

# The Idea of Justice in Climates of Change

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## 1.

The Idea of Justice has been percolating for some time.<sup>1</sup> The essays by Amartya Sen and George Anastaplo featured in this special issue derive from addresses presented at the John Jay College of Criminal Justice Third Biennial Literature and Law Conference, held in March of 2012 in New York City. The theme of that conference was The Idea of Justice, and it was dedicated to Sen's 2008 book of that title. Sen graciously agreed to deliver the keynote. The conference organizer, Andrew Majeske, who is also an editor of this journal, asked the late George Anastaplo to be the respondent. What ensued was a lively debate over the scope and meaning of justice, with Anastaplo taking a more local and conservative approach and Sen a more global one. Their contrasting views generated numerous provocative yet amiable exchanges. The collegiality had something to do with the academic context, but it may have also reflected the timing: the conference took place prior to most of the polarizing changes that have shaken the world over the past decade.

## 2.

The pertinent question in this debate is not always "what is justice?" but often also one of "where" it is, a geographical as much as a philosophical question. Sen's essay in this volume is entitled "Law and Ideas of Justice." A Nobel Laureate in Economics and an Emeritus professor at Harvard, Sen is famed for his work in economics (for which he won the 1998 Nobel Prize), especially relating to social choice theory. He is also well known for his social activism on behalf of women in the Global South.

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1. The author would like to thank James Dowthwaite and Andrew Gross for their help in composing this introduction.

George Anastaplo was a law professor and highly prolific scholar, particularly on matters relating to justice and jurisprudence. He became something of a *cause célèbre* for his principled opposition to questions about Communist party membership, posed to determine his eligibility for admission to the Illinois State Bar during the McCarthy era. Anastaplo was not a member of the Communist party, but he believed it was unconstitutional to restrict access to the law as a profession on the basis of political affiliation. His opposition, which went on to animate an unsuccessful ten-year struggle to become a lawyer, culminated in a 5-4 loss in the US Supreme Court “Bar Admission” case, *In Re Anastaplo*, 366 US 82 (1961). This case is addressed by Judge Jed Rakoff in his essay in this volume, “*In re Anastaplo Revisited—A Half Century Later.*”

Sen argues that while different people might have different ideas about justice, the sense of injustice is shared and widespread. This leads him to the conclusion that individuals, nations, and groupings of nation have the duty of remedying manifest injustices wherever they exist. He contends that wealthier nations also have a duty to help poorer ones if such aid will reduce the overall level of injustice in the world. The duty Sen posits to help others who are in need spans local/global as well as individual/nation divides. Sen buttresses these duties by aligning them with Jesus’ “story of the ‘good Samaritan’” and the words and actions of Guatama Buddha. The scriptural analogies are ecumenical because the claims are universal: Sen argues that all human beings should be considered as neighbors (*The Idea of Justice* 167-172). In effect, Sen seeks to localize the global—to make a community of the world (Sen, *Home in the World*, 96).

While Anastaplo could resist an injustice committed against him by drawing on the potentially universal principles of the *Declaration of Independence*, he did so in a local context, in an attempt to challenge and correct the missteps of his fellow citizens. It is no coincidence either that Anastaplo’s first published article was on Plato’s *Apology of Socrates*, a work in which Socrates defends his way of life and his philosophical vision to his fellow Athenians, or that both Socrates and Anastaplo were unsuccessful in their attempts and were punished (in different ways) by local authorities.

For Anastaplo justice is purely a local concern, even if the principles relied upon are universal in formulation. He considers justice to be limited to interactions and activities among those living within a particular society (including interactions with the government, institutions, and corporate entities). Anastaplo believes that rather than pursuing utopian visions of an unachievable global justice, we all would be better served by focusing our attention upon matters

of local concern among people who share core values, and for whom justice can have a common meaning. Accordingly, he views Sen's vision of justice, in which universal principles are applied globally, as fundamentally problematic. This debate about the scope of justice, relative to its meaning, dates back at least to Socrates' interrogation of Polemarchus in Plato's *Republic*, two and a half millennia ago.

Several contributions to this special issue directly address Sen, Anastaplo, and their debate. These include Kotzaro Suzumura's "Amartya Sen on Economics and Philosophy," which served to introduce Sen at the 2012 conference. Miriam Redleaf has contributed a letter about her father, George Anastaplo. Andrew Majeske's eulogy "In Memoriam: George Anastaplo," and Judge Jed Rakoff's reassessment of Anastaplo's Supreme Court case, mentioned above, also address the idea of justice in relation to its context and scope.

### 3.

The enduring appeal of achieving a global conception of justice persists, in part, because injustice is also global in nature. The climate change crisis is one obvious example that was on display at the UN COP27 summit in Cairo in November 2022. There the activist Zukiswa White, a South African campaigner for gender equity in climate policy, demanded that "poor nations" be compensated

for losses and damages already incurred in climate-fueled disasters, like floods or wildfires. We're moving from the premise this year that climate finance is not a matter of charity...but rather a matter of equity and justice, and that we're not asking anymore, simply saying: It's time to pay up. (Dickie and ShamsElDin)

Similar sentiments were expressed by the negotiator for Pakistan, Munir Akram, who said that "if there is any sense of morality and equity in international affairs," then a loss and damage fund was necessary. "This is a matter of climate justice," he concluded (Kaplan). White's call was also echoed by UN Secretary General António Guterres, who upon learning late in the COP27 conference that the EU had agreed to establish a loss and damage fund, noted "[t]his COP has taken an important step towards justice" (Dalton).

But the nations who are the largest past, present and likely future contributors to climate change were either not present at COP27, or they were not obligating themselves to contribute to the proposed "loss and damage" fund (Friedman). The United States is a prominent example of the latter. Nonetheless, there were some hopeful developments. Even prior to the surprise EU agreement to establish the

fund, some EU countries were beginning to develop global plans for climate justice. In 2021 Scotland became the first party to obligate itself to pay to the proposed loss and damage fund at COP26 held in Glasgow, and Ireland, Denmark and Belgium followed suit at COP27. President Xi of China has indicated he supports the proposed loss and damage fund, though he suggested China would not contribute to it. China's refusal to contribute is particularly vexing since the EU agreement was conditioned upon the requirement that wealthier developing countries like China contribute (Dalton, Meichtry, Said).

Meanwhile Switzerland (a European nation, but not an EU member), instead of contributing to such a fund, is paying poorer nations to cut emissions on its behalf (Hiroko). And the most pertinent response from the US was, in effect, to pass off the problem to the private sector, which is supposed to provide relief to poorer nations via mechanisms like carbon trading markets (Ramkumar and Shiflett). As noted by John Podesta, President Biden's senior advisor on climate change, "government funding alone can't cover most of what vulnerable countries need, private-sector capital flows...that's where the real money is..." (Halper and Puko). Consequently, while the US did not prevent the EU from establishing the loss and damage fund, it did not promise to contribute.

As Socrates discovered, of course, having an idea of justice does not necessarily succeed against the difficulties of political realities. The transnational (global) "equity and justice" appealed to by Zukiswa White does not always translate into local political contexts. This is even the case in liberal democracies such as the United States, where in November 2022 Republicans regained control of the House of Representatives, a body that would need to approve any US contributions to the fund. Just how difficult this would be is suggested by Paul Bledsoe, a climate adviser to President Bill Clinton who now teaches at American University:

the idea of paying climate reparations to distant nations would be an absolute political domestic disaster, and would cripple Mr. Biden's 2024 re-election chances. America is culturally incapable of meaningful reparations. Having not made them to Native Americans or African Americans, there is little to no chance they will be seriously considered regarding climate impacts to foreign nations. It's a complete non-starter in our domestic politics. (Friedman)

4.

That reparations are a non-starter politically does not mean that they are irrelevant to our idea of justice. Culture does play a role shaping the law, though perhaps not only in the way Podesta suggests. As Greta Olson notes in her book *From Law and Literature to Legality and Affect* (a review of the book and an interview with the author are featured in this issue), law is far more than the “state-based” promulgations most would take it to be. Law in her view should rather be considered as a reflection of the larger culture and as an expression of it—a view that resonates with Anastaplo’s. Law, for Olson, relates to how people feel about the legal culture within which they exist. It is noteworthy that what Olson describes as the “turn to passion” is evident also in Sen’s essay; Sen relies fundamentally upon peoples’ feelings about having been treated unjustly as a substitute for a difficult-to-achieve globally formulated conception of justice. Even the interdisciplinary of Law and Literature, which dates from the early 1970s, can “be understood as a form of legal critique and legal philosophy that imaginatively projects alternative legal orders or critiques existing ones” (125). Law, in other words, exists beyond courtrooms, legislatures, and jurisdictions, for instance in the narratives of injustice expressed in literature and criticism.

Mariana Torgovnick’s essay in this volume, “The Bomb and Climate Catastrophe in Fact and Fiction,” points to a shared sense of injustice and the difficulty of acting on it. What she calls the “empty city motif” has persisted in literature and film since the height of the cold war. The imagery has remained remarkably consistent, but the meaning may have changed. The empty buildings and streets that once evoked the horror of radiation poisoning, have now become an image of renewal for neo-Malthusians who see the salvation of the earth in a post-human future. What Torgovnick calls “thinking beyond the end” secularizes Judgement Day as nature’s justice, or justice after people, that is already being imaged in what she describes as pastoralism without the shepherds.

Potentially removing the shepherds asks troubling questions about the conception of justice. Is justice that which is beneficial to humanity alone? To what extent are human rights, natural rights? How natural are humans? How civilized is nature? Non-human animals are not currently holders of legal rights; however, the non-humans that are corporations do enjoy legal personhood, and legal rights, in the United States, are based on conceptions of natural rights that are not automatically extended to all people. Some of the ecological implications are sketched

above. Historically, these principles came into conflict during the Reconstruction, in different ways, when corporations, such as the railroads, were granted legal status under the equal protection clause, while African Americans were segregated in their carriages.

Torgovnick points out that end-of-world pastoralism often presents the possibility of interracial reconciliation against the backdrop of the end of the human race. This may seem like an odd feature, but it is not so surprising given the fact that race has always qualified equality in the United States, and therefore is often the subtext in the American experiment and its literature. James McBride's essay, "Walter Benjamin's *Critique of Violence*: The State, Police Violence, and Black Lives Matter," is pessimistic about the chances of correcting this basic defect. Social contract theory, originating with Locke, postulates a moment in pre-history when people voluntarily give up freedom in exchange for protection against random violence. McBride, drawing on Charles W. Mills, argues that the social contract is actually a racial contract, and that violence, far from being eradicated in civil society, has been directed against Black people since slavery was codified in the Constitution. Claims that the social contract presupposes voluntary concessions by members of a collective, ignore both the harsh history of slavery and the fact that the violence monopolized by the state is directed against Black people, who are still the targets of extra-judicial killings in numbers that rival those of the heyday of lynching. Drawing on Benjamin's observations that the State needs to commit violence to buttress its power, McBride doubts whether the social contract can be repaired.

Walter Benjamin's arguments about violence in the Weimar Republic might or might not be applicable to ideas of justice in the present-day United States. However, the passionate outrage triggered by injustice, and the sense that injustice against one group of citizens threatens justice for all, has certainly been a constant over the past century and more. This is particularly true for law and literature, as can be seen in Brook Thomas' essay "Defenders of Racial Justice: The Law and Literature Partnership of Albion W. Tourgée and Samuel F. Phillips." Thomas' essay relates the often coordinated efforts of pioneer civil rights activists Tourgée, a lawyer-author, and Phillips, the Solicitor General of the United States from 1872-1885, to realize for African Americans the rights and protections afforded by the 13<sup>th</sup> through 15<sup>th</sup> amendments. Both were involved in opposing Louisiana's 1890 Separate Car Law in the case that would reach the US Supreme Court as *Plessy v. Ferguson* (1896). Though the two men eventually

went their separate ways, both their collaboration and their differences, some of them figured in Tourgée's fiction, helped set the stage for the case that would finally overturn the principle established in *Plessy*, namely that separate vehicles of public conveyance and public facilities could be equal.

*Brown vs. Board of Education* (1954) overturned the established doctrine of separate but equal, drawing legal attention to the pernicious effects of the color line. However, the Southwestern border of the United States is, among other things, a geopolitical color line which renders entire populations vulnerable to surveillance and violence. The essay on the poetry of Anthony Cody by Matthew Moran entitled "Cross/Borders: The Transcultural Poet as Counterwitness in Anthony Cody's *Borderline Apocrypha*," brings the color line in relation to the borderline while shifting the imaginative register to poetry. Cody's *Borderland Apocrypha* (2020), a National Book Award Nominee, writes against conservative visions of immigration, focusing particularly on the landscape of the Mexican-American border and the legacy of its complex, and intense, history. Cody draws on individual experiences, figures and forms of lynching and abuse, which are sadly part of the American imagination, as well as photographs, newspaper columns, and legal texts. These documents are both affect and archive in a project that Moran calls Cody's "transcultural counterwitness," a form of lyric articulating vulnerable identities through legal claims for equality and citizenship. The transcultural counterwitness challenges longstanding stereotypes of Latino communities in the light of American media political and identity discourses, particularly of the divisive Fox-news variety.

Although we conceive of a conception of justice, and a legal system of some kind, as underpinning civil society, there are areas of life that it cannot reach, and one of these remains the behavior of citizens. In this space between the law and adherence or non-adherence to it, other forces are often called upon: most prominently, surveillance. Dale Barleben's essay "Orwell, Jones and the New York Times: Conversations Shaping the Fundamental Rights of Privacy" also falls within the legal critique-genre as it explores the US Supreme Court's largely unsuccessful attempts in *United States v. Jones* to stay abreast of technological developments relating to surveillance. Barleben examines often unhelpful and even misleading allusions to George Orwell's *Nineteen Eight-Four* in the oral arguments and briefs in the *Jones* case, as well as in press reports about the case. He concludes from this analysis that the extent of the surveillance state we currently experience goes far beyond what was anticipated in *Nineteen Eight-Four*. He also determines that the US legal system, as currently constituted, is woefully inadequate to the challenges of dealing with rapid technological developments in areas such as surveillance.

This is not to suggest, however, that Barleben's vision is devoid of hope. In Orwell's novel, surveillance is not a method of supporting a legal system but is instead its replacement (Oceania famously has no laws). Thus, a dynamic approach from the judiciary can be employed in order to protect against the excesses of surveillance systems. This is another potential legacy of Jones.

5.

If the prose contributions to this special issue rail against injustice, the poems might be said to cast doubt upon justice, which is dangerous because in its universal sense it is an ideal, inhuman insofar as it is divine. James Dowthwaite's "Ode to Shamash, or on The Problem of Absolutism in the Case of the Law," addresses the incomprehensibility of divine justice in the form of a lament or a prayer. In a series of apostrophes addressed to the ancient Mesopotamian sun god, the speaker looks for liturgical balance in a world whose manifest imbalance seems to foreshadow our own crisis, political and climactic: "And if it is right that you incinerate lies and liars; that false judges are burnt up in your image,/ then it is right that the reeds burn, too;/ it is right that the river dries." "Birthright," by Joshua Weiner, evokes a retributive pattern of justice that is both postlapsarian and secular. The "birthright" announced in the title seems to be an original wrong—a wrong whose personified voice hovers like a ghost over an addressee who just wants to get "over" it: "I'll pick you up when you get there/ you may wonder who I am/...I'm underneath the overgrowth/ I'm over it all the same."

If justice involves remembering old wrongs in order to right them, then it might be understood as nostalgia for the moment before the fall. This is one implication of Donna Stonecipher's forthcoming collection *The Ruins of Nostalgia*, here represented by three prose poems, numbered 37, 45, and 57 in the series. Her speaker, sometimes described in the third person, speculates on the symmetrical façade of a Carnegie library that has been converted into an antique store. "She asked: was it symmetry's fault that it had afforded an orderly façade for systemic asymmetrical disorder? It was probably philanthropy's fault that, in a just world, it would not exist. She asked: now that everyone lived in asymmetrical houses, and worked in asymmetrical buildings with asymmetrical public art... were power structures any more symmetrical than when symmetry had hidden asymmetry?" The question remains unanswered, but nonsymmetrical art is no better, and perhaps a little worse, than philanthropy in righting injustice.



The question about artistic balance and justice raises another question about the ideological function of art, its role in justifying power relations that might demand the ultimate sacrifice from human beings. This matter is raised in “The Horses of Xian” by Dave Smith, with the Terracotta Army and Horses meant to represent the fortitude of will, but also the fortitude of art, in the face of changing battlefields and changing times: “Art insists//none think to flee when shapes shift.” Such fortitude turns human beings and horses into statues standing at attention; it might also transform soldiers, like horses, into beasts of burden, pulling for the emperor’s glory in ways that bury their own feelings: “In battle, spit’s drip and blood-bubble/ perfectly measures a man, the best/ horse for field-clamor, the struggle/of hearts buried.” The rest is silence—the silence of the repressed emotion, the cenotaph, and the grave.

This special issue features two additional essays under the rubric of “occasional papers” in an effort to present our readership with subjects beyond the margins of the present theme. But if the idea of justice, whatever form it take, is as pervasive a concern as the writers in this issue contend, then these essays are by no means peripheral: perhaps further away from the center of justice, at its fraying edges, we might gain another perspective. The first paper is a biographical essay by Jorge Pereira recovering the significance of the forgotten landscape painter Francis Augustus Silva, born on October 4, 1835, in New York City to Portuguese immigrant parents. Silva specialized in coastal scenes that suggest something eternal and absolute in nature—a stability resistant to the changes brought about by the Civil War and technological progress. The issue concludes with Heinz Ickstadt’s review of Susanne Rohr’s recent publication, *Von Grauen und Glamour*, which analyzes contemporary representations of the Holocaust in Germany, Israel, and the United States. The question that drives Rohr, and Ickstadt, is what it means for younger generations to receive mediated representations of a historical catastrophe that called the very basis of civilization into question. Is trauma handed down the generations? What do we think of those who came before us? This too is a question of justice, and it has shaped the way contemporary generations look at the meanings of law, literature, and their limits.

## Works Cited

- Anastaplo, George. *The American Moralist: On Law, Ethics, and Government*. Ohio UP 1994.
- . "A Beginning to the Study of Plato's *Apology of Socrates*." In *Ancients and Moderns: Essays on the Tradition of Political Philosophy, in Honor of Leo Strauss*. Basic Books. 1964.
- Dalton, Matthew. "COP27 Sets Up Climate Damage Fund for Poorer Nations but Rejects Faster Emissions Cuts." *The Wall Street Journal*. November 20, 2022.
- Dalton, Matthew, Stacy Meichtry, and Summer Said. "COP27 Strikes Deal on Fund for Poorer Countries Vulnerable to Climate Change." *The Wall Street Journal*. November 19, 2022.
- Dickie, Gloria and Mai ShamELDin. "At COP27, Protesters Within UN Venue Demand Climate Finance." *US News*. November 9, 2022.
- Friedman, Lisa. "Biden's Message on Climate Might Not Be the One the World Wants." *New York Times*, November 10, 2022.
- Halper, Evan and Timothy Puko,. "In a shift, U.S. says companies are pivotal to climate talks' success." *Washington Post*. November 7, 2022.
- Hannah-Jones, Nikole, Caitlin Roper, Ilena Silverman, and Jake Silverstein. *The 1619 Project: A New Origin Story*. Random House (One World). 2021.
- Harari, Yuval Noah. *Sapiens: A Brief History of Humankind*. Harper. 2015.
- Hiroko, Tabuchi. "Switzerland Is Paying Poorer Nations to Cut Emissions on Its Behalf." *New York Times*, November 7, 2022.
- Kaplan, Sarah. "COP27 Leaves World on Dangerous Warming Path Despite Historic Climate Fund." *The Washington Post*. November 20, 2022.
- Olson, Greta. *From Law and Literature to Legality and Affect*. Oxford UP 2022.
- Ramkumar, Amrith and Shane Shiflett. "Carbon Market Under Pressure to Deliver Billions in Climate Funding." *The Wall Street Journal*. November 12, 2022.
- Sen, Amartya. *The Idea of Justice*. Harvard UP 2009.
- . *Home in the World: A Memoir*. Liveright Press, 2022.

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