

# Thinking about Justice

## CHAPTER

# 1

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### LEARNING OBJECTIVES

- Identify the aims of corrective justice
- Distinguish between the aims of corrective justice and criminal justice
- Analyze criminal punishment from the standpoint of theories of deterrence and theories of retribution
- Consider the connection between criminal and corrective justice in settings where crime victims are unable to secure complete corrective justice for themselves

### KEY TERMS

**Thought experiment**

**Corrective justice**

**Criminal justice**

**Stages of justice questions**

**Baseline reasoning**

**Ponzi scheme**

**Clawback**

**General deterrence**

**Specific deterrence**

**Retributivism**

Justice is a part of everyday life. Because it is, the key concepts associated with justice are familiar ones. We routinely talk about whether someone *deserved* something (“oh, he deserved it,” “yeah, he had it coming”). We talk about whether someone’s act was *right* or *wrong* (“you know, that just isn’t right”). And we talk about whether something is *fair* or *unfair* (“that teacher wasn’t fair to me”). This is the language of justice. Its familiarity means we take it for granted, so a course on justice is somewhat different from other college courses. The language of physics, to take an obvious example, isn’t part of everyday conversation. We don’t regularly refer to *atoms*, *neutrons*, *neutrinos*, or *quarks*. These are words from a special world of thought. Students enter this world when they take a class in physics, just as they enter different mental worlds when they take classes in, say, mathematics or chemistry. In a course on justice, on the other hand, students bring *their* world into the classroom. A course on justice gives students a chance to think about ideas they otherwise take for granted, to arrange those ideas carefully, and to apply them in settings that go beyond their immediate experience.

As a general matter, we can say that justice is the master concept used to talk about the fair terms of cooperation with others. In the absence of fair rules for cooperation, the possibility of communal life is jeopardized. If fair rules are honored, then concepts such as *rights* and *obligations* make sense as ways of working out the implications of cooperative activity believed to be fair. When understood in this way, the concept of justice can be considered independently of legal rules. We of course *want* the legal system to produce just results, but if someone says “that criminal sentence was too harsh” or “that defendant shouldn’t have been punished,” then the concept of justice is being used to *assess* the legal system, not to endorse its results.

In thinking about justice, we can develop a framework that simultaneously looks to the future and provides a way to respond to past events. Looking forward, we can identify the rights people have and the obligations they ought to assume. Looking back, we can identify the steps that should be taken to correct the consequences of faulty behavior and also the steps that should be taken to punish people who have engaged in wrongful conduct. Each of these perspectives depends on the notion of how people *ought* to act cooperatively. There is thus an important sense in which comments on justice *parallel* comments about the law. A properly organized legal system identifies individual rights and obligations. A legal system also establishes procedures for correcting harm and for punishing wrongful behavior. Justice and the law sometimes coincide, then. But they don’t have to—and it’s because they are sometimes in conflict that people use concepts of justice to evaluate the law.

This chapter focuses on what justice requires once wrongdoing has already occurred—that is, the chapter addresses issues in *corrective justice* (i.e., the steps that should be taken when someone at fault interferes with another person’s rights) and issues in *criminal justice* (i.e., the steps that should be taken by the government to punish people who engage in serious wrongdoing). Other dimensions of justice include *procedural justice*, *social justice*, *transitional justice*, and *restorative justice*. Because these different dimensions aren’t always harmonious, we will have occasion later to think about how a coherent approach to justice can make them as consistent as possible. In this chapter, we will concentrate solely on corrective and criminal justice.

**Thought experiment** a scenario that exemplifies one or more key principles of justice

**Corrective justice** a victim-centered framework whose aim is to make whole the victim of an injustice

**Criminal justice** an offender-centered framework that responds to wrongdoing by imposing punishment

**Stages of justice questions** these ask (a) what were the injured party’s rights? (b) in what way were these rights interfered with? and (c) what is the proper response to this act of interference?

Because even the concepts of corrective and criminal justice are themselves fairly complicated, we will use **thought experiments** to examine them. Our thought experiments address scenarios that address one or more key principles of justice. The first two thought experiments presented in the current chapter are entirely made up. In other words, they’re stories that are told not because they review actual events but because they illustrate ideas worth examining. The chapter’s last, and longest, thought experiment is based on real-life events. Even here, though, we will depart from what we know by changing events and so asking questions that help us explore the range of the concepts under review.

In our first thought experiment, we consider justice in its simplest form—the justice that calls on people to *correct* harm that’s occurred because of faulty behavior. The next thought experiment considers the relationship between corrective and criminal justice. **Corrective justice** is victim-centered: its aim is to make whole the victim of wrongdoing. In contrast, **criminal justice** is offender-centered: it imposes punishment for grave wrongdoing. The final thought experiment examines our two dimensions of justice—corrective and criminal justice—in light of real-life events.

In each of the thought experiments posed here, we’ll ask three essential questions. These **stages of justice questions** deal with basic issues associated with individual rights and interference with those rights. The questions are these:

### Stages of Justice Questions

Stage 1: What were the injured party’s rights?

Stage 2: In what way were those rights interfered with?

Stage 3: What is the proper response to this act of interference?

As should be clear, these questions can be asked in all kinds of settings. They’re relevant to murder trials and car accidents. They’re relevant as well to human rights violations and even to questions about student cheating. We begin with something simple, though—with a fender bender and the corrective steps that should be taken to repair a damaged car. From there, we move on to questions about crime and punishment.

## Corrective Justice: An Introduction

“You break it, you pay for it!” These lines are posted in stores throughout the world. They don’t have the word *corrective* in them, but they draw on the notion essential to corrective justice: if you are at fault in causing an injury, then you must take the steps needed to restore the preinjury situation. Needless to say, introduction of the concept of fault introduces a complexity into “You break it, you pay for it!” It’s possible, after all, for someone to break something *without* being at fault (as when an earthquake erupts while a customer is holding a porcelain vase). However, if we assume that we can identify faulty behavior and that the concept of fault is built into “You break it, you pay for it!” we then have a helpful way to think about corrective justice. A thought experiment offers a way to clarify these points:

### THOUGHT Experiment 1.1

#### Correcting the Damage after a Fender Bender

Having been friends for years, Vance agreed when Winston asked for permission to drive Vance’s yellow sports car to a weekend basketball tournament in another state. The trip itself was uneventful. It was when Vance returned the car that an accident occurred. While turning into Vance’s driveway, Winston absentmindedly failed to put his foot on the brake and so hit the front of the garage door. Not only was the body of the car damaged, so too was the engine. Deeply embarrassed by what had happened, Winston immediately offered to make Vance whole for the damage done to the car. “I’ll have the car towed to a repair shop,” Winston said, “and make sure it’s back to you in a week.”

Here’s a case of corrective justice at its most straightforward. Vance was careless with Winston’s property—he was *at fault*, in other words. Vance admits to his fault. Winston doesn’t have to hire a lawyer to get Vance to agree to repair the car: Vance acknowledges not merely the fact that he damaged Winston’s car but also the *principle of justice* that he, as the person at fault, should be the one to make Vance whole. In this setting, justice guides decision making. The legal system serves as a backdrop to Winston’s offer—after all, Winston might not be quite so ready to take corrective steps were it not for the possibility that Vance could sue him for damages. For our purposes, though, there’s no need to bring in the law at all. Rather, as in [Table 1.1](#), we need simply consider Winston’s offer in light of the three stages of justice reasoning:

TABLE

1.1 Stages of Justice Questions: Analyzing the Fender Bender

Stage	Concern
Stage 1	<b>What were the injured party’s rights?</b> Vance had an ownership right in his sports car. Winston interfered with this right by damaging the car.
Stage 2	<b>In what way were those rights interfered with?</b> Winston accidentally damaged Vance’s car. The accident was Winston’s fault—that is, he had an obligation to drive Vance’s car carefully and failed to honor that obligation. Winston’s fault wasn’t intentional, however. He’s <i>responsible</i> for the consequences of the accident, but his conduct can’t be classified as seriously <i>wrongful</i> .
Stage 3	<b>What is the proper response to this act of interference?</b> Winston has offered to have the car fixed. In stating that he would make Vance whole, he took responsibility for failing to honor his obligation to Vance. In particular, by saying that he would make Vance whole, Winston promised to pay for repairs for (a) the car body, (b) the engine, (c) any other part of the car that was damaged, and (d) the portion of the garage door that was damaged.

In this thought experiment, correction of past harm equals restoration of the actual condition of the object damaged. The condition the car was in prior to the accident *sets the baseline* for determining the condition it should be in once repairs are finished. If Vance had already nicked the paint on the latch on top of the fuel cap and if Winston's crash did no damage to the latch, Winston wouldn't have to repair the paint on the fuel cap. Justice, we can thus say, is concerned with *precise* measurement of what one person owes another. Were Winston to have the nick on the fuel cap painted over while realizing that he was under no obligation to do so, we would call this an act of generosity rather than an act of corrective justice.

**Baseline reasoning** a framework essential to corrective justice that considers all factors essential to restoring the victim of harm to the condition he or she would have been in had the harm not occurred

Correction of past harm doesn't always equal restoration of a prior condition, however. **Baseline reasoning**, an essential component of corrective justice, requires consideration of all factors essential to restoring the victim of harm to the condition he or she would have been in had the harm not occurred. In this respect, baseline reasoning is an essential component of corrective justice, a point made clear by the following thought experiment.

## THOUGHT Experiment 1.2

### Identifying the Baseline for Compensatory Damages

Although he was initially shaken by the accident, Vance eventually came to accept Winston's promise to have the car repaired. Only after a few hours' reflection did Vance begin to consider another issue. Now that he didn't have a car, Vance said to himself, he had no way to get to college to take his new course on justice. He also wouldn't be able to visit the mall to hang out with friends. Calling Winston, Vance mentioned these concerns. In particular, Vance noted that Winston had promised not merely to have the sports car repaired but that he'd promised, more generally, to make him whole. How was Winston going to take care of Vance's transportation problem during the week the car was in the shop, Vance asked?

Winston hesitated a moment before answering. He thought about the possibility of serving as Vance's chauffeur for a week. They were both enrolled in the same justice course, so it wouldn't be hard to drive Vance to and from college for that. On the other hand, they didn't have the same circle of friends, so Winston didn't look forward to the idea of waiting for Vance at the mall while he hung out with people he didn't know. In any event, Vance might need the car for errands—for shopping, for instance, or going to the college library to study. Winston thus offered to rent Vance a car for the week that the sports car was in the shop and to pay for gas for the rented car. Vance said that would be fine. Although Vance thought to himself that Winston should have offered to rent him a *sports* car, he decided not to press the point and said to himself it was enough for Winston to rent him a simple sedan.

Is Winston's offer acceptable according to the standards of corrective justice? The general aim of corrective justice, we've said, is to make someone whole. More specifically, corrective justice requires that an injured party be placed in the position he would have been in but for the injury. Judged in this way, Winston offers too little and too much.

Winston offers too little because he's promised to rent only a sedan, not a sports car. It's not a minor matter for the owner of a sports car to have to drive around in a sedan. Sedans are for middle-aged people. Sports cars are for young men. They signal to others—to girls in particular—that a guy has what it takes to make it in the world. Vance certainly could have insisted on a rented sports car—even a *yellow* rented sports car of the same make as his—if he had wanted the *full* measure of corrective justice. Insistence on this would have amounted to nothing more than insistence on his rights. There would have been no question of generosity on Winston's part in providing Vance with a yellow rental sports car for a week. In doing so, Winston would have been providing Vance with the full measure of justice; thus Vance can

## Justice in Context 1.1: Corrective Justice and Tort Law

The term *corrective justice* has roots in the ancient world. In his *Nicomachean Ethics*, written in the fourth century BCE, Aristotle distinguishes between two kinds of justice associated with transactions.<sup>1</sup> One kind would now come under the heading of *contractual* transactions—that is, transactions associated with agreements to sell goods or services. The other comes under the heading of *involuntary* transactions—that is, transactions someone doesn't agree to but that occur because of an interference with an individual's rights—and that must be *corrected* to make the injured party whole. In today's legal system, *corrective justice* is the primary concern of what is known as *tort law*.

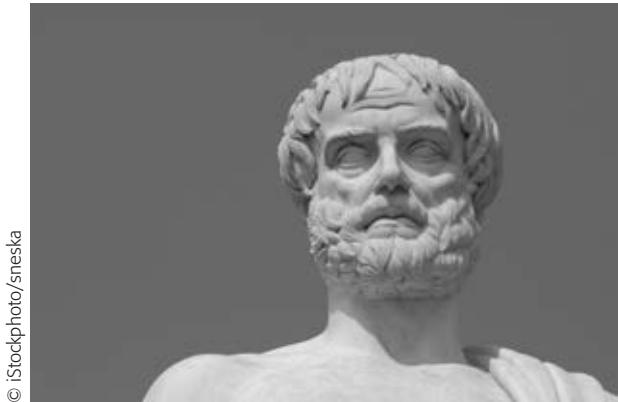


Figure 1.1 Aristotle wrote the *Nicomachean Ethics* in about 350 BCE.

In French, the word *tort* means *wrong*. Because the Duke of Normandy conquered England in 1066, a great many legal words in Anglo-American law are derived from French. Many of the words adopted in the medieval common law of England are still part of today's law, the word *tort* among them. A tort is a civil wrong. When a lawyer refers to a tort, the lawyer is speaking of an involuntary transaction in which a civil wrong has occurred. The transaction can involve carelessness (as in the Vance–Winston thought experiment). It can also involve intentional wrongdoing (as in the next thought experiment that will be considered). When mere carelessness is involved, the legal system is concerned solely with corrective justice—that is, with making whole the victim of another person's faulty behavior. When intentional wrongdoing occurs, the legal system is concerned with corrective justice *and* with criminal justice.<sup>2</sup>

be considered generous in *not* insisting on this. It's essential to realize that these two concepts—the *full measure of justice* and *generosity*—stand in tension with one another. It's nice to be generous. When someone is generous to others, that person is *kind* and *warm-hearted*. Justice, however, isn't a matter of generosity or kindness. Rather, it's a matter of *obligation*—a matter of what is *due* someone else.

There is another sense, though, in which Winston offers Vance too much. On the occasion Vance drives his sports car to college or the mall, the value of the car depreciates by a certain amount per mile. The sports car's resale price, in other words, declines somewhat because of use. If we assume for purposes of discussion that Vance drives an average of 150 miles per week and that the car's depreciation rate is 12 cents per mile, then the car depreciates at a rate of \$18.00 per week. This is an amount Winston could have *subtracted* from his offer. It might be argued of course that the \$18.00 extra Winston is paying Vance is approximately the amount Winston would have had to pay to rent Vance a sports car



for a week. But this is only a rough calculation. It's possible in this instance to develop a precise measure of what it would take to make Vance whole. This measure would include renting him a yellow sports car (i.e., where Winston does too little for Vance) and also deducting the weekly depreciation cost of Vance's car (i.e., where Winston does too much). The baseline for corrective justice is thus determined not simply by what existed beforehand (fixing Vance's car) but also by what would have been the case had an accident not occurred (providing Vance with compensation for the inconvenience he suffered while his car was being fixed).

## Criminal Justice: An Introduction

Now let's turn to an incident in which the offenders' conduct is more serious. In **Thought Experiment 1.3**, a driver steals a car and crashes it, so questions have to be raised about criminal wrongdoing *as well as* questions about corrective justice. It will be helpful to rely on different characters—Victor (for *victim*) and Wesley (for *wrongdoer*) in order to emphasize that the friends mentioned in the prior thought experiment aren't involved in the serious wrongdoing at issue here.

### THOUGHT Experiment 1.3

#### **Punishment in Addition to Corrective Justice**

Having worked every afternoon for four years and having also worked during his summer vacations, Victor finally accumulated enough savings to buy himself a shiny black sports car. Admittedly, Victor could afford only a used car, but what he bought was in good shape and had only 75,000 miles on it. While driving the car, Victor noticed that his friends treated him differently now that he was behind the wheel of a sports car. The boys at the mall were more respectful. The girls seemed interested in him in a way they hadn't previously been. Life, Victor decided, was good.

Victor was thus dismayed when he walked out to the driveway next to his parents' home one morning and discovered that the sports car was missing. Victor immediately called the police to report its disappearance. A week passed, however, before he got any word about the car—and when word finally did arrive, it was discouraging. The car had been totaled, the police reported, after it had hit a telephone pole on a road about 20 miles away from Victor's home. The driver had emerged from the car unhurt and had been arrested while walking away from the scene of the accident, the police reported.

And who was the driver, Victor asked. Someone named Wesley, he was told. "Wesley Walker?" Victor continued. "Why, he sometimes sits next to me in my college class on justice."

"Well, I don't know about that," the police officer said. "But I do know the driver was Wesley Walker. He's under arrest now for grand larceny auto. Please come down to the station house to identify not only him but also the remains of your car."

"I guess this just goes to prove that taking a course on justice doesn't make you a just person," Victor remarked sadly.

When Victor arrived at the station house, he saw that it was indeed the Wesley he knew from the justice course. In pressing charges, Victor had to restrain himself from punching Wesley in the gut. Wesley said nothing at the time. Later, when Victor had calmed down, he asked Wesley to repay him—to make him whole for the loss of his beloved sports car. Victor was somewhat surprised, and at least somewhat gratified, when Wesley replied that he couldn't repay him at the moment but that he would try to do so over the course of the next year. Wesley said he had only \$275 in the bank, that he would give this immediately to Victor, and that he would make weekly

## THOUGHT Experiment 1.3 (continued)

installment payments so as to provide full reparation. "Maybe a course on justice does make a difference," Victor muttered to himself.

Wesley was charged with grand larceny auto. He waived his right to a trial and pled guilty to the charge. At sentencing, the judge denounced Wesley's behavior, saying that if everyone were to act in the same way communal life would be impossible. The judge insisted that Wesley apologize to Victor, and Wesley did so. The judge then stated that Wesley's promise to provide Victor with compensation for the car be incorporated into the judgment convicting him of the crime of auto theft, thus making Wesley's promise a legally binding obligation. The judge then sentenced Wesley to a year's probation. A prison sentence would not be appropriate, the judge said, given the fact that this was Wesley's only criminal conviction.

In this thought experiment, we encounter not only greater harm than we did in the previous one but also greater wrongdoing. A distinction between harm and wrongdoing is essential here, as in all discussions of justice. The term *harm* refers to a setback someone suffers to his or her interests. The term *wrongdoing*, in contrast, refers to the way in which someone has attempted or has actually brought about a setback to interests. In the thought experiment just considered, harm occurs *as well as* wrongdoing. It's possible, though, for harm to be brought about in the absence of wrongdoing and also possible for wrongdoing to be undertaken even when there's no resulting harm. As for the first possibility, imagine that Wesley had secured Victor's permission to use the car and that Wesley (while driving with Victor's permission) got into a serious accident which was wholly the fault of the other driver. Under these circumstances, the harm would be similar to what we've just encountered, but the wrongdoing would be different: in fact, we wouldn't say that Wesley was at fault at all. In contrast, imagine that Wesley tried to steal Victor's car but that Victor caught him just as he was about to pry open the car door. In this setting, one wouldn't speak of harm, but Wesley would nonetheless be said to have engaged in wrongdoing—*unsuccessful* wrongdoing, of course, but wrongdoing nonetheless.

If we bear in mind the importance of the distinction between harm and wrongdoing, we will be able to provide the answers needed for the stages of justice questions that have to be raised about the Victor–Wesley thought experiment. (Table 1.2.)

TABLE

1.2 A Further Extension of the Stages of Justice Questions

Stage	Concern
Stage 1	<b>What were the injured party's rights?</b> Victor had an ownership right in his car. Wesley interfered with this right by taking the car.
Stage 2	<b>In what way were those rights interfered with?</b> Wesley took Victor's car with the intention to deprive him of it permanently. After taking the car, he totaled it. Wesley thus violated the general obligation each person must accept not to interfere with the property rights of others.
Stage 3	<b>What is the proper response to this act of interference?</b> Wesley should make Victor whole. Apart from the question of how to correct the harm Victor suffered, a further question arises as to whether Wesley should be punished for his wrongdoing.

The first stage of justice reasoning reviewed here addresses the same issue examined earlier: interference with ownership rights. The term *interference* is quite general, of course, because we know that Winston interfered with Vance's ownership rights in a way that was different from the one in which Wesley interfered with Victor's rights; nonetheless it is appropriate for each incident.

It's at the second stage of justice reasoning that we begin to encounter differences between the earlier thought experiments and this one. In the Vance–Winston thought experiment, the interference with ownership rights was accidental—Winston was *at fault*, but the fault wasn't serious. In this thought experiment, on the other hand, the interference is intentional—and serious. That is, at the time of their faulty actions, Winston and Wesley had different *orientations* toward the results they brought about. Winston didn't set out to interfere with Vance's ownership interest in the car. Like any 6-year-old, Winston could say, "I didn't *mean* to do it." Wesley, on the other hand, *did* mean to harm Victor. There's no reason to suppose he intended to total Victor's car. However, because Wesley took Victor's car and didn't return it for a week, there's every reason to believe he intended to deprive him of it permanently.

Why should this matter? A missing car is a missing car, someone might say: the important point is the harm suffered, not the reason why it occurred. To focus on harm, though, is to ignore the separate issue of wrongfulness. In thinking about whether someone should be *blamed* for harm, wrongfulness is a critical issue. Not only is it possible to total a car in the absence of wrongful conduct, it's even possible to kill a human being while doing nothing wrong. Imagine, for example, that a child playing on the sidewalk suddenly and unexpectedly runs out from behind a double-parked truck and is hit by a car whose driver was operating it within the posted speed limit. Great harm is done—indeed, the greatest harm imaginable. However, no wrongfulness preceded the harm: the driver was operating the car within the speed limit and so can't reasonably be blamed for what happened. Wrongfulness is a necessary condition for assigning blame. To assign blame for something—to hold someone *culpable* (that is, to determine that someone is blameworthy)—it's essential to find that the person *did something wrong*.

Because there's no doubt that Wesley did something wrong in stealing Victor's car, we can turn to the stage 3 question concerning the appropriate response to his conduct. One proper response is to have Wesley correct the harm done. But is this a *sufficient* response? If Wesley makes Victor whole, should he *also* be punished for what he did?

Generalizing on this, we can see that this question is critical to all reflections on justice, for it asks about the relationship between corrective and criminal justice. It might be argued that corrective justice, if provided in a fully satisfactory way, makes criminal justice unnecessary. Assuming Wesley makes Victor whole—to draw on the example provided by our thought experiment—why should Wesley be punished as well? In developing the implications behind this question, someone might say that corrective justice, when satisfactorily provided, makes criminal justice superfluous. Alternatively, it could be said that because criminal justice is different in character from corrective justice, it *complements* corrective justice. Punishment is a necessary feature of criminal justice, someone taking this position might note, and punishment, this person would contend, is necessary in cases of serious wrongdoing *even when* corrective justice responds fully to a victim's needs.

In adopting this latter option, one can speak of different *dimensions of justice*, with one dimension primarily concerned with compensating victims and the other with punishing offenders. This is the way in which Aristotle approaches the concept of justice, for he states that corrective justice "has nothing to do with punishment proper but [aims] only at [repairing] a wrong that has been done."<sup>3</sup> Corrective and criminal justice aren't the only dimensions of justice. Clearly, though, they're the dimensions that should be considered first when trying to determine what's at stake when thinking about justice. It is this premise about the complementary nature of corrective and criminal justice that we will investigate in the remainder of the chapter.

## Corrective and Criminal Justice in Real Life

A real-life story will help us extend further our inquiry into the relationship between corrective and criminal justice. The story itself is fascinating and quite well-known, for it involves Bernard Madoff, the



Ponzi scheme he carried out for two decades, and victims of Madoff's acts. We will consider Madoff not because what he did is intrinsically interesting (though it is) but instead because his conduct is properly the subject of both corrective and criminal justice. Let's begin by considering the characteristics of a Ponzi scheme. After that, we'll turn to Madoff's conduct.

## Ponzi's Scheme

In January 1920, Charles Ponzi, a man already twice convicted of fraud, founded a "Securities Exchange Corporation" in Boston that promised to double his investors' payments to the corporation within 90 days. By February, more than \$4,000 had been invested. A month later, investments reached \$10,000. By early June, nearly \$500,000 had been entrusted to Ponzi.<sup>4</sup>

Because Ponzi was promising returns on investments that were vastly higher than what bank deposits could provide, few of his investors actually withdrew their money from his scheme during the early months of 1920. Rather, most chose to take interest payments (with the interest paid at a rate far higher than the one a bank depositor would receive) while keeping their principal with Ponzi. Ponzi, as we now know, was not in fact investing the money he received. Instead, he was using it to make interest payments to already-existing investors. Initial investors were pleased they were receiving substantial interest payments. Later investors, not aware that the money they were entrusting to Ponzi was in fact the source of interest payments to earlier investors, were impressed by the returns Ponzi was providing and so added to the total to which he had access.

The end came in July 1920. In June, a Boston newspaper published a story that asked how Ponzi could deliver such high returns. As suspicion of Ponzi grew, his investors clamored to withdraw their money. By late July, Ponzi admitted he was unable to repay his investors. He had spent a large portion of their investments on himself and had set aside only a small amount for interest payments. Ponzi was convicted of wire fraud in federal court. Generalizing on this, we can say that a **Ponzi scheme** consists of an extended fraud in which someone raises capital from unsuspecting investors by promising above-average returns, with the person perpetrating the fraud keeping the money raised for his or her personal use, repaying some investors to make the scheme appear honest, but providing investors with little or nothing once the fraud is exposed.

**Ponzi scheme** an extended fraud in which someone raises capital from unsuspecting investors by promising above-average returns, with the person perpetrating the fraud keeping the money raised for his or her personal use, repaying some investors to make the scheme appear honest, but providing investors with little or nothing once the fraud is exposed

## Bernard Madoff's Ponzi Scheme

By its very nature, a Ponzi scheme is a breach of trust. If justice is the master concept for thinking about the fair terms of social cooperation, then a Ponzi scheme serves as a straightforward example of how a just person should *not* act. Once trust disappears, the possibility of satisfactory communal life is undermined.

Most Ponzi schemes collapse quickly. As we've just seen, Charles Ponzi's was revealed to be fraudulent after about six months. In contrast, Bernard Madoff's scheme was unusual because it lasted for two decades. Indeed, it might not even have collapsed during Madoff's lifetime had the world economy not entered into the worst downturn since the Great Depression of the 1930s.<sup>5</sup>

Madoff began his career on Wall Street in the 1980s with a legitimate business enterprise. In this early stage of his career, Madoff served as a *market maker*—that is, he was an intermediary between buyers and sellers. By Madoff's own admission, this market-making business provided him and his family with a very comfortable income. Nonetheless, sometime in the early 1990s, Madoff expanded his business. He continued to serve as a market maker, but he also began to provide investment advisory services for individuals—and it was his investment advisory business that operated as a Ponzi scheme.<sup>6</sup> Madoff's investment advisory business provided clients with statements about the stocks and other assets in their accounts. These statements reported gains (and occasional losses) in holdings. Because the statements relied on publicly available information about stock prices, they looked very much like the statements any investor would receive from his or her stockbroker.

Although the financial statements Madoff sent his clients resembled those from other brokerage firms, there was one key difference: they were fictitious. Sometime in the early 1990s, Madoff began to list false trades that provided substantially greater returns than most investors in the stock market can make.



## Justice in Context 1.2: Ponzi Schemes in History

"There's a sucker born every minute," P.T. Barnum, the founder of Ringling Brothers, Barnum & Bailey Circus, is supposed to have said.<sup>7</sup> Because suckers are common—in particular, because there are people who want to believe that they can get rich with little effort—Ponzi schemes are common as well. Charles Ponzi wasn't the first person to promise outside returns on an investment (he was just the person whose name became attached to this). Almost certainly, there will be Ponzi schemes long after Bernard Madoff is dead.

A famous American Ponzi scheme of the 1980s was run by Lou Pearlman, the founder of Backstreet Boys and 'N Sync. Pearlman established a company called Trans Continental Travel Services, sold shares of stock in the company (even though it never performed any travel services), and even established a fake accounting firm that claimed to have audited Trans Continental's books. Pearlman's fraud continued for more than a decade. When it was finally revealed, he fled the United States, was apprehended and tried, and was sentenced to 25 years in prison.<sup>8</sup>

Ponzi schemes have operated in other countries besides America. In 1992, for instance, Damara Bertges and Hans Gunther Spachholz started an organization that they called the European Kings Club. Investors bought shares in the club, which then provided dividends that doubled investments every 12 months. The unusual feature of this Ponzi scheme is that many investors continued to believe in it even after it collapsed. When Bertges was put on trial, many of her investors came to the courtroom to defend her, not to accuse her. She was nonetheless sentenced to seven years in prison for her fraud.<sup>9</sup>

In any given year, the price of stocks can go up or down substantially. Madoff's reports, while informing clients of occasional declines, usually contained statements that stated their holdings were increasing in value at a pace higher than that of market averages. Madoff could do this because he knew how stocks had traded when he drew up statements for his customers. With the benefit of hindsight, someone can of course pick winners even in a market where most stocks are going down. In drawing up false statements, Madoff reported gains of about 15% per year for nearly 20 years once price appreciation and dividends are taken into account. During the same period (from the early 1990s to late 2008), the comparable figure for the stock market was less 10% per year.<sup>10</sup>

Not surprisingly, individuals clamored to put their money into Madoff's investment advisory fund. Unlike Charles Ponzi, Madoff didn't advertise his services. Rather, Madoff let investors come to him. He sometimes turned down prospective investors. When he did accept someone as a client, he made it seem as if he'd just done that person a favor. As time passed, investments in Madoff's advisory fund grew dramatically. By 2008, it had stated assets of more than \$64 billion (yes, that's *billions*, not *millions*).

Why did it take nearly 20 years for Madoff's fraud to be exposed? We now know that some bankers questioned the legitimacy of his financial statements. No one, these bankers said to one another in e-mails, is likely on a year-in-year-out basis to make the kind of money Madoff claimed to be making. We also know now that government regulators were warned that Madoff might be running a Ponzi scheme. Indeed, Harry Markopolos, a certified public accountant, warned officials of the Securities and Exchange Commission, a regulatory agency of the federal government, in 2000 and again in 2005 about this possibility—but to no avail. The fact that Madoff didn't actively advertise his fund seems to have counted in his favor. Someone who lets individuals come to him, who actually turns away some potential investors—that kind of person simply can't be running a fraudulent fund, government officials appear to have concluded.<sup>11</sup>

Madoff's fraud came to an end on December 10, 2008. Earlier that year, prices on the stock market began to fall as major banks ran out of capital. By September, the relatively modest decline in stock prices

increased dramatically. Not surprisingly, many of Madoff's clients decided to redeem their investments. Madoff, of course, didn't have enough funds on hand to honor all the redemptions. Thus on December 10, Madoff decided to call it quits by confessing to his family that he had been running a Ponzi scheme for a long time. In June 2009, he admitted to his crimes in a federal courtroom and was sentenced to 150 years in prison.<sup>12</sup>

Two further features of the Madoff fraud should be noted, one having to do with his family, the other with his victims. As far as his family is concerned, Madoff's confession was the beginning of a series of calamities. On the very day Madoff revealed his crimes to his sons Mark and Andrew, the sons immediately went to a lawyer, who advised them to cut off all contact with their father. Madoff's wife, Ruth, stood by her husband, but this meant forfeiting her relationship with her sons and grandchildren. The sons, after cutting ties to their parents, lived in constant anxiety about victims' lawsuits to recapture money. Two of Mark's grandchildren even changed their last name so as to avoid being identified with their grandfather. Ultimately, Mark himself succumbed to the weight of his father's crime. On December 10, 2010, 2 years to the day after his father's admission of guilt to his family, Mark committed suicide in the living room of his Manhattan apartment. He did so while his two-year-old son was asleep in an adjoining room.<sup>13</sup>

The other feature of the Madoff that requires special notice has to do with its impact on investors of limited means. Some of Madoff's investors were very rich. Others, however, had very little money. Still other investment organizations in Madoff's fund were charities: a fund for survivors of Hitler's Holocaust had entrusted money to Madoff, as had Yeshiva University. In late December 2008, a trustee, Irving Picard, was appointed by a bankruptcy court to represent victims of Madoff's fraud. Picard's aim was to provide corrective justice—that is, he wanted to make whole Madoff's victims.<sup>14</sup> We turn next to the issues of corrective justice Picard has confronted. After that, we turn to Madoff and the criminal justice system.

### A First Question about Corrective Justice: How Much Should Madoff's Victims Get Back?

The core principle of corrective justice is to make whole individuals who have been injured as a result of someone else's actions. This principle was applied without much difficulty in the Vance–Winston and Victor–Wesley thought experiments.

Matters aren't as straightforward here. Madoff deceived his clients into thinking their wealth was substantially greater than it actually was. Even if it's agreed that they should be made whole, it's not clear what this means in a complicated case where some people actually came out winners while most emerged as losers. Are Madoff's victims entitled to receive the (fictitious) amounts mentioned in their last (i.e., November 2008) statements from the investment advisory business? Or are they entitled to receive only the amount they actually invested with Madoff? The first question suggests they're entitled to the *expectation amount* established by their statements. The second question suggests they're entitled only to the *investment amount*. It will be helpful to use stages of justice reasoning when thinking about the arguments for each version of corrective justice. See [Table 1.3](#) for the argument for the expectation amount.

In advancing this argument, someone would concede that the investor didn't actually earn any dividends on his investment. However, as a proponent of this line of reasoning would also note, the investor *believed* he did—indeed, up to the moment when the fraud was revealed, the investor *expected* that he could get back the total amount mentioned in his statement if he were to decide to redeem his investment. It's in this sense that we can speak of an expectation hypothesis of corrective justice for victims of a Ponzi scheme.

An alternative approach holds that victims are entitled only to the amount they invested. [Table 1.4](#) outlines the argument for this hypothesis.

There's a certain degree of plausibility to each of the arguments. The expectation hypothesis tracks the beliefs of Madoff's victims. In doing so, it helps to explain how they organized their lives—that is,



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Figure 1.2 Bernard Madoff was taken into custody in December 2008.

TABLE

1.3

Stages of Justice Questions from the Expectation Perspective

Stage	Concern
Stage 1	<b>What were the injured party's rights?</b> A Madoff victim might argue that he had a right to the amount mentioned in the final statement. If Smith invested \$10,000, was told that his investment had produced dividends of \$15,000, and instructed Madoff to reinvest all those dividends, his final statement would list \$25,000 as the amount Smith had on account with Madoff's investment advisory service.
Stage 2	<b>In what way were those rights interfered with?</b> Madoff defrauded his investors in two different ways, it could be said. Madoff misrepresented his intention to invest the sums initially entrusted to him. He also falsely reported dividends concerning the sums he was supposedly investing.
Stage 3	<b>What is the proper correct justice response to this act of fraud?</b> An investor who initially entrusted \$10,000 to Madoff and was told that this had become \$25,000 through accumulated monthly dividends might argue that he can be made whole only by recovering the entire \$25,000. The investor <i>relied on</i> Madoff's statements, it could be said. He's entitled to what he relied on.

we can understand the sense of loss felt by Madoff's victims only if we realize that they believed themselves to be richer than they actually were. The reality hypothesis tracks actual facts rather than expectations. The money Madoff's clients entrusted to him was never actually invested. Instead, it was used to pay off redemptions and to support his luxurious lifestyle.

However, even though both hypotheses have a certain degree of plausibility, only the reality hypothesis is consistent with the baseline principle of corrective justice. This is because Madoff's investors can claim, as of right, only the amount they actually entrusted to him—plus a reasonable return on their

TABLE

1.4

Stages of Justice Questions from the Reality Perspective

Stage	Concern
Stage 1	<b>What were the injured party's rights?</b> In adopting this hypothesis, someone would argue that the investor's "dividends" of \$15,000 were completely fictitious and that no one has a right to a fictitious sum of money.
Stage 2	<b>In what way were those rights interfered with?</b> Madoff's fraud involved both the \$10,000 initially invested and the \$15,000 in fictitious earnings. One can't speak of <i>interference</i> with the \$15,000, however, because it never existed.
Stage 3	<b>What is the proper corrective justice response to this act of fraud?</b> The investor is entitled to recover his initial \$10,000. He doesn't, however, have a right to the extra \$15,000. Granted, he <i>believed</i> that he'd earned those dividends, but we now know he didn't.

investments (not the fictitious returns Madoff was promising). Here are the figures the Madoff trustee presented five years after the fraud became known:<sup>15</sup>

1. Total amount in all Madoff client statements as of November 30, 2008: \$64,800,000,000
2. Total amount actually invested in the Madoff investment advisory business as of November 30, 2008: \$17,300,000,000
3. Total amount likely to be recovered by the Madoff trustee and the federal government on behalf of Madoff's investors: \$9,400,000,000

If we compare the first and second figures, we can see that Madoff's remaining clients as of December 2008 had an expectation of about \$47,500,000,000 more than they had actually invested with his firm. As for the possibility of recovering actual investments, the trustee calculated that, at most, he, acting in conjunction with federal authorities who seized assets belonging to Madoff, could provide Madoff's remaining clients as of late 2008 with about 55% of the amount they invested (and about 15% of what they expected). The trustee was in no position to return anything above the investment amount. Needless to say, in accepting the baseline principle, the trustee *wanted* to provide Madoff's investors 100% of the amount they actually placed in his funds. He couldn't offer even that amount, so the judge overseeing the case held that the investors should get back the 55% on hand—plus (a) every dollar up to the amount invested and (b) reasonable interest on the dollars invested with Madoff.

But what if (3) were to turn out to be greater than (2) plus reasonable interest? In other words, what if the Madoff trustee were to recover more than the investment amount plus the returns Madoff's investors would have earned had they put their money in safe investments such as United States treasury obligations? **Thought Experiment 1.4** will help us address this question.

## **THOUGHT Experiment 1.4**

### **The Trustee Recovers More than the Amount Actually Invested**

To everyone's surprise, the Madoff trustee recovers considerably more than the amount actually invested by Madoff's clients plus the interest that would have been generated by United States treasury obligations. He considers two options concerning the distribution of this surplus amount. One is to give the surplus away to a fund for victims of other Ponzi schemes who got nothing back on their investments. The other option is to give back the money on a proportional basis to each of the Madoff victims (that is, if a victim's investments amounted to 1% of the total amount invested in Madoff's funds, that victim would receive 1% of the surplus). That rationale for adopting this option is that Madoff's victims were the ones affected by his wrongdoing and that they should therefore benefit from the surplus recovered.

The trustee isn't entirely satisfied with either option. The first provides a benefit to people who weren't directly affected by Madoff. The second provides compensation to Madoff victims over and above the amount they actually earned for themselves.

We shouldn't be surprised that difficulties arise once we venture beyond the baseline principle, for this thought experiment doesn't call that principle into question. Under the baseline principle, Madoff's investors must receive all the money they entrusted to him plus reasonable interest. Once a surplus beyond this arises, it's not clear the Madoff investors should receive the surplus or that it should be distributed to some other recipient. The principles of justice, although they often generate clear results in core cases, may sometimes produce less definitive answers once we venture beyond the core.



## A Second Question about Corrective Justice: Should Clawbacks Be Included in the Total Amount Recovered by Madoff's Investors as of November 30, 2008?

When the trustee spoke of the total amount he hoped to recover (figure 3), he was including the money he would seek to recover from investors who'd redeemed their funds from Madoff's investment advisory firm prior to revelation of the fraud. The funds to be regained under these circumstances are called **clawbacks**—i.e., the amount recovered from successful investors in a fraudulent scheme to compensate those defrauded by it.

**Clawback** the amount recovered from successful investors in a fraudulent scheme to compensate those defrauded by it

Here's how a clawback works. Imagine that Ames invested \$10,000 in the Madoff investment advisory fund in 2001, amassed dividends of \$15,000 by 2007, and then redeemed his \$25,000 in that year. We know that Madoff wasn't in fact making any profits for Ames—that Madoff instead was using investments from others to pay people like Ames who were redeeming everything they'd placed with Madoff. But Madoff couldn't admit publicly that he was running a Ponzi scheme (had he done so, the investment advisory firm would have collapsed immediately), so he had to pay off those like Ames who were redeeming everything.

Imagine on the other hand that Bassett invested \$10,000 with Madoff in 2001, amassed dividends of \$15,000 by 2007, but decided to keep all his funds with Madoff, thus producing a November 2008 statement listing \$28,500. Bassett, we've seen, is entitled as a matter of corrective justice to at least \$10,000, the amount of his initial investment. We've also seen that the trustee believes he can provide Madoff victims like Bassett with about 55% of his initial investment. What we haven't seen, though, is that the trustee has said this is possible *only if he is able to recover the amount received by people who redeemed their funds prior to December 2008*. In other words, the trustee can provide someone like Bassett with approximately half corrective justice only by *clawing back* money from someone like Ames.

Is it just to claw back money from successful investors? Needless to say, the notion of making a victim whole takes us only so far in this setting. Ames didn't know Madoff was a fraud—or at least we'll assume this for purpose of argument. Ames relied on the statements provided by Madoff's investment advisory firm. The trustee's position is that despite the way in which people like Ames relied on Madoff's statements, they should be compelled to return all the dividends they received following redemption and even a small portion of their initial investment so as to increase the amount for people in Bassett's position. Not surprisingly, the clawback targets have been enraged. One of their lawyers has put it this way: "You've got people who've done nothing wrong who took out money they thought was theirs, and now you've got the trustee saying that money needs to go to the victims."<sup>16</sup> Some of the people who redeemed early took out huge sums of money. In other instances, though, investors walked away with relatively modest amounts and will be severely limited in their personal spending if they are required to go along with the trustee's efforts to provide clawbacks.<sup>17</sup>

On the other hand, investors in Bassett's position will be left substantially worse off if clawbacks *aren't* provided. The trustee's calculation that he could probably recover about 55% of initial investments to all Madoff victims assumed a completely successful system of clawbacks. To the extent the clawback efforts are unsuccessful, investors in Bassett's position will recover *less than* 55% whereas investors in Ames's position will receive *more*.

How, then, should the competing claims of investors in the Ames and Bassett positions be analyzed? One principle of justice is to *treat like cases alike*. It's not always clear what makes cases alike or different. Here, though, it's worth speculating on the role of luck for Madoff's investors. Assuming it was a matter of chance that Ames redeemed his funds prior to 2008 and that Bassett didn't, then why should they be treated differently now? Whenever luck is at work, someone can't be said to claim something as a matter of right. If Ames doesn't have a right to the amount he received on redemption, then it seems just to leave him in the same position as Bassett. Put differently, luck is an important wild card to consider when justice reasoning is at stake. When luck is a factor in determining outcomes, there are sound reasons from the standpoint of justice to take away the benefits of luck and redistribute gains so that everyone benefits (or loses out) equally.

But what if a Madoff investor got out because he believed something was fishy about the entire operation? For example, what if Ames suspected something was rotten about the Madoff investment advisory service and so decided to take all his funds out while it was still possible to do so? If this is why Ames (or some actual Madoff investor) withdrew his funds, would such a smart investor have a good reason, based on considerations of justice, to resist the trustee's effort at a clawback?

The argument here has to be that insight into a fraudulent scheme makes someone entitled as a matter of right to the greater amount he has amassed by comparison with someone who failed to identify the fraud. But *why* does this generate a right? It might be said that someone who publicly noted that Madoff was perhaps running a fishy operation should be given an award (a whistleblower's reward) for pointing this out to others. This line of reasoning, however, covers only the few individuals, like Harry Markopolos, the outspoken accountant, who provided public warnings about Madoff's operation. Alternatively, it might be said that someone who redeemed earlier while realizing that Madoff's operation was fishy is entitled to his gains *even though this person (a) never actually earned the dividends paid on his investment and (b) failed to warn others about it*. This line of reasoning is doubly troubling, though. First, it holds that people are entitled to fictitious profits—and so is incompatible with the baseline principle. And second, it holds that they're entitled to these profits even when they had reason to believe the profits were phony but didn't warn others about this. To argue for Ames under these circumstances is to say that Ames should benefit from what he knows to be a fiction whereas Bassett should suffer a huge loss given the gain realized by Ames.

Nonetheless, even if it's agreed that it's just to require early redeemers to participate in the clawback, there's clearly an element of tragedy in the policies adopted by the trustee. When we started thinking about the concept of justice, we made no reference to the possibility of tragedy—indeed, the notion of corrective justice, in particular, seems at first sight to make tragedy unnecessary since it holds out the prospect of *overcoming* wrongdoing by restoring victims to the position they would have been in but for the wrong. What we've seen so far in thinking about compensating the Madoff victims, however, is that *partial* corrective justice requires difficult choices as to who should lose out. Insistence on justice, we can thus say, makes tragedy less pressing than it might be. Nonetheless, insistence on justice doesn't eliminate the possibility of tragedy altogether.

### **A Third Question about Corrective Justice: Should the Government Compensate Victims of Ponzi Schemes such as Madoff's?**

The tragic choices just mentioned can be avoided, someone might note, if the government were to provide compensation to investors such as those victimized by Madoff. Two different arguments might be advanced in support of this claim. First, it could be said that the government ought to provide compensation whenever someone encounters a loss due to fraud. Second, it could be contended not that all losses due to fraud should be the subject of government compensation but that the government should provide compensation for losses attributable to frauds if warnings were provided to government officials and they failed to respond adequately to those warnings.

The first argument is highly questionable. If Madoff's victims were entitled to compensation from the government, then why aren't other victims of crime? In the Victor–Wesley thought experiment, Wesley steals Victor's car. Should the government provide Victor with compensation because it failed to prevent the crime? If we say yes, then we're saying that it should compensate all crime victims (not just Victor)—and that it should do so even when it had no credible evidence of the likelihood of a specific act of wrongdoing. This seems too broad an argument. We rely on the police to protect us. However, we know that the police are unlikely to prevent many crimes when they don't have advance warning about what's likely to happen.

What about a more limited argument, then? As we've seen, Harry Markopolos, an accountant who specialized in detecting fraud, repeatedly warned government officials that Madoff might be running a Ponzi scheme. Markopolos didn't have proof of this. However, his warnings were based on a reasonable assessment of what was publicly known, so someone advancing an argument for government

compensation of Madoff's victims might say that when an observer makes a credible case about the likelihood of a crime and the crime actually occurs, then the government should provide compensation to crime victims for failing to prevent something it had a reasonable opportunity to prevent.

This is an argument worth taking seriously. It's far from conclusive, though, because we can't say that justice requires *full* compensation by the government under the circumstances just mentioned. At most, the government had an indirect obligation to protect Madoff's victims. Whereas Madoff had a direct obligation to invest money on behalf of his clients, the government's obligation was only to *protect* his investors from fraud. Even if it's agreed, then, that the government has an obligation to protect individuals from fraud *when there's credible evidence a specific fraud is underway* doesn't mean that the government's obligation is similar to the one Madoff owed his clients. Because Madoff failed completely to honor his obligation to his clients, they have a just claim of *complete* corrective justice against him. In contrast, assuming that the government failed to honor its obligation of protection following credible evidence of fraud, this can't be said to amount to a just claim for complete corrective justice (i.e., full compensation). At most, the government owes *partial* compensation to Madoff's victims—even if one takes into account Harry Markopolos's warnings of 2005.

Is the government obligated to provide even partial compensation under these circumstances? If it does, it's of course providing compensation from money paid by *taxpayers*, for of course the government's money comes not from the heavens but from taxes raised on income and sales. Even if it's agreed, then, that government officials were at fault in failing to heed Markopolos's warnings, the question has to be asked whether taxpayers should be on the hook for the failings of government officials. As individuals, taxpayers were under no obligation to protect Madoff's clients. Should they then have to bear the burden of bailing out those clients?

Questions such as these are hard to answer. We had no difficulty with our initial cases because no one could doubt Winston's obligation to Vance, Wesley's obligation to Victor, and Madoff's obligation to his clients. Here, the issue of government (or, perhaps we should *taxpayer*) obligation becomes less clear cut, for we're asking on the one hand about the scope of the government's obligation to prevent fraud and on the other hand we're considering whether people (i.e., taxpayers) who had nothing to do with a fraud should provide compensation to fraud victims. There is no reason to be concerned about the absence of an easy answer to this justice question. There are, after all, convincing answers to *some* questions—for instance, convincing answers about compensation by Winston to Vance, by Wesley to Victor, and by Madoff to his clients. It is typical of justice reasoning that one begins with *clear cases* and moves from the principles that can be identified in the clear cases to *uncertain cases*.

## **A First Question about Criminal Justice: The Victims' Role in Sentencing and the Issue of Revenge**

In thinking about Madoff's case, it's essential to consider not merely issues of corrective justice but also questions about criminal justice. Should Madoff be punished? If so, how much punishment should be imposed? And for what purpose should punishment be imposed?

Questions about Madoff's punishment arose at a time when it appeared that Madoff's victims would receive less than 50% of the amount they'd invested with him. During the week following Madoff's December 2008 arrest, authorities found checks worth \$700 million in his desk. They also seized Madoff's assets—his homes, boats, clothing, etc.—and treated these as items that could produce funds for compensation. The \$9.4 billion estimate of possible funds for compensation wasn't made until late 2012, however, so Madoff's victims were furious at the time of sentencing about the possibility of receiving very little by way of corrective justice.

In June 2009, many Madoff victims traveled to the federal courthouse in lower Manhattan to express their rage to the judge prior to sentencing, a rage that was fueled in part by the prospect of incomplete corrective justice. Here is a sampling of the victims' remarks made at the hearing. Jesse Cohen called Madoff "a thief and a monster." Ronnie Sue Ambrosino stated that "the birds that had been chirping stopped singing [and] the sun stopped shining" once she and her husband discovered that they had lost their life savings as a result of the fraud. Michael Schwartz remarked that Madoff had stolen money he

was saving to care for his disabled brother. Schwartz said he hoped Madoff's "jail cell will become his coffin." Burt Ross, who lost five million dollars as a result of the fraud, cited Dante Alighieri's *The Divine Comedy*, one of the great works of Western literature. In the first book of *The Divine Comedy*, called *Inferno* (Italian for *hell*), Dante classifies fraud as "the worst sin." Ross said he hoped that when Madoff dies, he'll find himself in the lowest circle of hell.<sup>18</sup>

When crime victims make statements at sentencing hearings, they typically express hatred for the offender and demand maximum punishment for his crimes. It's become common to give victims a chance to speak prior to sentencing (the only unusual feature of Madoff sentencing was that *so many* victims wanted to denounce him). The troubling feature of these statements is that they appear to be concerned primarily with revenge. Madoff's lawyer, Ira Lee Sorkin, noted just this possibility at the sentencing hearing. By allowing the victims to speak, Sorkin argued, the judge appeared to be open to the possibility of "mob vengeance" against Madoff.<sup>19</sup>

*Should* the desire for vengeance play a role in sentencing an offender? There's an obvious argument against allowing vengeance to influence a determination of what a punishment should be. The standard justification for punishment is that it's *right to punish a wrongdoer*—i.e., it is commonly said that someone *ought to be* subject to such-and-such amount of time in prison because this is the proper response to the offender's wrongful conduct. But *who* should determine what's right in this setting—a victim or an impartial observer? The answer to this seems simple: a victim *might* determine the proper amount of punishment, but a victim might be influenced by a desire for revenge. In contrast, an impartial observer is likely to fall prey to this.

Should victims even be allowed to speak prior to sentencing? More generally, does it make sense to speak of *just revenge*—or is this a contradiction in terms? For the moment, it's enough to note that over the last several decades most states and the federal government now permit victims to speak at sentencing hearings.<sup>20</sup>

## A Second Question about Criminal Justice: The Significance of Deterrence

After the Madoff victims had their say, Denny Chin, the federal judge in the case, sentenced the defendant to 150 years in prison. Madoff was 71 at the time. The sentence, which was the maximum allowed under the sentencing guidelines for federal courts, insured that Madoff would die in prison. In other words, Judge Chin—although he may not have been influenced by Michael Schwartz's expressed hope that Madoff's "jail cell will be his coffin"—imposed a sentence in line with what Schwartz had requested.

Does this mean that Judge Chin actually was influenced by the victims' demands for a long sentence? Not necessarily—but the long time in prison imposed on Madoff serves as a reminder of how hard it is to determine with precision the appropriate scope of a prison sentence. As a general matter, two different considerations are relevant to punishment. One has to do with *deterrence*, the other with *retribution*. These two considerations sometimes lead to the same conclusion about the appropriateness of a sentence. They follow very different lines of reasoning, however, as to why punishment should be imposed.

For deterrence, the process of reasoning starts with reflections on prevention. This is because deterrence is a strategy that aims at preventing behavior through communication of a threat of unpleasant consequences if someone engages in prohibited behavior. When a parent says to her child, "if you eat that candy, you won't get dessert for a week," the parent is employing a deterrence strategy. Similarly, if the President of the United States announces to the leader of another country, "if you attack us, we will attack you," the president is employing a deterrence strategy.

As these examples make clear, deterrence has no necessary connection to criminal justice. It's a preventive strategy that can be employed in numerous different settings. As far as criminal punishment is concerned, there are general and specific versions of deterrence that must be considered. **General deterrence** is a framework that seeks to prevent prohibited acts through announcement to the public at large that a sanction will be imposed for engaging in that act. In contrast, **specific deterrence** is a framework that seeks to prevent prohibited acts

**General deterrence** a preventive framework that announces to the public at large that a sanction will be imposed for engaging in a prohibited act

**Specific deterrence** a preventive framework that announces to a specific individual that a sanction will be imposed for engaging in a prohibited act

through announcement to an individual that a sanction will be imposed on that individual for engaging in the prohibited act.

Is Judge Chin's 150-year sentence justifiable as an exercise in general deterrence? In relying on this rationale, someone might claim that the 150-year sentence will discourage people who might otherwise commit fraud from engaging in it. A justification of this kind, it will be noted, doesn't rely on the concept of proportional punishment. That is, an advocate of general deterrence could argue that even if a 150-year sentence is too long—and so *disproportionate*—the sentence should nonetheless be imposed to discourage others from engaging in the behavior being condemned. On a general deterrence theory of sentencing, the punishment imposed on an offender becomes *an example* to others. Even if the sentence is considered excessive, an advocate of general deterrence could argue that it perhaps should nonetheless be imposed so as to discourage others from engaging in the behavior being condemned.

Many have argued that this is not an acceptable framework for sentencing. General deterrence, it's been pointed out, places no limits on the amount of punishment imposed as long as the punishment is effective in preventing behavior by other possible offenders. Is it appropriate to cut off an offender's arm for shoplifting? Perhaps it is, an advocate of general deterrence would claim, if that's what's necessary to discourage others from shoplifting. Is the death penalty for double parking excessive? Perhaps not from the standpoint of general deterrence, for if double parking is a serious social problem and nothing else besides execution will discourage it, then the death penalty may well be appropriate response (from the standpoint of general deterrence) to double parking. Put differently, we can say that general deterrence is subject to criticism because it offers no limiting principle relevant to proportionality.

A similar criticism has to be considered with respect to specific deterrence. Is a 3-year sentence for shoplifting disproportionate to the offense? Arguably it is—but if our only concern is to prevent the person convicted of shoplifting from committing the crime, then 3 years may be necessary to make sure that the deterrent message has its desired effect.

### A Third Question about Criminal Justice: The Significance of Retribution

To talk about the proportionality of a punishment is to use the vocabulary of retribution. **Retributivism** is a framework that, at a minimum, insists on proportionate punishment for wrongdoing. This point is unmistakably relevant to the difficulties with deterrence just noted, for deterrence theory, standing alone, places no proportionality limitations on punishment. Because retributivism relies on a proportionality principle, it must serve as a guide to just punishment.

**Retributivism** a framework that, at a minimum, insists on proportionate punishment for wrongdoing

Indeed, retributivism accounts for a great deal of what we classify as criminal justice. First, it explains why offenders are criticized for what they do. Second, retributivism makes clear why pain is essential to punishment. *All* punishment has these characteristics. *Criminal* punishment, as noted earlier, has a third characteristic: government officials preside over the process of condemnation and settle on the specific sanctions to be applied.

Understood in this sense, retributivism appears to offer a better way to account for the aims of criminal justice than does deterrence theory, for retributivism provides a framework for thinking about the appropriate response to serious wrongdoing, a framework that focuses on culpability, responsibility, and proportionality. There are difficulties with retributivism, however, for when we turn to the question of *how much* punishment should be imposed, we discover that retributivism isn't more helpful than deterrence theory. In fact, because retributivism is part of a more general framework (concerning responses to human conduct) that assigns praise *as well as* blame for acts, it has to be noted that the question of *how much?* is as hard to answer for a good thing (for a well-written college paper) as it is for a bad thing (for an intentional act of wrongdoing). It is easier to *rank* student papers than it is to determine exactly what grade they should receive. The same point applies to punishment.

We encountered similar problems when thinking about corrective justice. As we saw, even though the general principle of corrective justice is straightforward (*someone who is at fault in interfering with another person's rights must make whole the person injured by the interference*), application of this principle is less certain once we get to difficult questions about what it means to make whole an injured party.



Uncertainty about the appropriate application of a principle doesn't mean, though, that the principle should be cast aside. On the contrary, as far as corrective justice and retribution are concerned, it's essential to realize that these concepts capture essential features of justice *and* that the concepts nonetheless generate less than certain results once applied to concrete cases. The concepts of corrective justice and retribution *guide* inquiry. They don't *settle* everything.

Madoff's case provides a helpful example of the guidance function of the retributive framework. After the victims spoke at his sentencing hearing, Madoff addressed them and Judge Chin. He admitted that he had inflicted wrongful harm on his victims. "Your honor," Madoff said,

I cannot offer an excuse for my behavior. How do you excuse betraying thousands of investors who entrusted me with their life savings? ... Although I may not have intended any harm, I did a great deal of harm.... I made a terrible mistake, but it wasn't the kind of mistake I made time and again, which is a trading mistake. In my business, when you make a trading error, it's accepted. My error was much more serious. I made an error of judgment.

Having acknowledged the wrongfulness of his acts, Madoff offered an apology:

Apologizing and saying I am sorry, that's not enough. Nothing I can do [now] will correct the things I have done. I feel terrible that an industry I spent my life trying to improve is being criticized now, that regulators I worked with over the years are being criticized for what I have done. This is a horrible guilt to live with. There is nothing I can do that will make anyone feel better for the pain and suffering I caused them, but I will live with this pain, with this torment, for the rest of my life. I apologize to my victims. I will turn and face you. I am sorry. I know that doesn't help you. Your honor, thank you for listening to me.<sup>21</sup>

Here, then, is an unmistakable apology. In apologizing (whether in a criminal court or in a family setting), an offender recognizes that he has wrongfully interfered with other people's rights and disregarded his obligations to them. Essential to an apology is an offender's acceptance of blame. The offender recognizes that he has hurt others, that he could have done otherwise, and that he *should* have done otherwise. In this respect, an apology is the opposite of a rewards ceremony. In rewarding someone, we credit him for his accomplishment. So just as movie stars deliver a speech after winning an Oscar (and so take credit for their work, while crediting others as well), wrongdoers often speak at sentencing hearings to accept blame for their misconduct.

But an apology can be phony. At sentencing, criminal defendants sometimes adopt the language of justice—*no excuse for what I did, I'm guilty, I apologize*—but still don't mean what they say. In settings such as Madoff's, where a criminal scheme went on for a long time with no effort by the offender to bring it to an end, there's an understandable skepticism about the sincerity of the offender's sudden discovery of the language of responsibility and guilt. In Madoff's case, there were particularly important reasons to be skeptical. At sentencing time (and still today), there was uncertainty about whether members of Madoff's family were aware of the fraud he was committing. Madoff has repeatedly denied that family members helped him carry out his Ponzi scheme. Nonetheless, questions continue to be asked about this given the fact that Madoff worked closely with his sons, his brother, and his niece. Furthermore, at sentencing Madoff didn't implicate any associates from his investment advisory business. In the months after the sentence, Frank DiPascali, a high officer in the Madoff investment advisory business, was charged with aiding Madoff, but it isn't clear whether Madoff actually provided government officials with any help in discovering facts about DiPascali's wrongdoing. Madoff's apology, while completely appropriate for a crime with devastating consequences to others, is thus suspect for two reasons. First, Madoff didn't come clean about his fraud until market conditions made this necessary. Second, even after he apologized, Madoff provided little or no help in identifying the others who helped him carry out the fraud.<sup>22</sup>

Was Madoff's 150-year sentence just, then? As we've seen, the answer to this has to be that there is no precise way to determine *exactly* how much pain someone should suffer because of the pain he's caused others. If it's agreed that a fraud that causes widespread harm should lead to a longer sentence than a fraud that causes modest harm, then we can say with relative confidence that Madoff deserved a very severe sentence (with the exact amount of time in prison left indefinite) for his crimes. We can go

beyond this, however, only by pretending to greater certainty about justice than one can reasonably claim. Indeed, we can go even this far by claiming a greater degree of certainty about the concept of deserved punishment than is reasonably warranted.

There are two other factors that further complicate reflections on Madoff's sentence. One of these has to do with corrective justice. When Madoff was sentenced (in June 2009), the trustee was more pessimistic about the amount he could recover for purposes of victim-compensation than he was by 2012. It's important to ask, then, whether full compensation of the amount invested by Madoff's clients should lead to a reduction in punishment. In remarks about Madoff made after the sentencing hearing, Judge Chin stated that he took into account the possibility of less than full corrective justice when thinking about punishment. "I was uncertain whether the victims would ever recover their losses," Judge Chin said, "and I thought this [sentence] would help them."<sup>23</sup>

Does this mean that Judge Chin should have sentenced Madoff to a shorter term if it was clear that the victims would recover most of their investment losses? We now know (as Judge Chin couldn't have known in June 2009) that the trustee will probably recover about 55% of the amount invested. Should punishment be decreased as the prospects for corrective justice become brighter? It appears that Judge Chin thought of this as the appropriate way to think about punishment—that is, he reasoned in terms of a corrective justice/criminal justice tradeoff. In adopting this tradeoff hypothesis, we might ask whether Madoff should have been punished at all if, by some extraordinary turn of fortune, his investors had been able to recover the full \$64.8 billion from him. For example, what if it turned out that Madoff had indeed conducted a Ponzi scheme with his investors' money but that he *also had* \$64.8 billion in bank accounts registered in his name and so had been able to compensate his investors completely? The investors would still know he had *tried* to defraud them and, assuming Madoff didn't pay them off immediately, they would also have undergone the pain and suffering associating with *fearing* that they had lost their money. Are these factors that justify punishment *apart from* the corrective justice imperative of making victims whole? We will confront this difficult question about the relationship between corrective and criminal justice in later chapters. For the moment, it's enough to note that Judge Chin, whose commitment to doing justice within the law is unmistakable, appears to have believed that people should reason in terms of an active connection between the two dimensions of justice—corrective and criminal justice—we have considered in this chapter.

The other issue that should be addressed concerning Madoff's sentence is quite different in nature. As we've seen, two years to the day after Madoff confronted his family with news about his Ponzi scheme, his eldest son committed suicide. If, as we've seen, punishment is a form of pain imposed for prior wrongdoing, should a tragedy such as a son's suicide be counted as part of the pain an offender suffers for his conduct? Here, as before, the principles of justice provide us with no clear answer. These principles guide inquiry in that we can ask better questions about sentencing by focusing on concepts such as desert and wrongdoing. It's too much to expect definitive answers to these questions, however.



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## Summary

There are two key dimensions of justice, one concerned with *correcting* harm, the other with *punishing* it. The first dimension is called *corrective* justice, the second *criminal* justice. The former type of justice is victim-centered. Its aim is to make whole the victim of wrongdoing. The second type is offender-centered. Its aim is not to provide compensation to victims but instead to respond appropriately to an act of wrongdoing. In a case such as Bernard Madoff's, the two dimensions of justice play complementary roles.

## Further Reading

- Aristotle's discussion of corrective justice is the starting point for consideration of the subject. See his *Nicomachean Ethics* Book V. Two insightful modern analyses of corrective justice are Ernest J. Weinrib, *The Idea of Private Law* (revised edition, 2012), Chapter 3 ("Corrective Justice") and John Gardner, "What Is Tort Law For? Part 1: The Place of Corrective Justice," 30 *Law and Philosophy* 1 (2011). Gardner's article considers, among other things, the relationship between corrective and criminal justice.
- For a comprehensive study of Madoff's crimes as well as Ponzi schemes carried out by others, see Diana B. Henriques, *The Wizard of Lies: Bernie Madoff and the Death of Trust* (2011).
- Victim impact statements are now a standard component of criminal sentencing. For a summary of current practice, see the website maintained by the United States Department of Justice at <http://www.ojp.usdoj.gov/ovc>.

## Notes

1. Aristotle, *Nicomachean Ethics* 1130b8-30 in *The Basic Works of Aristotle*, Richard McKeon, ed. (1941) (W.D. Ross, trans.).
2. For further discussion of the distinction between crime and tort, see T.F.T. Plucknett, *A Concise History of the Common Law* 463-482 (5th ed., 1956).
3. Aristotle, *supra* note 1 at 1132a2, n. 6.
4. See Donald Dunn, *Ponzi: The Incredible True Story of the King of Financial Cons* (2004).
5. This account of Madoff's crimes is based on Diana B. Henriques, *The Wizard of Lies: Bernie Madoff and the Death of Trust* (2011).
6. After researching Madoff's career carefully, Henriques states that she is not entirely confident Madoff avoided fraudulent dealings even early in his career. *Id.* 41.
7. Whether Barnum actually said this is a subject of considerable controversy. See David W. Maurer, *The Big Con* (1940).
8. See Tyler Gray, *The Hit Charade: Lou Pearlman, Boy Bands, and the Biggest Ponzi Scheme in U.S. History* (2008). There's an irony to this title. The book was published in 2008 and was superseded in the same year by Madoff Ponzi scheme, which as of now is the biggest Ponzi scheme in world history.
9. See Thomas Illi, "European Kings Club: Nicht mehr viel zu holen," *Beobachter* July 14, 2001.
10. See McGraw-Hill Company, *S&P Indices* (2012).
11. Suspicions about Madoff's investment fund, including those voiced by Harry Markopolis and the SEC's half-hearted investigation in 2005, are discussed in Chapter 8 of Henriques, *supra* note 6.
12. See *id.* 279-80.
13. *Id.* 321-23.
14. *Id.* 216-18.
15. For a summary of the trustee's report to the United States Bankruptcy Court judge, see Diana B. Henriques, "Madoff Judge Endorses Trustee's Rule on Losses," *The New York Times*, March 2, 2010, B 1 and 4. For the opinion by the Second Circuit Court of Appeals affirming the bankruptcy judge's ruling, see *In re Bernard L. Madoff Inv. Sec.*, 654 F.3d 229 (CA 2, 2011). A more complete report was made available by the trustee in September 2013. See Peter Lattman, "Deadline Approaching, U.S. Is Weighing More Charges in Madoff Case," *The New York Times*, September 18, 2013 B6.
16. Statement of Ilene Kent, coordinator of a group of Madoff victims known as the Network for Investor Action and Protection, quoted in Aaron Smith, "Another Blow for Madoff Victims," December 8, 2010, CNN website: [www.money.cnn.com/2010/12/07/news.companies/madoff\\_trustee\\_victims/](http://www.money.cnn.com/2010/12/07/news.companies/madoff_trustee_victims/)
17. *Id.*
18. For a more extensive account of comments made by Madoff's victims prior to his sentencing, see "Madoff Receives Maximum Sentence, 150 Years, for Big Ponzi Scheme," *The New York Times* June 30, 2009 B4.
19. *Id.*
20. For trends in victim impact statements, see the website maintained by the United States Department of Justice, Office of Victims of Crime at <http://www.ojp.usdoj.gov/ovc>.
21. See the summary of Madoff sentencing at *supra* note 5, 279-80.
22. The possibility of complicity of other people in the Madoff fraud is discussed in Henriques, *supra* note 5 at 309-10.
23. Brett Tomlinson, "Alumni Day: Lectures, Honors, and Memories," *Princeton Alumni Weekly* March 23, 2011 (quoting Judge Chin's remarks).

