



‘Finnis on Justice’

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Finnis on Justice

JOHN GARDNER*

1. *Justice as a virtue of character*

Because one's pursuit of fulfilment would be unreasonable and self-mutilating if it were indifferent to friendship and to the worth of the instantiation of human goods in the lives of other people, one needs look to getting order into one's relations with one's fellows, one's communities. The name for that order, *and* for one's constant concern for it, is justice.¹

We will have occasion, in what follows, to engage critically with some ideas in the first sentence of this passage. But we begin with the second. Justice, for John Finnis as for me, names two things. It names a virtue of character (a 'constant concern') and a state of affairs (an 'order [in] one's relations' that one 'look[s] to getting').² Clearly, the two are logically related. The constant concern, in Finnis's formulation, is a concern for the order. Does this mean that the order has logical priority over the concern?

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¹ 'Discourse, Truth, and Friendship', in John Finnis, *Reason in Action: Collected Essays Volume I* (Oxford 2011) 47. Emphasis in original.

² Finnis famously resists the portrayal of practical rationality as the pursuit of 'states of affairs'. See his *Fundamentals of Ethics* (Oxford 1983), 112–20. But he uses the offending expression in a technical sense that associates it with an 'eventist' (or loosely consequentialist) moral outlook. I use it less technically to mean the state of (my, your, our, and hence the world's) affairs, which includes the condition of (my, your, our) relationships, roles, and projects.

Does it entail that the just state of affairs can be characterised independently of the virtue of character, and that the virtue is to be understood derivatively as the virtue of one who cares about the existence of that (independently specified) state of affairs?

No. It is consistent with what Finnis says here that the just state of affairs is to be understood as the state of affairs in which all just actions have been performed, and that just actions are to be identified in turn as those which a just person – a person with the relevant ‘constant concern’ – would be disposed to perform. It does not follow (I hasten to add) that justice, as a state of affairs, can be attained only by just people. The connection between the state of affairs and the virtue of character could be more indirect than that. Quite possibly it goes like this. First one identifies the constant concern of just people, what it is they care about *qua* just. From that one can identify certain actions as just even if they are not performed by just people, because they are the actions that just people would be disposed to perform. Then a just state of affairs can be thought of as one in which those very actions have been performed, whether by just people or not. Or perhaps we would prefer to call that a *not unjust* state of affairs, reserving the title of a just state of affairs for the rarer case in which injustice was avoided by people manifesting the virtue of justice. Either way, it is the virtue that is in the logical driving seat.

Let me address a couple of possible objections to this way of thinking about justice. First, as Finnis rightly insists, the only actions that exhibit the virtue of their agents are justified actions or (synonymously) reasonable actions.³ Contrary to the exotic teachings of some ‘virtue ethicists’, however, actions are not reasonable because they are virtuous. On the contrary: actions are virtuous because they are reasonable. Their reasonableness is independently determined; it resides in the fact that they are

³ eg ‘Distributive Justice and the Bottom Line’ in Finnis, *Human Rights and Common Good: Collected Essays Volume III* (Oxford 2011), 76.

performed for one or more undefeated reasons – not just reasons thought by the agent to be undefeated, but reasons truly undefeated. This independently-determined fact of the action's reasonableness (together with some other facts about the agent) makes its performance virtuous. So surely the independently-determined fact of the action's justice (together with some other facts about the agent) is likewise what makes an action that of a just person? That does not follow. Often, there are multiple undefeated reasons for performing one and the same action, and people with different virtues of character perform that action for different undefeated reasons. As people with different virtues, they have (in Finnis's terminology) different 'constant concerns', or (as I prefer to put it) different rational priorities.⁴ Our question is: Granted that a certain action is reasonable, what makes it just? What gives it that special mode, key, shading, or flavour, of reasonableness? A good answer, I am suggesting, invokes the constant concerns of the just person. The action is just because (in that) at least one of the undefeated reasons for its performance is a reason of the kind that just people, in particular, care about. So just people would be disposed to perform it. That makes it such that its performance is capable of contributing constitutively to justice, now understood as a state of affairs.

A different kind of objection: If we understand justice as a state of affairs only by thinking about justice as a virtue of character, we leave no logical space for justice or injustice that is not the work of some agent. Justice and injustice must be *done*. They cannot reside in any pattern of holdings or advantages, defined independently of what anybody did to create or sustain it. And that surely makes an oxymoron of familiar ideas such as 'social justice' and 'global justice', and if not an oxymoron then at least a mockery of 'distributive justice' as many now

⁴ See Gardner, 'The Virtue of Justice and the Character of Law', *Current Legal Problems* 53 (2000), 1.

understand it? F.A. Hayek famously relished that conclusion.⁵ But one need not follow him, either in relishing it or in drawing it. Justice may, as John Rawls emphasised, be a virtue of social institutions as well as of natural persons.⁶ Moreover, omissions as well as interventions, and either of them accidental as well as intentional, are among the ways in which agents, natural or institutional, may exhibit their justice. Finnis agrees that there may be ‘a failure of justice, by act or omission.’⁷ And of social justice he is consequently able to write, in non-Hayekian vein:

[S]ocial justice, occupying the place of Aristotle’s and Aquinas’s general/legal justice, clearly has the character attributed to the latter by Aquinas ..., namely that social/general/legal justice is centrally a virtue of the ruler(s) ... It is a concern of the citizen only insofar as citizens have the character [role?] ascribed to them (in the central case of citizenship) by Aristotle: participants in governing, ie in ruling.⁸

Do these remarks also associate Finnis with my suggested way of thinking about justice, according to which what counts as a just ‘order’ depends on what count as the ‘constant concerns’ of just people? I am not so sure. He certainly laments, in his recent postscript to *Natural Law and Natural Rights*, that while

‘justice as a quality of character’ is the subject of the sentence that wraps up sec. VII.2, the opportunity is missed to reflect a little, somewhere in the chapter, on the fact that the classic definition picks out a *virtue – constans et perpetua voluntas jus suum cuique tribuere*.⁹

⁵ Hayek, *Law, Legislation, and Liberty* (1973), ch 9.

⁶ Rawls, *A Theory of Justice* (1971), 3.

⁷ Finnis, *Natural Law and Natural Rights* (1980, 2nd ed 2011), 165. (Hereafter *NLNR*. All references are to the second edition.)

⁸ *NLNR*, 462.

⁹ *NLNR*, 460.

But maybe he regards this as only a matter of emphasis, not of logical priority. Whatever Finnis's position on the matter, I will be focusing attention here primarily on justice as a virtue of character. That is because my main aim is to contrast Finnis's account of the just person's 'constant concerns', her distinctive rational priorities, with a rival account that I tend to favour.

2. *Justice, wide and narrow*

I face a preliminary problem in structuring my disagreement with Finnis. The language of justice, notes Aristotle, is sometimes used in a wide sense. Justice in this sense 'is not a part of virtue but is co-extensive with virtue ... in so far as [virtue] has respect to one's neighbour.'¹⁰ Justice in the wide sense, in other words, is the other-regarding part of ethics, for which the label 'morality' is nowadays sometimes reserved. In this sense it is just to be diligent, honest, trustworthy, reliable, considerate, loyal, and humane – towards others. And in this sense there is no contrast between justice and charity, or between justice and mercy, or between justice and generosity, for they too are virtues capable of being exhibited in one's treatment of others.

Justice in this all-encompassing sense is to be contrasted, says Aristotle, with 'justice in the sense in which it is a *part* of virtue', or one virtue of character among others.¹¹ In this narrower sense being impeccably just does not entail being impeccably loyal, honest, humane, diligent, considerate, and so forth, even in one's treatment of others. And being impeccably just may even entail that one is less than impeccably charitable or merciful. In this sense justice is but one virtue among many, competing with the others to constitute our rational priorities, and thus to determine

¹⁰ Aristotle, *Nicomachean Ethics*, 1130^a9–13.

¹¹ *Ibid.*, 1130^a15.

which justified action, when there is more than one available justified action, we are most disposed to perform.

Like Aristotle, I am primarily interested in understanding justice in the narrow sense, justice as one virtue of character among many. But it is not entirely clear whether Finnis is interested in the same thing, for he declines to maintain the Aristotelian distinction between justice in the wide sense and justice in the narrow sense. True, he distinguishes prominently between ‘general justice’ and ‘particular justice’, but that turns out to be a different contrast.¹² As Finnis and Aristotle agree, the ‘constant concerns’ of the just person can conveniently be divided up. In *Natural Law and Natural Rights* Finnis, following Aquinas, divides them (‘exhaustive[ly]’) into ‘distributive’ and ‘commutative’ concerns.¹³ Distributive and commutative justice are then presented as the two species of justice, the two particular forms that general justice may take. But this leaves open whether ‘general justice’ itself is justice in the wide sense or justice in the narrow sense. Finnis says: no need to distinguish the two. Indeed, he seeks a unity or reintegration of the two senses, putting to rest what he regards as a ‘technical distinction’ that Aristotle ‘wanted to introduce into academic discourse’ for want, he says, of adequate conceptual resources to avoid it.¹⁴

This seems to me to be a mistake. There is nothing technical about Aristotle’s distinction. Admittedly, one might wonder whether the word ‘justice’, in modern English, does the same double service that the Greek word δίκαιοσ does according to Aristotle. Leaving aside a few stock phrases, I don’t think it does.¹⁵ But whatever one thinks about this, there is still a nontechnical distinction to be drawn, along Aristotelian lines,

¹² *NLNR*, 166.

¹³ *NLNR*, 166.

¹⁴ *NLNR*, 165.

¹⁵ David Miller, *Social Justice* (1976), 17. A stock phrase: ‘the sleep of the just’, meaning the sleep of the virtuous. See David Miller, *Social Justice* (1976), 17.

between the investigation of *one* virtue of character, with ‘constant concerns’ that diverge from (whether or not they necessarily rival) those constituting other virtues of character, and an investigation of *all* virtues of character, with all their different ‘constant concerns’, where these manifest themselves in one’s treatment of others. To avoid cross-purposes, we still need to know: which investigation are we conducting when we investigate justice? The first or the second?

In spite of his attempt to dismiss the distinction, I will treat Finnis as pursuing the first investigation. He presents justice as ‘a virtue’,¹⁶ ‘a quality of character’.¹⁷ The singular indefinite article licences us to read him as differentiating justice from other virtues of character. True, we might think that there is a master-virtue that all who exhibit any (other) virtue of character also exhibit. But for Finnis, as for Aristotle, this master virtue is practical wisdom or ‘practical reasonableness’ as Finnis usually calls it.¹⁸ Acting justly is but one way of exhibiting practical wisdom; acting unjustly is correspondingly but one way of exhibiting a lack of it. Therefore, ‘one’s personal failings do not all on every occasion implicate one in injustice.’¹⁹ Not even one’s personal failings exhibited towards others implicate one, on every occasion, in injustice. There is also meanness, lack of mercy, unkindness, intolerance, disloyalty, and so on. So there is no risk (to return to the quotation with which we opened our discussion) that the ‘pursuit of fulfilment’ will be ‘unreasonable and self-mutilating’, ‘indifferent to friendship and to the worth of the instantiation of human goods in the lives of other people’ *merely* for want of justice. Personally, I prefer that my friends be as kind and patient as can be, even where the price is that they are less than totally just. On the other hand I prefer that the judge

¹⁶ *NLNR*, 460.

¹⁷ *NLNR*, 165.

¹⁸ eg *Fundamentals of Ethics*, 70-4.

¹⁹ *NLNR*, 164-5.

that I am appearing before be as just as can be, even if this means that he or she is less than totally kind or patient.

In his reintegrated account of justice Finnis combines some aspects of Aristotle's account of justice in the narrow sense with some aspects of Aristotle's account of justice in the wide sense. From the latter he imports the thought, quite alien to the former, that justice and injustice are 'other-directed', meaning that justices and injustices can only be done to others.²⁰ So the case in which one is said to be doing oneself an injustice, or not being fair to oneself,²¹ involves, for Finnis, 'a kind of metaphorical extension' of justice-talk.²² I see no reason to think that there is either metaphor or extension here. Maybe some virtues of character can only be exhibited towards others. Loyalty and public-spiritedness are possible examples. But one can be just or unjust towards oneself, I think, in much the same way that one can be charitable or uncharitable towards oneself, or honest or dishonest with oneself. It is not even an odd case. A person impeccably manifesting the virtue of justice is neither especially unconcerned for herself nor especially concerned for herself. It is part of her being impeccably just that she gives herself her due precisely as she gives others their due; what concerns her is that people, including her, always get their due.

²⁰ *NLNR*, 161.

²¹ There is, to my ears, no significant difference between justice and fairness, and so the expression 'justice as fairness', coined by John Rawls, to my ears means 'justice as justice'. So when I speak of a just person I mean the same person who might these days more commonly be described as a 'fair-minded' person. Finnis seems to agree in regarding justice and fairness as essentially equivalent, speaking of 'what is fitting, fair, or just' (*NLNR*, 178), and treating a 'just balance of advantages' as an 'order of fairness' (*NLNR*, 263).

²² *NLNR*, 161.

3. Giving people their due

Finnis and I agree that the constant concern of just people, *qua* just people, is to give people their due. But we interpret this differently. For Finnis (under the influence of Justinian as well as Aquinas) 'due' has the following sense or connotation:

that of *duty*, of what is owed (*debitum*) or due to another, and correspondingly of what that other person has a right to (viz. roughly, to what is his or her 'own' or at least 'due', by right.)²³

You can see here why talk of 'doing oneself justice' has to be sidelined by Finnis. One may owe duties to oneself, but one has no rights against oneself. So if the constant concern of just people is a concern with rights, it is with what is due to *other* people, not with what is due to people full stop. No doubt this is one reason why Finnis says, revisiting the foregoing passage:

[T]he Roman definition of justice, which I quoted, about giving every man his due, is not wholly adequate.²⁴

He also has another problem in mind when he says this. He worries that the person to whom something is due in a given situation is not always the same person to whom our attention first turns when we reflect on the rights that are at stake, and hence the injustices that are possible in that situation. Supplies are stolen, for example, on their way to the army; the supplies themselves are due to the soldiers, but the injustice is done, he thinks, first and foremost to the general population who rely on the soldiers for their defence, and who, I suppose he would say, have a collective right to the safe delivery of the supplies even though they do not have a right to the supplies themselves. Any

²³ *NLNR*, 162.

²⁴ 'Distributive Justice and the Bottom Line', 79

rights of the soldiers to the supplies, and any injustice done to them by non-delivery, is according to Finnis derivative.

I am not sure that I agree with Finnis's verdicts about who has the rights to what in this case. But I do think that his worries about the reconcilability of these verdicts with an understanding of justice as 'giving people their due' are well-founded. To that extent the case alerts us, I think, to a larger dislocation or disorientation in Finnis's understanding of justice. To bear that claim out, I will split it into two subsidiary claims. First, I will claim, although many things that are due to A, in the sense that concerns just people, are also A's by right, others are not. Secondly, I will claim, while many things that are A's by right are also due to A, in the sense that concerns just people, others are not. So the sense of 'due' that matters for a sound understanding of justice is not 'owed as of right'. Even 'owed' by itself is, I will suggest, a very misleading reformulation. The legalistic Romans were wrong to associate getting what is due, in the sense that concerns the just person, with the payment of debts or dues.

(a) *Due, but not owed as of right.* Some of the things that are due to people, in the sense that concerns the just person, are things that those people deserve. I do not suggest that people getting what they deserve is the only or even the main thing that concerns the just person,²⁵ but it is one thing that concerns him, which does not similarly concern those who possess other virtues.

Consider some unwelcome things that people may deserve: criticism, opprobrium, punishment, misery, hardship, failure. For Finnis, as for most people, it is conceptually awkward to classify any of these as owed as of right to those who deserve them. That is because it is common to all plausible accounts of rights, including Finnis's,²⁶ that a right is to something that the

²⁵ Compare Tom Campbell, 'Humanity Before Justice', *British Journal of Political Science* 4 (1974), 1, who makes the stronger claim.

²⁶ *NLNR*, 205.

rightholder either does or should welcome. To be sure, there are aspects of punishment that should be welcomed by the person who is deservedly punished. There is, for example, the implicit acknowledgement that he is a morally responsible agent.²⁷ But that does not suffice to overcome the conceptual awkwardness of regarding him as having a right to be punished. It is a defining purpose of punishment that, on balance, it be unwelcome to the person punished. Even if punishment has a silver lining, then, it needs on the whole to be a cloud. Besides, the same silver lining is not present in other clouds that people deserve to live under. In what way is deservedly losing one's reputation or one's business – not by way of punishment – an acknowledgement by anyone of one's status as a person, or of any other facts the acknowledgement of which one should welcome? A self-important narcissist or a needy arch-manipulator may deserve to lose all her friends, even if she does not deserve to be punished.²⁸ The just person – in this respect very unlike the compassionate or the merciful or the humane person – sees no cause for sympathy when she, meaning the narcissist or arch-manipulator, does lose her friends. Unless there are other respects in which her loss is undue, he is not disposed to remonstrate with her ex-friends, or to set her up with new ones. But that is clearly not because the narcissist or arch-manipulator has a *right* to be abandoned by her friends. It is because she got what she deserved.

The just person, if I am correct here, is concerned that people get what they deserve, never mind whether they also have a right to it. True, the just person also has a matching concern about the avoidance of *undeserved* ills. It is a cause of satisfaction to the just person not only that people deservedly lose

²⁷ See my *Offences and Defences* (Oxford 2007), 192 for discussion.

²⁸ Punishment can be deserved only for wrongdoing. One may exhibit numerous vices without being a wrongdoer, and deserve various ills other than punishment when one does. See Thomas Hurka, 'Desert: Individualistic and Holistic' in Serena Olsaretti (ed), *Desert and Justice* (2003), 51ff.

their friends, but also that they do not undeservedly lose them. He cares not only that people are punished as they deserve to be, but also that they are not punished as they do not deserve to be. It is clearly not conceptually awkward (never mind whether it is morally correct) to think of people as having a right not to suffer ills that they do not deserve. But it strikes me as impossible to admit that people sometimes deserve ills in such a way as to be able to draw a contrast with those who do not deserve them, without in the process regarding the fact that the former people deserve those ills as a positive reason why they should have them. That much seems to me to be built into the very concept of desert.²⁹ So one cannot, it seems to me, use this shift from getting what is deserved to avoiding what is undeserved to reunite what is due to people, in the sense that matters for the rational priorities of the just person, with what people have a right to get.

Finnis may have a different plan for reuniting deserts and rights. He writes very little about deserts.³⁰ When he speaks about punishment in his mature work he portrays it as a right of people other than the person punished, a right of others, assembled together in a community, to a kind of rebalancing of the moral books. And he adds that therefore, in his view,

one merits reward or deserves punishment (which can only be rightly imposed by persons responsible for a community, administering its law) precisely as someone who is (or, like a visitor, is reasonably taken to be) a part of a community.³¹

²⁹ See John Gardner and François Tanguay-Renaud, 'Desert and Avoidability in Self-Defense', *Ethics* 122 (2011), 111.

³⁰ They enjoy a mention in the *NLNR* discussion of justice only as a criterion of comparison that may figure in a scheme of distributive justice: *NLNR*, 175. Noncomparative deserts appear to be absent from the scene altogether.

³¹ 'Retribution: Punishment's Formative Aim', in Finnis, *Human Rights and Common Good: Collected Essays Volume III*, 175n40.

Here, as with the army supplies, the question ‘to whom is this punishment due?’ does not readily invite the same answer as the question ‘who has a right to it?’ The community, for Finnis, has a right that the punishment be delivered to the person to whom it (the punishment itself) is due. In this case there is not even a derivative right owed to that person of the kind that was owed to the soldiers. True, in this situation we would never say that an injustice was done *to* the person deserving punishment if she went unpunished. But that only goes to show, I think, that while all injustices need to be done, not all injustices need be done to someone. And that in turn is because the things that are due to people, in the sense that concerns the just person, are not only the things that people have a right to. This is not to deny – although I would deny it in a longer discussion – that the rest of us have the collective right that Finnis says we have to see those who deserve it punished. Neither is it to deny – although I would deny it in a longer discussion – that the just person has a constant concern, *qua* just, to see that collective right honoured if it exists. My point is only that, whether or not there is such a right and whether or not the honouring of it sounds in justice, the just person has an independent concern with whether the person punished gets the punishment that she deserves (and with the gullible electorate getting the government they deserve, the remiss father getting the relationship with his children that he deserves, the shyster getting the friends he deserves, etc).

These remarks also hint at a more radical objection to what Finnis says about justice. Not only does reflection on people’s ‘just deserts’ drive a wedge between justice and rights; it also drives a wedge between justice and duties. To see why, consider some more welcome things that people may deserve. A well-behaved child may deserve a treat, a hard-working carer may deserve some respite, a well-run voluntary organisation may deserve public support, a friend who has made an effort may deserve a compliment. As already indicated, to say this much is already to give a reason in favour of giving these things to these

beneficiaries. But does it mean that anyone has a duty to give them, rights-based or otherwise? No. Normally, that these things are deserved is just one reason among others for giving them. Even in the eyes of the just person, no wrong (to the deserving, or at all) is done if treats, gifts, concessions, donations and compliments do not reach those who deserve them. It is a shortfall of conformity with reasons of justice, but not by virtue of that alone an *injustice*, which connotes breach of duty.

To put it another way: the just person has a special concern for people getting (inter alia) what they deserve, but this is consistent with her treating it on occasions as no more than desirable, and perhaps supererogatory, to get it to them. I tend to think that the same is often true of punishment and other ills that are deserved. That ills are deserved is a reason for anyone to mete them out, but that does not make it anyone's duty to mete them out. And that, it seems to me, is also how the just person sees it. For the just person is also practically wise. Her special attention to some reasons rather than others when there are multiple undefeated reasons for action does not lead her to imagine that everything that earns that attention is her, or someone's, duty. If this is right then 'giving people their due' in the sense that is relevant to an understanding of justice has nothing special to do with 'duty' or what is 'owed'. It means something more like: giving people what is appropriate, fitting,³² apt, or suited to them in their situations, of which giving them what they deserve is a prominent, but certainly not the only, species.

If I am right about this it has radical implications for the way in which justice is sometimes contrasted with charity, generosity, mercy and so on in modern political theory. A common view is that up to a certain point justice requires actions of us, and after that point they become 'merely' charitable, generous, merciful, benevolent, humane, etc, which is taken to mean that they are

³² Finnis occasionally relates dueness to fittingness, eg *NLNR* 163, 178, 180.

not required, or at any rate not a matter of duty. That seems to me to be an entirely misguided picture. There are duties of justice but there are also duties of charity (etc).³³ There are also ordinary non-mandatory reasons of justice as well as of charity. Just people (and institutions) differ from their charitable counterparts in respect of which reason or reasons they are disposed to act on, when more than one reason is undefeated and hence rationally available to be acted on by a virtuous person. Since duties do not automatically defeat non-duties, this leaves open whether either just or charitable people are always disposed, all things considered, to do their duty or whether they are sometimes disposed to breach it (unlike diligent people, for whom the doing of duty *per se* is a constant concern).

(b) *Owed as of right, but not due.* A complete set of principles of justice, for Finnis, is one that

includes principles for assessing how one person ought to treat another or how one person has a right to be treated, regardless of whether or not others are being so treated; in my usage, a principle forbidding torture in *all* cases is a principle of justice.³⁴

Allow me to leave aside the words ‘regardless of whether or not others are being so treated’. It leads one to presume that resistance to Finnis’s final remark about torture and justice will be limited to so-called ‘strict egalitarians’, those who believe that how one person should be treated (in justice) depends on how

³³ For more discussion see my ‘The Virtue of Charity and its Foils’ in Charles Mitchell and Sue Moody (eds), *Foundations of Charity* (2000).

³⁴ *NLNR*, 163–4. He thinks this about murder as well as about torture: ‘Distributive Justice and the Bottom Line’, 78. My comments below apply, *mutatis mutandis*, in the case of murder too. I don’t think that an ordinary murder – by contrast with a death penalty, a revenge killing, or a murder of one who is mistaken for another – is best thought of as an injustice.

others are already being, or have already been, treated.³⁵ I am no strict egalitarian, and I tend to think that there are few valid strictly egalitarian principles. In particular, I do not think that the fact that some people have already been tortured or are about to be tortured supplies any kind of reason, however slight, to torture anyone else. So my resistance to Finnis's final remark about torture and justice has a quite different source.

Imagine someone who has been tortured severely, and who complains of the injustice of it. To my ear this complaint would indicate warped rational priorities. Has the torture perhaps affected its victim's moral compass? What comes across to me, but perhaps not to Finnis, is that this torture victim regards himself as having been wrongly picked out for torture, or as having been exposed to disproportionate torture, or as having been tortured on the wrong ground, or in some other way as having been *unduly* tortured. He is complaining about this undueness rather than about the resort to torture as such. Why? What sort of person, reflecting on such extreme inhumanity, quibbles instead about the allocation of it? There are rare cases, to be sure, in which this might be the natural focus. If the only possible way to prevent one person being tortured is to torture another, then there is immediately a live question of who should bear how much of the (*ex hypothesi* unavoidable) torture. In that situation the most pressing moral question is, alas, one of justice. But when, as is usual, there is an unlimited amount of non-torture to go round, focusing on the injustice of a given act of torture suggests the mindset of a childish person, incapable of grasping moral problems except as problems about who get how much of what and why. Such a person is a justice-fanatic.

I am not suggesting, I hasten to add, that the just person is this justice-fanatic, converting every problem childishly into an

³⁵ On 'strict egalitarianism' so understood, see Joseph Raz, *The Morality of Freedom*, ch 9 and Derek Parfit 'Equality and Priority', *Ratio* 10 (1997), 202.

allocative one. The just person is also practically wise, and can see when the reasons for doing something are all defeated, such that the question of which undefeated reason one is to act for does not arise. All that I am suggesting is that the just person has nothing much to add to what any other practically wise person has to say on the subject of torture. She has no distinctive take on it *qua* just. Or at any rate, her only distinctive take on it is that she has nothing much to add: she can confirm, in case anyone was wondering, that torture is never deserved, and she can confirm that the question of how to allocate it does not arise except in rare situations of unavoidable torture. The problem of torture is not, in the normal run of things, a problem of justice, one that calls for a specifically just person to sort it out. And that is in spite of the fact that each of us has a right not to be tortured.

It is easy to slip into thinking that every question about rights is an allocative one. After all, a duty that is owed to nobody in particular is not a right-based duty. I have a duty not to despoil a beautiful landscape, or burn an important historical document, even when I am its owner. A duty to whom? To the world, we sometimes say, or to posterity. But it would be better to admit that this duty is just a duty, a duty to nobody, so that no right is involved. That is because talk of rights is implicitly contrastive. It indicates that a duty is owed to one person or group rather than another. If everyone together – the universe of valuers – is the beneficiary of the duty, then who is the other who is not? It is very tempting to think that this implicit contrastiveness in rights-talk already makes rights-talk implicitly allocative. But when I say that a rights-based duty is owed to one person or group rather than another I do not mean that it is owed to one *at the expense of* the other, or *in competition with* the other, or *such that a like duty is not equally owed to the other*, or anything like that. That one person has a right to my ϕ ing or to my not ψ ing in her case is often fully consistent with everyone else in the world having a like right to my ϕ ing or to my not ψ ing in their cases. If there is plenty of my ϕ ing or my not ψ ing to go round, and if the right

in question is not a right to some allocation, some quota or measure or share, of my ϕ ing or not ψ ing, the extent of which calls for determination, then no allocative question arises for me when I ask whether to ϕ or not ψ in your case.

Surely (you may object) that is because an allocative question was already asked in connection with the right itself, and the answer was already given ‘everyone gets the right’? Not so. To be sure, allocative questions arise automatically in connection with some legal and more broadly institutional rights, when we have to decide (the question being open until we do decide) who is going to get them. But we do not need to decide this – in fact there is no room for *deciding* it – in connection with ordinary moral rights. They are held by those who hold them irrespective of what we decide about who is going to hold them. There is therefore nothing up for allocation. And there is a question of justice, I contend, only when something is up for allocation. The distinctive role of the just person is to do the allocating: to determine who is to get how much of what, and why.

For the avoidance of doubt let me stress that all of this is consistent with Finnis’s view that, as just people,

we may be interested in comparing adult’s rations with small children’s rations as shares of some available supply, or we may be interested in comparing adults’ rations with what they need or with what is *fitting* for them to have if they are to remain alive and well, regardless of questions of supply and shares.³⁶

Although I have some minor reservations about the examples, I agree with Finnis’s main point here. Scarcity of resources always gives rise to questions of justice, but not all questions of justice arise from scarcity of resources, or scarcity of anything.³⁷ I would

³⁶ NLNR, 165.

³⁷ In ‘The Virtue of Justice and the Character of Law’ I overemphasised scarcity. What I had in mind was that scarcity forces us to confront some

add: Not even all questions of *comparative* justice arise from scarcity. There are questions of comparative justice that arise in connection with punishment, for example, even when there is an unlimited amount of punishment, as well as an unlimited amount of non-punishment, to go round. And there are also plentiful non-comparative questions of justice, such as whether a particular punishment (or criticism or reward or compliment or electoral defeat etc) is deserved, or whether a particular procedure (eg for determining guilt or awarding a license) is fair, irrespective of parity with any other instances or recipients. All of this is included within the ethics of giving people their due, and hence belongs squarely to the distinctive constant concerns of the just person, as I have now explained them.

4. *The forms of justice*

The contrast that Finnis draws, in *Natural Law and Natural Rights*, between justice in its distributive form and justice in its commutative form seems, in at least some of his formulations,³⁸ to map onto the contrast between comparative and noncomparative justice. We ‘compar[e] adult’s rations with children’s rations as shares of some available supply’ when we are doing distributive justice, whereas the pursuit of commutative justice does not raise ‘questions of supply and shares’, but includes (for example) ‘comparing adults’ rations with what they

problems as problems of justice when otherwise we might more naturally have seen them through a different lens. However I came across as denying that they could be problems of justice without scarcity. Thanks to Leslie Green for drawing my attention to the misleading impression I gave.

³⁸ He formulates the contrast in various ways and not, I think, always consistently. For example, to judge by *NLNR* 169n10 only strictly egalitarian comparative justice (where the fact that A got an extra ration, now eaten, is a reason why others should get an extra ration too) is distributive; other kinds of comparative justice seem to be classed, by implication, as commutative.

need or with what is fitting for them to have if they are to remain alive and well, regardless of questions of supply and shares.’

I think both of these are best regarded as not merely allocative but specifically distributive concerns. The first is a comparative distributive concern, the second a non-comparative one. I agree with Finnis, of course, that picking out some of the just person’s concerns as somehow distributive ones, to be contrasted with some others that are somehow non-distributive, is ‘no more than an analytical convenience’.³⁹ Yet Finnis’s contrast between distributive and commutative justice, inherited from Aquinas, is not very convenient, as Finnis himself has come to recognise. In later work, Finnis wisely abandons what he calls ‘Aquinas’ unstable classifications of justice’,⁴⁰ in which the second classification, ‘commutative justice’, serves as no more than a residual ragbag containing all the many forms of justice that are left behind when distributive justice has been hived off, distributive justice itself having a somewhat mysterious scope.

Should the failure of Aquinas’s attempt to subdivide the just person’s concerns lead us to abandon all attempts to subdivide them? I don’t think so. Here I want to speak up for one scheme of subdivision, Aristotle’s, on which Finnis has consistently poured cold water. In his recent postscript he writes:

Oddly, in the years since the first edition [of *Natural Law and Natural Rights*], Aristotle’s discussion of corrective justice has received wide attention and a surprising measure of acceptance from philosophers of law and of common law – surprising because this is a rather weak part of his *Ethics*, since it quite fails to discuss the duties of justice which, if violated, give rise to claims of corrective justice.⁴¹

This echoes and amplifies an earlier passage:

³⁹ *NLNR*, 179.

⁴⁰ Finnis, *Aquinas: Moral, Political, and Legal Theory* (1998), 215.

⁴¹ *NLNR*, 464.

The real problem with Aristotle's account is its emphasis on correction, on the remedying of the inequality that arises when one person injures or takes from another, or when one party fulfils his side of a bargain while the other does not. This is certainly one field of problems of justice, but even when added to the field of distributive justice it leaves untouched a wide range of problems. 'Correction' and 'restitution' are notions parasitic on some prior determination of what is to count as a crime, a tort, a binding agreement, etc.⁴²

Aristotle's 'leaving untouched a wide range of problems' with 'corrective justice' is the origin, as Finnis goes on to explain, of Aquinas' invention of 'commutative justice' as a more capacious replacement. 'Commutative justice' includes the whole of Aristotelian corrective justice but bundles it together with 'the duties of justice which, if violated, give rise to claims of corrective justice.' The bundling together is undermotivated, since Aristotle never suggests that the distributive-corrective scheme is meant to be exhaustive. But even if the scheme were meant to be exhaustive, the bundling together should still be resisted, and for a quite independent reason.

I have already given some advance notice of that reason. The duties which, if violated, give rise to claims of corrective justice need not be, and often are not, duties of justice at all, so no 'problems of justice' are left 'untouched' by a classificatory scheme that does not pay them any specific attention. They are often duties of (for example) considerateness, loyalty, honesty, humanity, or trustworthiness. Put less elliptically, they are duties that we have for reasons that are of special concern to considerate, loyal, honest, humane, or trustworthy people. Imagine someone who has been ripped off, who has fallen victim, say, to a scam. Suppose that she complains of the injustice of it. As with the torture victim who complains in similar terms, this complaint has some curious connotations. To my ears at

⁴² *NLNR*, 178.

least, it suggests that the victim of the scam regards herself as having been wrongly picked out for the scammer's attentions, or as having been subjected to more than her rightful share of scamming, or in some other way as having been *unduly* scammed. She does not, in other words, seem to be focusing attention on the main wrong that was done to her, namely the fact that she was scammed *tout court*. If she wanted to focus attention on that, it would be more natural for her to speak of having been a victim of dishonesty or unscrupulousness. Of course if the victim has to bear the loss while the scammer enjoys the ill-gotten gains, it would be perfectly natural to speak of *that* as an injustice. But it is not an injustice in the original scam. It is an injustice in the aftermath. It is an injustice in the fact that the scam went uncorrected – in other words a corrective injustice in the strict Aristotelian sense. For there to be corrective injustice it is not necessary that an injustice go uncorrected. All that is necessary is that there be an injustice in the noncorrection of something, which need not itself be an injustice.

Take, as a slightly trickier example, a case of inconsiderate or careless driving that injures a pedestrian. The careless person is sometimes said to 'fail to take due care' and this may lead one to think of the carelessness as unjust, because undue, to those who are injured by it. But such a failure of allocation is not what the word 'due' is meant to convey here. It is meant to convey that the driver was not taking the care that befits a driver, never mind how he allocated whatever care he did take among other road users. Once again it would be odd, suggestive of an unusual kind of case, for a pedestrian who has been run over to describe this as the doing of an injustice by the driver. That description would suggest that the driver mowed down the victim in a misdirected rage, or was discriminating on improper grounds against certain road users in giving out his care and attention, or something like that. But in the normal case of a driver who is simply not paying enough attention to anyone's safety, including his own, that seems to miss the point. The problem is that the driver is careless

or inconsiderate full stop, never mind whether unjustly so. Injustice is soon to be added to the mix, of course, if the pedestrian can't get the driver or the driver's insurance company to pay up for the loss of earnings that befell him because of the careless driving. But again that injustice is not an injustice in the driving of the car, or even in the running down of the pedestrian. It is injustice in the failure to correct, to repair, to remedy, the damage thereby inflicted. It is a corrective injustice, but not one that lies in the failure to correct an injustice. Rather, it lies in the failure to correct a wrong of carelessness or inconsiderateness, whether or not it is also unjust.

Readers of Aristotle sometimes have trouble understanding how there could ever be reasons of corrective justice that do not simply boil down to reasons of distributive (or otherwise non-corrective) justice. If there is an injustice, let's say a distributive one, then it doesn't take a reason of corrective justice to tell us to undo it. We should undo it because *ex hypothesi* it is an injustice. If, on the other hand, if there is no injustice then there is nothing, so far as justice is concerned, to undo. Either way there is no role for a distinct set of reasons of corrective justice. But the dilemma posed here is a false one. The second horn presupposes, falsely, that the only things in need of correction are injustices, or, to put it another way, that only an allocative wrong, a wrong of failure to give people their due, can give rise to a case for repair of the wrong by the wrongdoer. The just person has no particular eye for wrongdoing. That is not her distinctive department of practical life. But she has a particular eye for the secondary wrongdoing which is the noncorrection of wrongdoing. That is always a problem of allocation, a problem of someone's not getting what she is due, and that kind of problem, as I have explained, is what occupies the just person's distinctive department of practical life. Her concern for correction (reparation, restitution, disgorgement) is usefully regarded as a distinct subdepartment because it involves a special kind of allocation that could have an intelligible role in practical life even

if there were no other reasons of a distinctively allocative kind for her to attend to. One does not need to understand any other forms of justice in order to understand corrective justice.

Don't rights of corrective justice themselves have to be allocated? And isn't it a question of distributive justice how we are going to allocate them? Not always. As we already saw, rights are not always up for allocation. Ordinary moral rights do not need to be allocated by anyone; those who have them, have them by virtue of morality itself without the intervention of an allocator. Allocative questions arise only in connection with some legal and more broadly institutional rights, when we have to decide (the question being open until we do decide) who is going to get them. So in the law, it is true, raising a question of corrective justice normally raises a question of distributive justice about how corrective justice (meaning here a legal right to it) is going to be distributed. Do trespassers get it as well as lawful visitors? Do the intended beneficiaries of a broken contract get it even when they were not parties to the contract? But even in this institutional setting, notice, there is a good deal of 'analytical convenience' in contrasting norms of corrective justice, as Aristotle does, with norms of distributive justice. Without this contrast, it is a lot less easy to distinguish the thing to be allocated (which is a right of corrective justice) from the standard of allocation (which is a standard of distributive justice). True, the rival Aquinas-Finnis classification can boast a like analytical convenience, as Finnis's justly famous discussion of bankruptcy law demonstrates. If I am right, however, this convenience in the Aquinas-Finnis classification is eclipsed by the inconvenience of its including, under the heading of 'commutative justice', many matters that are either matters of distributive justice, or not matters of justice at all but rather matters of humanity, considerateness, honesty, politeness, generosity, etc.

4. Justice in politics, justice in law

I have focused here on questions about justice concerning which Finnis and I disagree, or seem to disagree. Sadly I have left too little space to highlight the many compelling things he says on the subject, several of which have had an abiding influence on me since I first became acquainted with them some 25 years ago. Allow me just to mention, in concluding, two points on which Finnis has done more than any other writer to shape my views.

First, Finnis stands up for the classical view that questions of justice arise first and foremost for each of us as ordinary moral agents, and only derivatively for political authorities and the like. Thus, *contra* Rawls, the question of what makes ‘social institutions’ just cannot be tackled without first tackling the question of what would make you or me just:

[W]hat is unjust about large disparities of wealth in a community is not the inequality as such but the fact that (as the inequality suggests) the rich have failed to redistribute that portion of their wealth which could be better used by others for the realization of basic values in their own lives. ... Where owners do not perform these duties, or cannot effectively co-ordinate their efforts to perform them, then public authority may rightly help them to perform their duties by devising and implementing schemes of distribution.⁴³

These remarks correctly locate the theory of justice in what has now come to be known as the ‘perfectionist’ view of politics, according to which it is the main task of the authorities to assist us in doing what we ought to be doing anyway, and not (therefore) to stand aloof from questions about what would qualify as living well, fulfilling our potentials, treating each other well, making the most of life, aspiring to excellence, etc.

⁴³ *NLNR*, 174 and 173. I have reversed the order of two passages here to create a composite in which Finnis’s direction of argument is clearer.

And yet, as Finnis also says, there may be a special connection between justice and the law, such that justice may strike us as the first virtue of the law, even though it strikes us as only one virtue among many for you and me, and perhaps not the one that we would most treasure among our friends and colleagues and travel agents and so forth. Why is a government department responsible for the workings of the legal system often called a ‘ministry of justice’? Why are law courts sometimes known as ‘courts of justice’? Why is legislation aimed at reform of the criminal process sometimes called a ‘criminal justice act’? Why not, for example, a ministry of kindness or a court of honesty or a criminal diligence act? Here is a good answer from Finnis:

[W]hether the subject-matter of [an] act of adjudication be a problem of distributive or commutative justice, the act of adjudication itself is always a matter for distributive justice. For the submission of an issue to the judge itself creates a kind of *common* subject-matter, the *lis inter partes*, which must be allocated between parties, the gain of one party being the loss of the other.⁴⁴

The point is that the bringing of a moral question before the courts is a way of guaranteeing its transformation into a question of justice even if there would, outside the courts, have been plenty of other (non-allocative) ways to approach it. If that is right, then we want our judges to be just people above all, even though we would not want our doctors or our social workers or our airline pilots, let alone our friends, to be just above all. I have explored this topic in considerable detail elsewhere, without at the time acknowledging, because without at the time being aware of, my debt to Finnis.⁴⁵ His is a way of explaining, without condoning, the late twentieth-century tendency to think of justice as a topic for political and legal philosophers rather than

⁴⁴ *NLNR*, 179.

⁴⁵ In ‘The Virtue of Justice and the Character of Law’.

for other moral philosophers. It allows us to see why Rawls began where he did, without agreeing that it was the best way to begin. For one may be led to imagine that justice is the first virtue of social institutions in general by taking an overly juridical view of social institutions, by thinking of society as a big law court and the rest of us as parties litigating for our fair shares of some social booty. Finnis does not make this mistake. But he certainly does help us to see how others come to do so.