using them not merely to assign properties to things, but to deny the very properties with which the things sensibly present themselves. Logic can extract all its possible consequences from any definition, and the logician ... is often tempted, when he cannot extract a certain property from a definition, to deny that the concrete object to which the definition applies can possibly possess that property. The definition that fails to yield it must exclude or negate it. ...

It is but the old story, of a useful practice first becoming a method, then a habit, and finally a tyranny that defeats the end it was used for. Concepts, first employed to make things intelligible, are clung to even when they make them unintelligible.<sup>101</sup>

James deemed this fallacy of intellectualism to be 'one of the great original sins of the rationalistic mind.'<sup>102</sup> Dewey was convinced that it suppresses and deadens our ability to understand and develop practical responses to the realities we experience daily.<sup>103</sup> Abstract concepts may well hold great practical value, but they do not reveal a deeper understanding of reality or

<sup>96</sup> James, *Pragmatism*, above n 92, 110.

<sup>97</sup> Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (1929) 35, reprinted in John Dewey, *The Later Works, 1925-1953* (1984) vol 4, 28.

<sup>98</sup> Ibid.

<sup>99</sup> See William James, *The Meaning of Truth* (first published 1909, 1975 ed) 135-6.

<sup>100</sup> Ibid 135.

<sup>101</sup> James, *A Pluralistic Universe*, above n 93, 218-9.

<sup>102</sup> James, *The Meaning of Truth*, above n 99, 136.

<sup>103</sup> See Dewey, *The Quest for Certainty*, above n 97, 36, *Later Works* 4:29; John Dewey, 'The Logic of Judgments of Practice' in *Essays in Experimental Logic* (1916) 436, reprinted in John Dewey, *The Middle Works, 1899-1924* (1979) vol 8, 14, 79.

truth than that found in perceptual experience;<sup>104</sup> nor does abstract thought amount to a 'higher type of thinking than practical.'<sup>105</sup> Theoretical concepts are merely 'thin extracts from perception,'<sup>106</sup> portraying nothing more than 'skeletonized abstraction[s]'<sup>107</sup> that we create 'in the interests of practice essentially and only subordinately in the interests of theory.'<sup>108</sup> James reproached those who think we can explain reality by way of theory alone, for in their 'imperfect and ministerial forms of being,'<sup>109</sup> theoretical concepts 'touch[] only the outer surface' of the experiential realm from which they were abstracted.<sup>110</sup> To truly apprehend reality we must 'return to empirical ground'<sup>111</sup> – '[d]ive back into the flux [of sensible experience] itself'<sup>112</sup> – for only there do we find the true domain of reality.

James and Dewey thus concurred that our practice of crafting and living according to abstract concepts must be recognised for what it is: 'an outgrowth of practical and immediate modes of thought, but not a substitute for them.'<sup>113</sup> So understood, theory-making can fulfil its promise as a highly worthwhile practice, one that emancipates practical life through a 'securer, freer and more widely shared embodiment of values in experience'.<sup>114</sup> Theories carry out this enabling function by extracting from personal and specific contexts those particular features of experience that are so salient, recurrent, and continuous as to stand out.<sup>115</sup> As Dewey put it, a 'theory means a system of objects detached from any particular personal standpoint,

---

<sup>104</sup> See William James, *Some Problems of Philosophy: A Beginning of an Introduction to Philosophy* (1911) 97.

<sup>105</sup> Dewey, *How We Think*, above n 94, 142, *Middle Works* 6:291; Dewey, *How We Think: A Restatement*, above n 94, *Later Works* 8:299. Accord John Dewey, *Experience and Nature* (first published 1929, 2<sup>nd</sup> ed, 1958) 107, reprinted in John Dewey, *The Later Works, 1925-1953* (1981) vol 1, 90 (arguing that there is 'no reason for making contemplative knowledge or any other particular affair the highest of all natural ends.').

<sup>106</sup> James, *Some Problems of Philosophy*, above n 104, 97.

<sup>107</sup> James, *The Meaning of Truth*, above n 99, 141.

<sup>108</sup> James, *A Pluralistic Universe*, above n 93, 244.

<sup>109</sup> James, *Some Problems of Philosophy*, above n 104, 109.

<sup>110</sup> James, *A Pluralistic Universe*, above n 93, 250.

<sup>111</sup> John Dewey, 'Introduction' in *Essays in Experimental Logic* (1916) 1, 47, reprinted as John Dewey, 'Introduction to Essays in Experimental Logic' in John Dewey, *The Middle Works, 1899-1924* (1980) vol 10, 320, 349.

<sup>112</sup> James, *A Pluralistic Universe*, above n 93, 252.

<sup>113</sup> Dewey, *How We Think*, above n 94, 142, *Middle Works* 6:291. Accord Dewey, *How We Think: A Restatement*, above n 94, *Later Works* 8:299 (describing theorising as 'an outgrowth of thinking on practical and immediate matters, but not a substitute for it.').

<sup>114</sup> Dewey, *The Quest for Certainty*, above n 97, 37, *Later Works* 4:30.

<sup>115</sup> See James, *A Pluralistic Universe*, above n 93, 235.



and therefore available for any and every possible personal standpoint.<sup>116</sup> Detaching and depersonalising the concrete facts of everyday experience frees us to reattach them in the 'largeness and imaginativeness' of new systematic modes of understanding.<sup>117</sup> Again, Dewey: 'For the purpose of day by day *action*, the sole value of a theory is the significance given to concrete events, when they are viewed in the light of the theory, in the concrete relations they sustain to one another.'<sup>118</sup>

## VI. Symptoms of Injustice

The power of Jack London's *The Chinago* comes in how forcefully its troubling, muddy facts return us to the empirical ground of normative judgment. Perhaps David Hume was right all along – that our moral intuitions or sentiments provide the empirical ground and true measure of the right, the good, and the just.<sup>119</sup> For it is our moral intuitions or sentiments that declare the execution of Ah Cho to be an unblemished wrong. And it is the unwavering conviction of that intuitive judgment that makes the case of Ah Cho the very sort of salient situation that stands out as paradigmatic of injustice and strikes such a discordant note with traditional justice theory.

The failure of standard philosophic theories of justice to account for the injustice that looms so large in London's sad tale is representative of the intellectualist fallacy. Instead of providing an imaginative and widely shared embodiment of values drawn from experience, traditional justice theory – whether act-centred, like the theories of Mill and Kant, or virtue-based as with Aristotle – has become so definitionally fixed as to exclude the very 'muddy particulars of experience'<sup>120</sup> that provide the phenomenological basis from which the concept of justice in its various theoretical forms was first abstracted. This exclusion elevates those 'skeletonized abstraction[s]'<sup>121</sup> above the very structures of experience they were meant to portray. Indeed, it renders that experiential data, such as the facts of Ah Cho's mistreatment and the manifest weight of our intuitive convictions, unintelligible and irrelevant.

<sup>116</sup> Dewey, 'The Logic of Judgments of Practice', above n 103, 440, *Middle Works* 8:81.

<sup>117</sup> Dewey, *How We Think*, above n 94, 139, *Middle Works* 6:289.

<sup>118</sup> John Dewey, *Freedom and Culture* (first published 1939, 1989 ed) 78, reprinted in John Dewey, *The Later Works, 1925-1953* (1988) vol 13, 132.

<sup>119</sup> See Hume, *An Enquiry Concerning the Principles of Morals*, above n 52, 13-16, 82-8; David Hume, *A Treatise of Human Nature* (2<sup>nd</sup> revised ed, first published 1888, 1978 ed) 455-76, 496.

<sup>120</sup> James, *Pragmatism*, above n 92, 110.

<sup>121</sup> James, *The Meaning of Truth*, above n 99, 141.

Avoiding these unhappy implications of intellectualism requires calling into question the theories that stand at variance to the concrete data of experience. It may be that the best way to reconcile justice theory with the Londonian counter-example would be to modify subtly one or another of the fundamental principles meant to connote the concept of justice or rarefy the conditions, necessary and sufficient, presumed to denote its extension. That is more than I can attempt here. Instead, I will risk the tentative suggestion that there are certain characteristic symptoms of injustice that, when present, serve as indicia of an unjust state of affairs. What I have in mind are familiar symptoms. Injustice is associated with social action that imposes, on one or more individuals, positive harm or suffering that bears the symptomatic marks of being (1) undeserved; (2) disproportionate; (3) random; (4) disassociated from the victim's personal ends; (5) deprivative of freedom or liberty; (6) based on characteristics over which the victim has no control; (7) contrary to overall human well-being; or (8) the product of offensive motives, incentives, or dispositional states.

The first symptom draws from the fact that, in matters of justice, moral desert matters. Suffering undeservedly is one of the most familiar indicators of injustice. It figures prominently in many theories of justice.<sup>122</sup> The disgust London's story stirs in our moral sentiments comes foremost from the fact that Ah Cho's suffering was entirely undeserved. The magistrate sentenced him to twenty-years' imprisonment for a crime he did not commit. That he was subsequently executed only aggravates the degree to which his punishment offends in terms of moral desert.

Second, a lack of proportionality between the consequences or effect of action on a person and his or her moral desert likewise commonly flags injustice. As discussed above, Aristotle emphasised this symptom.<sup>123</sup> It relates closely to moral desert, yet adds a distributive dimension. Aristotle, Rawls, and others have shown convincingly that right proportion in the distribution of social goods is a critical feature of justice. A lack of proportionality accordingly signals at least the possibility of injustice. Yet distributive justice, as Rawls notes, is different than rectificatory justice.<sup>124</sup> Responding to wrongful conduct through criminal punishment amounts to social action of a fundamentally different kind than the allocation of social

<sup>122</sup> See, eg, Aristotle, *Nicomachean Ethics*, above n 49, 1131a24-8; Geoffrey Cupit, *Justice as Fittingness* (1996) 35-63; Joel Feinberg, 'Justice and Personal Desert' in *Doing and Deserving: Essays in the Theory of Responsibility* (1970) 55-94; Kant, *The Metaphysical Elements of Justice*, above n 31, 331; Lucas, above n 68, 124-8, 137-8, 164-7, 170, 194-215; Mill, above n 14, 44; Sidgwick, above n 24, 279-83, 349-50, 445-7; Lloyd L Weinreb, *Natural Law and Justice* (1987) 10-11, 184-5, 194-209, 212-23.

<sup>123</sup> See Aristotle, *Nicomachean Ethics*, above n 49, 1131a29-1132b9.

<sup>124</sup> See Rawls, above n 68, 315. Accord Sidgwick, above n 24, 280-3, 290-1.

goods, whether tangible or intangible. Proportionality also, though, factors in criminal punishment as a measure ensuring that the severity of punishment corresponds with the gravity of the offense.<sup>125</sup> Yet even here all considerations of proportionality are inapposite in Ah Cho's case, rendered moot by the outright absence of moral desert.

A third common symptom of injustice is randomness in the infliction of social harm or the allocation of social benefits. In the words of Henry Sidgwick, '[I]n laying down the law no less than in carrying it out, all inequality affecting the interest of individuals which appears arbitrary, and for which no sufficient reason can be given, is held to be unjust.'<sup>126</sup> Ah Cho's initial twenty-year sentence was unjust because it imposed undeserved suffering. But it was the product of deliberate and reasoned social action. It followed a trial procedure designed with fairness in mind and justice as its purported end. His eventual execution was arbitrary in addition to undeserved. It was the product only of happenstance in the similarity of names. From an Aristotelian point-of-view, the involuntariness or mistake that led to the execution mitigates the degree of injustice. Our intuitions clamour otherwise. Randomness in the imposition of severe social harm exacerbates the degree of injustice we feel, not the opposite.

Fourth, suffering personal harm from social action done strictly to benefit others, including society-at-large, likewise signals unjust treatment. This is the Kantian symptom. As discussed above, Kant famously posited that it is morally wrong to treat a person simply as a means and not as an end as well. He extended this precept to rectificatory justice by insisting that punishment under law should be imposed only when deserved and in strict accordance with the Law of retribution. This symptom thus dovetails moral desert. It underscores why punishing undeservedly is so morally wrong. It also supplements proportionality, for the Law of retribution rests on a principle of unsparing 'equality between the crime and the retribution.'<sup>127</sup> Further, this Kantian consideration calls into question whether deterrence is a just basis for imposing criminal punishment. To punish for the end of preventing future wrongdoing, whether by the offender (specific deterrence) or others (general deterrence), is to use the offender merely as a means toward achieving beneficial social consequences. To Kant, this is unjust.<sup>128</sup> Yet his strict retributivist position is unusual. Many who have written on criminal justice consider deterrence a

---

<sup>125</sup> See, eg, Bentham, above n 22, 178-88; Kant, *The Metaphysical Elements of Justice*, above n 31, 332-4; Lucas, above n 68, 143, 147-8; Sidgwick, above n 24, 290-1.

<sup>126</sup> Sidgwick, above n 24, 267-8.

<sup>127</sup> Kant, *The Metaphysical Elements of Justice*, above n 31, 333.

<sup>128</sup> See *ibid* 331-2. Accord Cupit, above n 122, 155-7.

legitimate basis for punishing.<sup>129</sup> Whether it is or not, it is unlikely that deterrence-based punishment presumptively upsets our moral sentiments. Nonetheless, given how the Kantian end-in-itself symptom complements moral desert and proportionality, it adds importantly to our ability to diagnose injustice. In the case of Ah Cho, it augments our intuitive conviction that he was treated unjustly. For his punishment was undeserved in the most abject of ways – he was selected at random to be used, in a manner to which he could not possibly give assent, as a mere means to benefit others.

A fifth common indicator of injustice is found in action that deprives a person or group of persons of basic freedoms or liberty. This is to recognise, as many have before, that the sentiment of justice can become agitated when individual rights, legal or moral, have been infringed.<sup>130</sup> The infringement can come through deprivation of a legal right or from legally-sanctioned withholding of a moral right (as through enforcement of an ‘unjust law’). Either way, this symptom presents a cardinal sign of injustice. It is a sign that carries especial force in modern Western societies where constitutional and human rights feature prominently in political discourse. As to *The Chinago*, it unequivocally confirms our intuitions of Ah Cho’s mistreatment. Yet it adds little not intuited already from the symptoms previously discussed. For regardless whether Ah Cho had a right, legal or moral, not to be treated as he was, his colonial masters’ random, undeserved use of him merely as a means strikes us as grossly unjust.

Sixth, injustice often is associated with action that inflicts social harm or awards benefits on the basis of characteristics over which individuals have no control.<sup>131</sup> This symptom draws from the fact that, to varying degrees, discriminatory conduct offends. The offense, though, is distinctly relative. What counts as objectionable discrimination in one time and culture can be viewed as fully acceptable differential treatment in another. Hence, this symptom is less universal than many of the others. Just in the United States, immutable characteristics such as race, gender, ethnicity, age, disability, and sexual orientation that today mark off protected classes were only a century ago (or less) perfectly acceptable grounds for according differential treatment. The recurrent refrain from London’s story, ‘He is

<sup>129</sup> See, eg, Bentham, above n 22, 173-88. See also Cupit, above n 122, 155 (noting that in searching for justifications of punishment, the ‘most familiar purpose is deterrence.’).

<sup>130</sup> See, eg, Mill, above n 14, 42-3.

<sup>131</sup> See Ronald Dworkin, *Law’s Empire* (1986) 374-6; Ronald Dworkin, *Taking Rights Seriously* (1977) 223-39; Rawls, above n 68, 118-61, 504-12; Weinreb, above n 122, 161-82.

only a Chinago',<sup>132</sup> reflects the wretched yet commonplace racial and ethnic elitism so characteristic of European colonialism. Today such dismissive rhetoric sounds a discriminatory note that offends our intuitions of justice and ratifies the sentiment declaring Ah Cho's treatment to be unjust.

Seventh, sometimes the effect of action on overall human well-being can serve as an indicator of injustice. Dewey noted that it is inherently difficult to conceive of justice without taking into consideration how actions impact human well-being.<sup>133</sup> The previous symptoms all go to the well-being of the individuals who personally suffer injustice. This symptom – the utilitarian factor – concerns how actions affect the well-being of society as a whole. To Mill, this factor represents the apogee of the sentiment of justice.<sup>134</sup> It is questionable, however, how reliable general utility actually is as a measure of injustice. For in part it seems unclear how this utilitarian consideration can lead to an understanding of justice as distinct from ethics. Moreover, as noted earlier, it at best leads to an ambiguous assessment in Ah Cho's case. The utilitarian standpoint could well suggest that the treatment accorded Ah Cho by his colonial lords of life actually satisfied justice. For Ah Cho was but a beast of burden, a cheap and beholden immigrant labourer. His presence in Tahiti was singular; he was there to serve the English agricultural concern. Utilitarianism would determine the justice or injustice of his execution by measuring his fate against the overall well-being of the colony. It would require taking into account the discrete interests of all – from the local European masters, the cotton plantation's English investors, and the French colonial administrators to the hundreds of remaining Chinese workers and the displaced Tahitian natives. Measured against this collective array of interests, Ah Cho's rights and well-being weigh faint and inconsequential. The substantial weight of general utility lay in the deterrent value of making an example of one Chinago toward the ends of law and order, profit and efficiency, together with the collective self-interest of the other workers who wanted only to be spared themselves so they could return to the fields and eventually go home to China and build their own dream-gardens of serenity and repose.

Finally, determinations of injustice can be augmented by an Aristotelian finding that the agent of an unjust act was driven by a contemptible motive. Though our moral sentiments run counter to Aristotle's claim that the motive of *pleonexia* is required for truly unjust action, a finding that offending conduct is the product of an odious motive, or even apathy or feckless disregard for others' well-being can add an

---

<sup>132</sup> See London, above n 1, 19 ('He was only a Chinago'), 25 ('It was only a Chinago'), 28 ('It is only a Chinago'), 29 ('He is only a Chinago').

<sup>133</sup> See John Dewey, *Ethics* in John Dewey, *The Later Works, 1925-1953* (2<sup>nd</sup> ed, first published 1932, 1985 ed) vol 7, 250.

<sup>134</sup> See Mill, above n 14, 49-54.

additional element of disgust to the sentiment of injustice.<sup>135</sup> Thus, the licentious impatience that drove the sergeant to sanction the beheading of an innocent man does trigger aversion. Such callousness does not, however, provide an independent basis for finding injustice. No more so can a detestable motive like avarice or hatefulness. For such factors tied to a wrongdoer's character cannot establish injustice in the first instance. The sergeant's lust-driven indifference tragically underscores how needless was the wasting of Ah Cho's life and how insignificant would have been the cost of averting it. Yet had the sergeant, along with Schemmer, been motivated strictly by firm belief in the deterrent need to achieve prompt recompense for the killing of Chung Ga, Ah Cho's execution would have been no less unjust. The moral states of the agents of injustice, in other words, are only supplementary to judgments of injustice. More than anything, they speak to the degree of punishment or social condemnation the transgressors of justice are due.

## VII. Conclusion

Justifying judgments of injustice is difficult. Jack London's melancholy tale of justice scorned in an erstwhile South Pacific island paradise evokes repugnance. Intuitively, we know the execution of Ah Cho is unjust. We do not need justice theory to tell us that. Philosophy could be of service, though, if it could provide a justificatory account of that unassailable judgment. In the form of traditional justice theory, it cannot. No matter whether the approach is act-centred, as with Kant and utilitarianism, or virtue-based in the tradition of Aristotle, philosophic theories of justice fail to give adequate justificatory reasons for our conviction that Ah Cho's execution was flat out unjust. At best justice theory creates ambiguity and misgivings about the reliability of that intuitive judgment. At worst it opposes our intuition outright, casting a hesitating shadow of theoretic approval over the sequence of gnarly events leading to Ah Cho's untimely demise.

Like the early pragmatists, I find that the best response to such incongruence between philosophic theory and empirical life is to look with apprehension at the discordant theories. I have argued that the mismatch between justice theory and the empirical data of our moral sentiments is attributable to the fallacy of flawed intellectualism. Justice is a concept by which we measure our mistreatment of one another. It derives from shared sentiments of approbation and outrage, admiration and disgust. The function of justice theory is to embody and reinforce – or perhaps even to

---

<sup>135</sup> See, eg, Mill, above n 14, 50-1. Cf Kant, *The Metaphysical Principles of Virtue*, above n 40, 460 (observing that vices evincing a hatred of humankind, such as malice, are 'the direct opposite of loving one's neighbor, which is incumbent upon us as a duty.').

improve upon – the values found experientially in our sense of justice, abstracting from those somewhat chaotic particulars an orderly structure of general social precepts. The lesson that comes from London's doleful tale is that traditional justice theory, in the interest of theoretic neatness and definitional clarity, has distanced itself from the muddy empirical ground where our intuitions of justice kick about. Ah Cho's mistreatment seizes our intuitions with a revulsion that justice theory just cannot grasp.

Instead of labouring with this intellectualist tension, I have suggested that we can best make sense of our intuitions regarding Ah Cho's story by focusing on several symptoms of injustice. The symptoms I identified, eight in number, are characteristic signs that commonly accompany states of affairs we judge to be unjust. The presence of several in the case of Ah Cho provides a compelling basis for our intuitive judgment. His execution was entirely undeserved, inflicted randomly, against his human entitlement not to be treated simply as a means, and in violation of his moral right not to be punished on account of an immutable trait, his ethnic identity. Further, the miscreant agents of his abuse acted not out of substantial need but only from impatience and cold indifference. In combination these symptoms make the tumult Ah Cho's story rouses in our sentiment of justice readily understandable.

Still, the symptoms I have identified do not define injustice. Their presence, any one or all, does not establish a state of affairs as necessarily unjust. Nor does the absence of one or even all prove that justice is satisfied. For symptoms are merely hints. In terms of physical health, symptoms provide evidence of the possible presence of disease. In social life, they furnish reasons to support a finding of social disease, such as injustice. Ah Cho's execution details a story where the administration of law succumbs to acute infection. Yet it is not the symptoms that show Ah Cho to have been treated unjustly; our sentiment of justice does that. The symptoms supply reasons that allow us to understand why we intuit as we do. In that respect they perform the same justificatory role as traditional justice theory. Only the justification they provide is descriptive, not explanatory. And unlike justice theory, the symptoms cannot contravene our intuitions. For they are not fixed conditions meant to demarcate the boundaries of the just and the unjust and against which our intuitions are tested and measured, but factors that serve as *indicia* and describe the operation of those intuitions.

Philosophically speaking, framing justice as I have in terms of a loose collection of symptoms is less than fully satisfactory. A set of symptoms pitched as conditions supposed to be disjunctively necessary and conjunctively sufficient would provide a more robust demarcation of the boundaries of justice. But as we should have learned by now from Wittgenstein, most central concepts (and normative concepts perhaps most

of all) do not lend themselves to such rigid boundary lines.<sup>136</sup> This holds, I would argue, for the vague and unsettled frontiers of the just and the unjust. The concept of justice can only accommodate hazy boundaries. Efforts to enclose it within a rigid theoretical border, in the fashion of traditional justice theory, threaten reducing our intuitions to fleeting and unreliable instincts, however palpable they may appear beyond the shadowy light of justice theory. And they expose victims of injustice like Ah Cho to maltreatment readily rationalised and excused under the higher interests of theoretical consistency. Hence the lesson of *The Chinago* and the poignant footnote Jack London adds to justice theory.

---

<sup>136</sup> See, eg, Ludwig Wittgenstein, *Philosophical Investigations* (G E M Anscombe, P M S Hacker, & Joachim Schulte trans, first published 1953, revised 4<sup>th</sup> ed, 2009) [68-71, 76-7, 84].