

## Mistaken Judgments

Stewart Motha

Gauguin famously deserted his family in France to go and paint in Tahiti. Although his abandoned wife and children continued to suffer, this morally objectionable desertion might be retrospectively justified as it was the beginning of a creative life. The modern condition apparently features a subject whose decisive will and choices drive their destiny. We leave parents, lovers, and communities in search of what lies beyond. Whether we later believe these are mistakes or the conditions of a fulfilling life depends on how it all turns out in the end.<sup>1</sup> To put it another way, acting in the world necessarily involves the risk of being mistaken. There is no way of knowing the outcome in advance, but the ethical demands of responsibility follow nonetheless. This is the essence of a tragic sense of acting and taking responsibility in the world.

In *Shame and Necessity* Bernard Williams suggests two elements to a tragic perspective on action: the conversation with oneself about means and ends (what I will call the calculable), and the inevitable venturing into the unknown or incomprehensible that the Greeks associated with the ‘daimonic’, supernatural forces or the Gods (the incalculable).<sup>2</sup> Williams’s task is to better understand necessity and chance by subtracting the daimonic. Unlike Williams, I don’t believe the daimonic has gone (19). Bracketing his modern conceit for the time being, I am interested in how action necessarily risks being mistaken. This paper is concerned with the problem of judging such mistakes – especially when regret is expressed, and past actions are not affirmed.

How should past actions be judged? Moving this question from the register of moral philosophy to that of juridical and political judgment, this essay examines the problem of doing justice to past mistakes and errors.<sup>3</sup> Are past mistakes and errors merely contingent (to be judged on their contextual conditions and the passions and will of the agent of action), or can they be judged transhistorically through a transcendent measure? In the discussion this question is reframed as a wider problem of what it means to judge and do justice in the wake of mistakes that no one would wish to affirm after the event.

Judging past actions and omissions of individuals or states is what the law is regularly called on to do. However, the juridical significance of mistake and error is

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<sup>1</sup> These problems of will and action are explored in R. Jay Wallace, *The View From Here: On Affirmation, Attachment and the Limits of Regret* (Oxford: Oxford University Press, 2013). It is a work of moral philosophy that asks whether there are any limits to hand-wringing and regret about the past. See the essay by Thomas Nagel discussing Wallace – “An Invitation to Hand-Wringing” (2014) 36:7 *London Review of Books* 25.

<sup>2</sup> Bernard Williams, *Shame and Necessity*. (Berkeley: University of California Press, 1993) 19.

<sup>3</sup> I discuss the distinction between mistakes and errors in the paper.

not straightforward. Other than in the law of contract, law hardly addresses what might be called mistake or error at a deeper jurisprudential level. Something more than mistake/error is usually necessary to attract legal sanction. Transgressing the law in modern positivist legal systems shifts the agent of action beyond the register of mistake and error, right and wrong, and into categories such as responsibility, agency, authority, and guilt/innocence. However, these categories cannot expunge deeper moral and ethical questions about the mistakes, errors, and wrongs that lie behind actions that are later translated into crimes that are prosecuted and punished. Worse than that, they do not address the mistakes, errors, and wrongs deemed non-justiciable by courts.

*Mistaken judgments* are decisions and actions we would not retrospectively affirm. We do not have the luxury of acting differently in the first instance. The harm cannot be remedied. Often enough, if an injury is successfully prosecuted as a crime, a conviction would result in a judgment and punishment being declared. But in some cases that is not the end of the matter. The fact of punishment, or indeed amnesty, does not bring the problem of judgment to a close. The ripples of violence can return long after a sentence is declared or amnesty is granted. Judgment is thus a transhistorical problem – an eternal return of ethical demands and justice.

What the mistaken judgments discussed in this chapter reveal is not so much the errancy of the person being judged, but the limited imaginary brought to bear on the problem of judging itself. A mistaken judgment might be an untimely one – too hasty, without all the facts, knowledge of context, pleadings, or understanding of the standards and norms to be applied. I extend the notion of mistaken judgments to consider *forgetful judgments* as a form of mistake (where forgetting is the condition and interruption of memorial practices in post-apartheid South Africa).<sup>4</sup> I will also consider *indefensible judgments* (where the act of judgment itself seems indefensible), and *feminist judgments* (judging as the ‘work’ of critique).<sup>5</sup> Each of these forms of judgment either address a mistake by an individual agent or by the judicial process itself. The discussion explores the encounter between judging and doing justice to past mistakes.

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<sup>4</sup> *The Citizen v McBride* (2011) ZACC 11.

<sup>5</sup> See Blake Morrison, *As If* (London: Granta Books, 1997); and Rosemary Hunter, Clare McGlynn, and Erika Rackley (eds.) *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010).