Legal justice and ludic fairness

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I

I have proposed elsewhere[1] that questions of justice are distinctive in being allocative questions. Questions of justice are particularly prominent in the law because there is no law without adjudicative institutions – courts of law – and such institutions face unavoidably allocative tasks. They decide matters in which there must be losers as well as winners, and they are charged with deciding who will fall into which category. Often there are losses that have to be borne by somebody, and a court has to decide who will bear how much of which loss. Often a court has to decide how much to punish whom for what. Often, to do these things and others, a court has to decide how much weight to attach to whose testimony in respect of which disputes about the facts, as well as how to assign which levers of procedural control, which argumentative privileges, and which evidential or probative burdens, to which of the parties to the proceedings. And often, in doing these things and others, a court redistributes legal rights, duties, powers, permissions, justifications, excuses, presumptions, and so on, across a wider population of future law-users and law-violators. What makes a court an adjudicative institution is that it approaches such allocative tasks under an allocative description, by thinking about who stands to gain what, and who stands to lose what, and whether those are the people who should be gaining or losing whatever it is they stand

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[1] In my book *Law as a Leap of Faith* (2012), ch10, as well as in other places.

to gain or lose. For a court, in other words, the crucial question is almost[2] always: who is to get how much of what and why? And who is to get how much of what and why is, in my view, the distinctive preoccupation of the justice-seeker.

This is how the main conceptual connection between law and justice is forged: through the role of the courts. But the courts do not have an institutional monopoly on doing justice. There are also many adjudicative institutions that are not courts. There are arbitrators, ombudspersons, disciplinary panels, umpires, and so forth. What the courts do have an institutional monopoly on is doing justice *according to law*. Doing justice according to law is not simply doing justice without breaking the law. Roughly, it is doing justice by authoritative application of the law. And authoritative application of the law, in the relevant sense, goes beyond locating the facts of the case authoritatively inside or outside a legal rule.[3] It also includes using legal rules as the major premises of arguments that, in combination with other premises (not limited to the facts of the case) support one's authoritative ruling on the facts of the case. Nor need 'legal rules' here mean only 'existing legal rules'. In doing justice according to law, courts have scope to improve legal rules in the process of applying them, including to make them more just, so long as they do the improvement by application of the law, i.e. by using other legal rules as the major premises of arguments in favour of improving each legal rule that they improve. The main relevant restriction is that at some point in the argument they have to rely on one or more existing legal rules to mount their defence of whichever legal rules they end up applying.

It is sometimes thought that doing justice according to law is doing justice better, i.e. acting more justly. Some say that there is an extra kind of justice – legal justice – that one does whenever

[2] Some declaratory judgments may represent an exception.
[3] Gardner, above note 1, ch 7.

one authoritatively applies legal rules.[4] Since this is an extra kind of justice that belongs distinctively to the courts, justice done in the courts is more just, all else being equal, than justice done in other ways. In my view that is mainly a self-congratulatory myth put about by lawyers. Applying legal rules in the doing of justice, even allowing for the ability of the courts to improve those rules as they go along, inevitably constrains the ability of the courts to do justice. Often the courts could offer a more just solution if only they did not need to bother with the law. That is not only because many legal rules are positively unjust in ways that defy improvement by the courts sufficient to make them just. It is also for the deeper reason explained by Aristotle:

> [A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.[5]

What Aristotle is pointing out here is an inevitable tension between justice and the rule of law (also known as 'legality'). One attraction of arbitration as a mode of adjudication is that it can in principle do a more perfect justice, the justice of what Aristotle calls *epieikeia* (usually translated as 'equity'). One potential cost of arbitration, however, is that arbitrators, unlike judges, owe no special duty to respect and serve the rule of law. If all questions of justice were to go to arbitration instead of to court in the name of more perfectly just resolution, we would no longer live under the rule of law. Living under the rule of law is independently desirable. Of course, it too may contribute to justice. It may, for example, help to reallocate some of the power

[4] Notably H.L.A. Hart in *The Concept of Law* (Oxford 1961), 202.
[5] *Nicomachean Ethics* 1137^{b}12–19.

of well-connected people. But it distorts the ideal to think of it as serving only, or even mainly, allocative ends. The rule of law is in large part a collective good. It enables all of us to live better if it enables any of us to do so. Much of the case for living under the rule of law survives the objection that it is not significantly improving the allocation of anything.

II

My way of demarcating the subject-matter of justice has met some resistance. I say that the subject-matter of justice is allocation (whether or not rights and duties are involved). Others say that the subject-matter of justice is rights and duties (whether or not allocation is involved). For them torture is objectionable under the heading of injustice. For me, it is usually not. True, there is a duty not to torture and a right not to be tortured. Yet neither the duty nor the right, nor the torture itself, is up for allocation. Once we ask 'Who should be tortured, for what, by whom?' we have already missed the point, which is that there should be no torture. When there is torture, that is not unjust but inhumane. Of course, subsidiary questions of justice could arise. If someone says 'I was unjustly tortured' they clearly do not make a category mistake. They merely invite us to look past the inhumanity of the practice for a moment, to a local mistake made within it, a misallocation of torture, based perhaps on mistaken identity or false accusation. To this Alan Beever objects:

> [T]he complaint of those who have been tortured is almost uniformly precisely that they have been treated unjustly. The claim of those who campaign on behalf of torture victims is the same.[6]

[6] Beever, *Forgotten Justice: Forms of Justice in the History of Legal and Political Theory* (2013), 286.

It is hard to engage with this claim satisfactorily since Beever provides no examples. All I can say is that, in many years of involvement with relevant campaigning groups, I never heard a complaint or claim that torture is unjust, except from the occasional academic writer with a theoretical axe to grind. If I had heard it I would have found it jarring, and I think I would remember it. True, groups like Redress, CJA, and Amnesty International typically call for justice for survivors or victims of torture. But in calling for that they do not claim or even suggest that the problem with the original torture was its injustice. The injustice, rather, lies in the fact that the torturers were not punished, or even called to account, for their inhumane acts. The justice problem, in other words, is not the torture as such but the misallocation of punishment and accountability.

You may think that this shows a problem with one of my formulations in §I above. I said that allocation is 'the distinctive preoccupation of the justice-seeker.' But if some justice-seekers, like those campaigning groups I mentioned, are preoccupied with the allocation of punishment or accountability, they must by the same token be preoccupied with the wrongs that are supposed to be punished or for which people are supposed to be held accountable. In this vein Tom Angier objects:

> [The] 'allocative' view of justice is odd, since failure to correct and give what is due is intelligible as an evil only on the assumption that wrongdoing has been identified and needs correcting. Moreover, just allocation of benefits and penalties presupposes a fine-grained account of the types and degrees of wrongdoing.[7]

True. But the suggestion that justice-seekers are distinctively preoccupied with allocation is not the claim that they lack an interest in anything else. Obviously, like the rest of us, justice-

[7] 'Review: *Reason, Morality, and Law: The Philosophy of John Finnis*', *Philosophical Quarterly* 64 (2014), 318.

seekers are interested in wrongdoing – its avoidance as well as its identification. My point is only that *qua* justice-seekers they also have a distinctive thing that particularly worries them when it comes to wrongdoing. They worry about the injustices that wrongs may leave behind even when the wrongs were not themselves injustices. Those injustices that wrongs may leave behind are such things as failures to hold accountable, failures to punish, and failures to repair. They are allocative failures.

III

A different objection to my way of demarcating the subject-matter of justice, and the one that I am going to spend more time on here, is offered by Sari Kisilevsky. If I am right to understand questions of justice as allocative questions (says Kisilevsky) then questions of justice (and claims of injustice) ought to be pervasive in games, but (says Kisilevsky) they are not.[8]

My reply to Kisilevsky is that the relevant questions and claims are indeed pervasive in games, but often under the name of 'fairness' rather than 'justice'. Why under that name? I tend to think that an unfairness is something that would be an injustice if only it were more important, while an injustice is something that would be a mere unfairness if only it were less important. We tend to speak of 'unfairness' when, as in games played just for the sake of playing them, the stakes are pretty low. Justice-talk may become more apt even in game-playing if the game is not being played just for the sake of it. If the winner takes home a big cash prize, or if the cost of losing is more than mere disappointment, we might want to ask whether the game is a just mechanism for the allocation of such things. Is a round of poker a just way of settling debts? Is a game of chicken on the motorway a just way

[8] 'Legal Positivism and Legal Normativity: Gardner's *Law as a Leap of Faith*', *Jurisprudence* 6 (2015), 588.

to induct kids into the in-crowd? Yet sometimes we stick to fairness-talk even here. Switching from justice-talk to fairness-talk in contexts where something more important is at stake can be a way of lowering the moral temperature. That may of course suit reactionaries, who tend to benefit most from playing down the importance of injustices. But it could also suit progressives who want to lure those same reactionaries into thinking that they have little to fear from progress. Talk of fairness, unsurprisingly, found great favour during the years of the 'Third Way', in which politicians like Tony Blair and Bill Clinton attempted, with short-lived success, to bring progressives and reactionaries together in the same 'big tent'. Their legacy has included, it seems to me, an enfeebled political discourse in which even grave injustices can too easily be sidelined as mere unfairnesses. Does anyone ever speak of grave unfairnesses?[9]

We can learn some interesting things about law and justice by thinking about games and fairness. Here is one thing. It is true that, whereas legal rules are often said to be unjust, the rules of games are rarely said to be unfair. What is usually said to be unfair, in a game, is the conduct of a player relative to a rule. Why is that? The main explanation is that the rules of a game depend for their intelligibility on their place in the complex of rules that add up to constitute the game. Barring special cases, it does not make sense to follow one rule of a game in isolation from all the others. It makes sense to follow a rule of the game only if one is playing the game,[10] and one is not playing the game

[9] I have a satirical letterpress on my wall at home: 'All cases of unfairness must be reported! Do not delay!' (There follows an imaginary Whitehall telephone number.) Search 'Aardvark manifesto 2012' to see a copy online.

[10] One may very occasionally want to create an illusion that one is playing the game, or for some purpose act out the role of a player of the game. On a walk in the park, one may kick an abandoned ball into the net while shouting triumphantly 'he scores!' That is the kind of case that I was setting aside when I said 'barring special cases'.

unless one is following at least the bulk of its rules.[11] Correspondingly, each rule of a game falls to be evaluated, *qua* rule of the game, only in terms of its contribution to the playing of the game. 'That's a bad rule' is a perfectly ordinary thing to say, its implication being that the rule combines badly with the other rules and makes the game less satisfactory, as a game, than it might otherwise have been. 'That's an unfair rule', by contrast, finds fault with the rule in a way that goes beyond its contribution to the playing of the game. It finds, as it were, a non-ludic kind of fault with the rule. That talk of unjust legal rules is much more common than talk of unfair rules of games reflects the fact that legal rules, or most of them, are supposed be followed even in isolation from each other. Even if you run a red light and exceed the speed limit before you fail to stop and report an accident, it still makes sense to accuse you of failing to stop and report an accident. The rule is not there only for those who also follow the bulk of the other rules. It stands to be evaluated not just as a contributor to the legal system but also, in its own right, as a way of getting people to stop and report their accidents. *Inter alia* it should do so justly, i.e. in such a way that its benefits and costs are appropriately allocated.

To repeat: what is usually said to be unfair, in a game, is the conduct of a player relative to a rule. Sometimes the conduct in question is the cunning exploitation of a rule, or the sneaky concealment of a rule, or the fussy insistence upon a rule. Often, however, the unfairness is the breach of a rule. Is every breach of a rule of a game by a player an unfairness? No. Suppose that everyone starts playing Monopoly on a shared misconception that anyone who lands on 'Go' goes straight to 'Jail'. Sticking to this rule, they repeatedly break the rules of Monopoly. We could of course claim that what they do is create their own variation on Monopoly. And why not? Still, they create the new variation by

[11] In his *Practical Reason and Norms* (1975), at 114, Joseph Raz labels this feature of game rules their 'joint validity'.

breaking the rules of what might be called 'classic' Monopoly. Is that an unfairness, let alone an injustice? Of course not. Just breaking a rule does not make for unfairness. It makes for unfairness only if it makes for misallocation as between the players. Suppose, to push the example further, that the banker upholds the novel 'Go straight to Jail' rule for me and not for you. The unfairness lies not in the breach of the rules of classic Monopoly but in the misallocation of their benefits. Something similar holds in the law. Mere breach of a legal rule is not *per se* an injustice. If there is an injustice it lies in the misallocation that comes of the breach. There may be no such misallocation. Everyone expected the breach, it happens every time, nobody ever gained or lost anything by it, etc. In that case it is not even a morally insignificant injustice, i.e. an unfairness. There is no live allocative issue associated with the breach. This brings us back to the point I made in §I, namely that there is no extra 'legal justice': the mere fact that the law is applied to solve a problem does not add any extra justice to the solution.

IV

Not everyone thinks of 'unfair' as a temperature-lowering substitute for 'unjust'. Rawls had the following very different use for the word 'fairness': he thought that questions of fairness are questions of *procedural* justice.[12] So his name for his theory – 'justice as fairness' isn't as pleonastic to his ears as it is to mine. For him it captures the idea that one can get at the rest of justice through procedural justice, by asking something like this: 'which norms of (non-procedural) justice would we endorse if we assessed the candidate norms under procedurally just conditions?'

This view, however, doesn't help much to understand why fairness is such a live topic in games. It's not clear that games

[12] Rawls, *A Theory of Justice* (1971), 11-12.

typically include a distinct procedural element. Perhaps that's because, in the well-known Rawlsian terms, they are all 'pure procedural justice', i.e. once the just procedures are used there is no further logical space for injustice.[13] But that seems to me to conceal rather than illuminate the real problem.

The real problem is that in games any unfairness can be cast as procedural relative to something else, something else which is regarded for the purpose as not procedural. The umpire finds a foot-fault on second service. Is this a procedure? Yes, relative to the loss of the point. But we can also ask what is the proper procedure for the umpire to find a foot fault, i.e. is it to be determined by the umpire's perception alone, or should the umpire give the call of the line-judge some authority, or let the computerized detection system settle it, etc.? Relative to those procedures, the umpire's finding of a foot fault counts as non-procedural, whereas relative to the losing of the point, the umpire's finding counts as procedural.

We could go on. Relative to the winning of the game, the losing of the point counts as procedural. And so on. Procedurality has a shifting baseline, and so (with it) does the domain of procedural justice. This is not only true in games. It has many possible implications for thinking about procedural justice outside of games, e.g. in administrative law. It helps to explain the instability of the distinction, for example, between so-called 'procedural' legitimate expectations and so-called 'substantive' ones.[14] 'Substantive' here and in most other uses is what J.L. Austin cryptically and now archaically called a 'trouser word', meaning that it 'doesn't wear the trousers' in its relationship with its opposite.[15] Austin gave the word 'real' as an example. What it means depends on what it is being opposed to: when opposed to 'artificial' it means 'non-artificial', when

[13] Ibid, 85.
[14] For more on 'substantive' see Gardner, above note 1, ch 8.
[15] Austin, *Sense and Sensibilia* (1962), 63-71.

opposed to 'imaginary' it means 'non-imaginary', when opposed to 'fake' it means 'non-fake', etc. In the same way, 'substantive', when opposed to procedural, means 'non-procedural'. The problem is that it is hard to think of any practical problem we face in life that is *absolutely* non-procedural. Even 'how should I live my life?' is procedural relative to something.

V

There are many other issues about games and fairness that shed light on the way we lawyers think about justice. For the purpose of this contribution, let me just highlight two for further reflection. We might think of them as negative lessons, or perhaps more straightforwardly as cautions or warnings.

1. Enthusiasts for connecting law and justice may think that whenever we have a question of justice, we have a question fit for the law's attention. I hope they don't think we should use the law to regulate Monopoly, or hopscotch, or tiddlywinks. Of course they may say that, by my own account, the questions that these games give rise to are not questions of justice. They are only questions of fairness, for they are not morally important enough for the designation 'justice'. But then that gives rise to the following subversive thought: that what makes something fit for the law's attention is the fact that it is morally important, not that fact that it is specifically an allocative issue. Allocative issues may be suitable for the laws' attention mainly in virtue of the following contingent feature of them, namely that people tend to get into entrenched conflicts about them, and those conflicts tend to escalate to a point at which neither side is acting justifiably. That makes it morally important to intervene, and to do some allocating now, even if the original allocative question wasn't morally important. Here it is the moral importance, not the allocativeness, that is doing the real work. Allocativeness, hence justice, has an intimate connection to the law only at the next stage, when some adjudicative institution needs to decide

how to resolve or mitigate whatever conflict it was that necessitated the law's intervention.

2. I mentioned that switching from justice-talk to fairness-talk in other contexts, outside of games, can be a way of lowering the moral temperature. But it can also be a way of encouraging a game-like, or ludic, attitude to things other than games. 'It's just not cricket' is an understated British way of expressing moral disapproval. The idea that people will be fine (tolerated, left alone, etc.) if only they 'play by the rules' is a more pernicious example of the same thing. More pernicious because it encourages the thought that law is a game, and that people deserve the terrible things that law can heap upon them in much the same way as they deserve to pay a fellow-player when they land on her property-square in Monopoly. But law is quite obviously not a game and one should not take a ludic attitude in connection with it. The most important, and most obvious, difference is that the law heaps terrible things upon people, meaning things that are terrible for them as people, and not just for their position relative to the rules. Children may cry if they lose a game. We should try to teach them that it's only a game. But we shouldn't try to teach them the same lesson if their parent is arrested or jailed. We should teach them the opposite. This is a reason to insist on 'injustice' and not switch to 'unfairness' in connection with the law. That is equally true, I would like to propose, in connection with legal procedures and the way they are represented in the law. It is a potentially dangerous turn in English public law that the age-old principles of natural justice have come to be known as principles of mere 'procedural fairness'. It contributes to, as well as reflecting, the increasing lack of moral seriousness with which legal process is viewed, and helps to undermine the capacity of the law to do justice. For that capacity depends first on due process of law, itself an aspect of justice that is also a central facet of the ideal of the rule of law. This reminds us that the tension between justice and legality of which Aristotle spoke is only partial. Some desiderata of the rule of law are also requirements of justice. Others, however, are

distorted by thinking of them that way. Questions of allocation of prematurely foregrounded, and we lose sight of what we all have to gain together, by way of collective good, from the upholding and honouring of the rule of law.