The Virtue of Justice and the Character of Law (2000)

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The Virtue of Justice and the Character of Law†

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1. Why justice?

The idea that law is intertwined with justice lies so deep in our consciousness that it barely attracts critical attention. Few eyebrows are raised at the fact that we know our judges as Mrs Justice so-and-so and Lord Justice such-and-such. That magistrates are also known as justices of the peace may strike us as a little old-fashioned but it doesn't strike us as otherwise peculiar. When an Act of Parliament is labelled as an Administration of Justice Act it does not take a lawyer to work out that the Act is about the workings of the legal system. Nor does it take an insider to realise that 'the criminal justice system' is a shorthand way of referring to the institutions of the criminal law and its enforcement, and that 'civil justice reform' means reform of the legal process in non-criminal cases. Meanwhile in many countries – just in case you think this is a local phenomenon – the government office charged with oversight of the working of the legal system is known as the Ministry of Justice or the Department of Justice. Wherever there is mention of laws and legal systems, in other words, invocations of justice are unlikely to be far behind.

When I say that this fact attracts little critical attention I don't mean, of course, that legal systems are widely regarded as

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paragons of justice. On the contrary, in most countries much ink is spilt, and in some countries blood as well, over injustices allegedly perpetrated by and through the legal system. The fact that our judges are known as Mrs Justice so-and-so or Lord Justice such-and-such is occasionally paraded as a nice irony, while the rebranding of Criminal Justice Acts as Criminal Injustice Acts, or Ministries of Justice as Ministries of Injustice, is grist to the mill of campaigners and headline writers. Some critics even doubt whether legal systems really have it in them to live up to the aspiration that they should be just, and accordingly they treat the law's continual invocations of justice as a kind of tragi-comic conceit. But in all this disagreement the assumption generally remains unshakeable on all sides that justice is indeed the correct aspiration for the law, so that a law or legal system which fails to be just is a law or legal system which fails in a respect fundamental to its worthiness as a legal system. In every impassioned denial that the law is just there lurks, in other words, an equally impassioned re-confirmation that just is what it ought to be. That is why the ink, and the blood, is so often spilt over the alleged injustices.

To be on the safe side, perhaps we should leave room for the possibility that some particularly cynical types are not really objecting to the injustices as such. Perhaps they don't take a view on whether legal systems should be just; they just take the view that legal systems should not be hypocritical. Legal systems, they say, should live up to their own advertised aims, whatever those aims happen to be. Such critics hold the law up to the light of justice only because that is the same light which the law holds *itself* up to, with all its talk of Mrs Justice so-and-so and Lord Justice such-and such, with all its criminal justice this and civil justice that. But whatever the force of this 'hypocrisy' critique – and personally I find it shallow – it does not by-pass the question we have set ourselves. For it simply reframes that question as the question of why the law would choose the light of justice as the right one to hold itself up to. And if the answer is that this is a

light which will lend it an aura of public legitimacy or respectability, then the same question arises again, in a new guise, as the question of why the light of justice might be publicly regarded as the light most apt to lend it that aura. And so on. Unless we are prepared to say that the association between the law and justice is ultimately arbitrary – a conclusion which is hard to square with the fact that it appears to be a more or less universal association – the question cannot be avoided forever. Why should law be thought (by its defenders, by its critics, by itself, by the public, by anyone at all) to be the sort of thing which ought to be just?

Now one way of reading this question admittedly makes it a silly one to ask. Justice is a moral virtue and it is part of the nature of a moral virtue that anything that has the capacity for moral agency should exhibit it. That capacity for moral agency is not only a capacity of adult human beings but also of the institutions which they create and inhabit. The institutions of law – such as legislatures, courts and tribunals, police forces, and of course law firms – count among those human institutions. And some subset of such legal institutions add up to constitute a legal system. From this it follows without further ado that a legal system ought to be just. But so far as it goes this argument entails only that a legal system ought to be just *inter alia*. By the very same token it ought to possess all the other moral virtues too. In view of its capacity for moral agency it ought equally to be honest, loyal, trustworthy, humane, temperate, considerate, courageous, charitable, diligent, public-spirited, prudent, and so on. Yet somehow a campaign against the law's inconsiderateness or imprudence wouldn't have quite the same ring to it as a campaign against the law's injustice. And while philosophers have long debated whether an unjust law is really a law, I know of no corresponding debate about whether an intemperate law or an uncharitable law really is a law. Somehow, moreover, the titles Mr Loyalty so-and-so and Lord Courage such-and-such don't sound much like judges' titles (maybe a butler and an

admiral respectively?) and whatever the Ministry of Diligence or the Ministry of Trustworthiness might exist to supervise, it seems unlikely that either exists to supervise the workings of legal system (maybe industrial output and financial services respectively?)

The point I am making with these transparently silly proposals for renaming is that law is very commonly held to be subject to some *special* imperative to be just beyond that which binds it to exhibit other moral virtues. The puzzle before us is not, therefore, the question of why we should expect and demand of the law that it be just *inter alia*. It is the question of why we should expect and demand of the law that it be just *above all*, just *in particular*, just *as opposed to* morally virtuous in other ways. Given all the other moral virtues that it might possess, and *ceteris paribus* ought to possess, why should we so insistently and ubiquitously regard the moral virtue of justice as the apotheosis of the law's success, and injustice, accordingly, as the most damaging kind of legal failure?

2. Moral virtues and their horizons

To pursue this question, we obviously need to know a bit more about moral virtues and how to differentiate them from each other. The basic answer – although in a longer discussion it would call for some refinement – is that each moral virtue is differentiated from other moral virtues by the distinctive rational horizons of those who exhibit it. By this I mean that people and institutions with different moral virtues are animated by different rationally significant features of actions – not only their own actions but also the actions of others. The main implication is that what strikes, say, an honest person as sufficient reason to perform some action may strike a loyal person as being an insufficient reason to perform that same action, and *vice versa*. Sometimes, accordingly, the honest person and the loyal person may agree on the action to be performed, but disagree about *why*

it falls to be performed, since it has more than one rationally significant feature in its favour. The same action is required, let's suppose, both to avoid deceit (which the honest person is keen to avoid) and to avoid betrayal (which the loyal person is keen to avoid). So both the honest person and the loyal person lean, on this occasion, in favour of the same action. On other occasions, by contrast, their disagreement about the whys and wherefores of the available actions may lead the honest person and the loyal person to favour different, even diametrically opposed, actions. All else being equal, the honest person is inclined to betray to avoid deceiving, while the loyal person leans the other way. And the leaning in such cases is not only a leaning regarding their own actions. They apply it equally to each other. The honest person will see the loyal person as too quick to resort to deceit, while the loyal person will look askance at the honest person's preference to betray.

On a certain view of how reasons for action work this already creates a problem. Surely these two characters can't both be right at once? Surely a given reason is either a sufficient reason to perform a given action or it isn't? So, looking at the honest person and the loyal person, surely on any given occasion on which their rational horizons diverge, and they take against one another's priorities, at least one of them can't really be exhibiting a moral virtue at all, for he or she must be deluded, must have the relative importance of the reasons back to front, must have mistaken priorities? This line of thought led some moral philosophers of the modern age to try and isolate one single trait of character which is the only true moral virtue, being the one which consistently sets up the correct rational horizons for any moral agent. To fill this role the utilitarians often alighted on a rather austere kind of public-spiritedness which is sometimes

known as 'impartial benevolence' or 'responsible benevolence';[1] Kant and his followers, meanwhile, opted for variations on the rather different, but no less austere, theme of diligence or conscientiousness. These instincts to find one true path of moral virtue were based on the assumption that it could not conceivably be rational to be selective in one's attention to reasons, i.e. that rationality requires sensitivity to all reasons in proportion only to their independent rational force. A more classical view, which is the one I will endorse here, assumes the opposite. It assumes that, while reasons do have an independent rational force and that sometimes, accordingly, there is only one rationally acceptable way to go for a moral agent – which would indeed be the way chosen by all morally virtuous people and institutions – more often than not the independent force of reasons fails to provide any such closure of alternatives. In such cases rationality itself leaves various alternative rationally acceptable ways for a moral agent to react to and prioritise the various competing reasons that are thrown up by the practical situation he is in. In such cases people and institutions with different moral virtues tend to react to the reasons and prioritise them in different ways, sometime leading them to different, even mutually antagonistic, actions.

3. The horizons of justice

What, then, are the distinctive priorities of the just person? What sets her rational horizons apart from those of other virtuous people? Aristotle says, and I think rightly, that the just person has a special concern with *proportionality*.[2] But not just any kind of

[1] For a particularly interesting study of this complex character trait see William Frankena, 'Beneficence/Benevolence', *Social Philosophy and Policy* 4 (1987), 1.

[2] 'The just, then, is a species of the proportionate': *NE* 1131^{a}29.

proportionality. Hers is not a preoccupation with keeping reasons in proportion to other reasons, or keeping means in proportion to ends, or keeping reactions in proportion to actions, etc. – although she may incidentally care about these things too. Her distinctive concern *qua* just is a concern with proportionality between one person (or group of people) and another person (or group of people).[3] The just person is one who particularly cares, in other words, about who is allocated which proportion of what goods and ills, and on what grounds.

There is more than one type of allocative proportionality, as Aristotle points out, and so the just person's distinctive concerns come in more than one guise.[4] On the one hand the just person has *distributive* concerns which are concerns about securing or maintaining *geometric* proportionality between people. Under this heading the just person asks whether some good or ill – be it pleasure or suffering, reward or punishment, love or resentment, consumption or production, truth or falsehood, honour or shame, etc. – is divided up in the proper way among those who are, on a given occasion, candidates for receiving it. *Corrective* concerns, by contrast, are concerns about *arithmetic* proportionality between people's allocations of goods and ills. Under this heading the just person would have it that some good or ill regrettably transferred between two parties should be transferred back, so that the *status quo ante* or *status quo alter* may be restored. Roughly, distributive justice is the justice of division, while corrective justice is the justice of subtraction. These two *forms* of justice, as they are sometimes known, are cross-cutting. They do not co-exist harmoniously on the just person's rational horizons. Sometimes a just person may have reasons of corrective justice to effect a transfer which her distributive concerns put her under severe rational pressure not

[3] Herself included. The just person acts to secure or maintain proportion 'either between himself and another or between two others': *NE* 1134^{a}2.
[4] See *NE* 1130^{a}30ff.

to effect (say, to return the stolen property she just found to its ungrateful owner who has much less use for it and much less need for it than the thief). There is nothing surprising about this. Sometimes, by the same token, reasons of distributive justice may be at war among themselves ('to each according to his need' often conflicts, for instance, with 'from each according to his ability'), and the same is true of reasons of corrective justice (the restitution of wrongful gains famously tends to misalign, for instance, with the compensation of wrongful losses[5]). Nobody, after all, promised that a virtuous life would be immune from the experience of moral conflict. What is distinctive about the life of the just person is that moral conflicts for her, *qua* just, are allocative conflicts. They are conflicts, in other words, about who gets how much of what and why.

To see the distinctiveness of these rational horizons, try comparing the just person with the humane person.[6] These two characters might well converge on some pursuits. They might well converge, for example, on a campaign for the cancellation of the debts of poor countries in the developing world. It does not follow that they both see the problem in the same light. The humane campaigner cares about the alleviation of suffering. Of course, her concern about the alleviation of suffering is not completely indiscriminate. She baulks, for example, at the intentional infliction of fresh suffering merely in order to prevent

[5] Around 1132^{a}12 Aristotle talks as if he denies this; but luckily for his reputation as a sensible thinker he makes clear that in talking of the gain and the loss as coextensive he is using 'gain' in a special technical sense which is widely employed in corrective contexts 'even if it be not a term appropriate to certain cases.'

[6] This contrast was first brought to life for me by Tom Campbell's important article 'Humanity before Justice', *British Journal of Political Science* 4 (1974), 1. However, my explanation of the contrast differs from Campbell's. Indeed I ally myself with some of the views he criticises.

greater suffering to other people or on other occasions.[7] But this is not because she focuses on how suffering is allocated as between different people or groups. It is because, *qua* humane, she regards the intentional infliction of suffering as the worst evil irrespective of how it is allocated, and the non-alleviation of suffering – again irrespective of how it is allocated – as the next-worst.[8] The just campaigner, by contrast, foregrounds the allocative questions, the questions about who is suffering, and in what measure, and by comparison with whom, etc. She stresses, perhaps, the fact that the suffering in question is so unevenly spread across the globe, or the fact that it is the fault of fat-cat bankers in the developed world who should accordingly be the ones charged with putting it right, or the fact that current anti-poverty measures are not ensuring that each person or group of people in the suffering constituency gets the appropriate share of the remedy, etc. For the humane person these various distributive and corrective concerns all seem like distractions from the real business of alleviating suffering (other than by intentionally inflicting it). For the just person, on the other hand, they *are* the real business of relieving suffering (other than by intentionally inflicting it); there is no other acceptable way to think about this business, complains the just person, except as a problem of who gets how much of what and why. To which the

[7] Herein lies one of my disagreements with Campbell. Allying the humane person with a version of utilitarianism (ibid., at 6), he holds that the humane person cares to minimise suffering rather than to allocate it. But in my view she cares neither to minimise nor to allocate suffering. She cares first that it not be intentionally inflicted and subject to that, second, that it be alleviated. For allied doubts about the utilitarian reinterpretation of the virtue of humanity, see Brian Barry 'Humanity and Justice in Global Perspective', *Nomos* 24 (1982), 219.

[8] Which is not to say that *no* amount of alleviation of suffering could, in the eyes of the humane person, justify its intentional infliction. Her priorities need not yield an absolute constraint, let alone an agent-relative absolute constraint of the type sometimes called a side-constraint.

humane person replies that of course what she does has allocative *consequences* but it is myopic to be fixated with this, when the more important fact about what she does is that it alleviates a great deal of suffering but not by intentionally inflicting any. And so on. Naturally, this difference of *Weltanschauung* can lead to disagreement between the two campaigners about the details of their campaign, e.g. about whether the debt should be cancelled before we start worrying about who ends up funding the cancellation, or about what should be done about poverty in the meantime.

From the inside of this disagreement – for the campaigners themselves – it may seem that only one of the ways forward can be the correct way. But as I already indicated, the nature of morality is such that there could be two incompatible correct ways forward – in this case, the just way and the humane way. For those of us who possess a modicum of both virtues, this incompatibility surfaces as ambivalence. We are ambivalent about how to go about relieving the suffering which debt brings to poor countries. Are we in favour of sending out food lorries to famine zones, or do we reject this as shoring up the fundamental iniquity of global capitalism, deflecting responsibility from those really to blame, letting ourselves off the hook by a token gesture instead of really making a proportionate sacrifice of our own creature comforts, etc.? We are similarly ambivalent about the trial of now ageing and frail alleged war criminals, about the misery of investors who were bankrupted by their own failed money-spinning gamble, about the future of a National Health Service that may be getting better at prioritisation of cases but in the process treats patients with less warmth and fellow-feeling, etc. In other words we experience not only the many conflicts within justice and humanity respectively, but also the conflicts between them, since we are less morally single-minded than the campaigners just portrayed. Unlike them we notice that sometimes we are compromising our humanity in being more

just, or alternatively compromising our justice in being more humane.

The contrast between the single-mindedly just campaigner and the single-mindedly humane campaigner helps, however, to illuminate the Aristotelian idea that reasons of justice are distinguished by their form. It helps us to see that, unlike some other moral virtues, the virtue of justice has no special subject-matter of its own, no special goods and ills over which it presides and which fill its horizons.[9] The humane person is distinguished from many others – e.g. from the honest person and the loyal person – by the evils she is especially concerned about, namely those evils defined by their connection with suffering. Not so the just person. She deals in many goods and ills, including, but not limited to, the infliction and non-alleviation of suffering. She also cares about the goods and ills which animate honest and loyal people respectively. She is distinguished from all of them, not by *which* goods and ills she cares about, but by *how* she cares about them, namely as possible objects of allocation, whether geometric or arithmetic. Her distinctive concerns are distinguished, in other words, not by their substance but by their form.[10]

4. The myth of 'formal justice'

This Aristotelian idea is widely misunderstood. I have often seen it suggested that Aristotle espouses principles of 'formal justice' as

[9] In some people's work this role is filled by the good of equality. I am among those who believe that there is no such good (even though I often support the policy proposals of those who say that there is). I was persuaded by Joseph Raz, *The Morality of Freedom* (Oxford 1986), ch 9.

[10] Alas, Aristotle doesn't quite stand firm on this point. He is occasionally tempted to associate justice with certain distinctive goods and ills. On which see Bernard Williams, 'Justice as a Virtue' in A.O. Rorty (ed.), *Essays on Aristotle's Ethics* (Berkeley 1981).

opposed to principles of 'substantive justice'.[11] But Aristotle espouses nothing that could conceivably be called a principle of formal justice. He never says, as he is sometimes accused of saying, that people act justly whenever they act to restore people's relative positions to the *status quo ante*, or whenever they treat like people alike and unalike people unalike, or whenever they secure or restore some kind of proportion, etc. He never claims, in other words, that the just person is merely one whose principles take the correct form. In fact he explicitly denies this. He argues at some length that there are unsound principles of justice as well as sound ones, on both the distributive front and the corrective front.[12] The just person, it goes without saying, is the person who is animated only by *sound* principles of justice. To act on unsound principles of justice – such as 'give black people fewer benefits than white people' or 'an eye for an eye, a tooth for a tooth' – is to be an *un*just person; it is to possess, not the virtue, but the corresponding vice. But sound principles of justice and unsound principles of justice, as you can see from these examples, take the same distinctive forms. By isolating these forms Aristotle is not, therefore, attempting to distinguish the just from the unjust. He is attempting to distinguish the just and the unjust together on the one hand from, on the other hand, the generous and the mean, the honest and the dishonest, the courageous and the cowardly, the loyal and the treacherous, etc. The form of some principles, in other words, makes them principles of justice. It does not make them *sound* principles of justice.

[11] Eg Patricia Smith, 'On Equality: Justice, Discrimination, and Equal Treatment' in Smith (ed.), *Feminist Jurisprudence* (Oxford 1993), 17; Sandra Fredman, *Women and the Law* (Oxford 1997), 15 and 349; *Andrews* v *Law Society of British Columbia* [1989] 1 SCR 143 at 166 per McIntyre J.

[12] This is the main point of his attack on 'the Pythagoreans' from *NE* $1132^{b}22$ onwards.

It follows that, for Aristotle, any principles which merely have the right form and nothing else – these so-called principles of 'formal justice' – are not, and cannot be, sound ones. The only sound principles of justice are substantive ones, i.e. ones that have healthy flesh on their allocative bones, ones that tend to allocate the *right* goods and ills to the *right* people on the *right* grounds. There may, of course, be several right grounds and they may conflict in what they identify as the right allocations for the right people. But it does not follow that any old ground for any old allocation is right. On the contrary, *some* must be mistaken or there is no such thing as the vice of injustice.

The claim here that the only sound principles of justice are substantive ones rather than formal ones should not be mistaken, as a lawyer might well mistake it, for the claim that there are no sound principles of *procedural* justice.[13] Arguably Aristotle's typology of forms of justice is incomplete in its omission of procedural justice. Arguably considerations of procedural justice are neither distributive nor corrective in form. They are concerned with the interpersonal allocation of goods and ills, but not so much with what would *count as* a sound allocation – whether geometrically or arithmetically – as with *how to go about making* a sound allocation. This need not, of course, be an entirely separate question. There may be an interplay. The fact that it was approached in the right way might turn out, for example, to be one of the factors contributing to making a certain allocation count as correctively or distributively just. Perhaps the fact that the doctrines of *audi alterem partem* and *nemo iudex in parte sua* were observed not only made it more likely that a just settlement of a dispute would be arrived at, but also made whatever settlement of the dispute was arrived at more just than

[13] Collapsing the formal and the procedural: Patricia Smith, 'On Equality', above note 11, 17; Matthew Kramer, 'Justice as Constancy', *Law and Philosophy* 16 (1997), 56.

it would have been had it been arrived at by other means.[14] So perhaps it would be a mistake to list procedural justice as simply another quite distinct form of justice alongside the corrective and distributive forms. Perhaps, indeed, the relationships among all the forms of justice are more complex that at first it appeared. But be that as it may, any principles of procedural justice that may turn out to exist are identical to principles of corrective and distributive justice in at least one respect. They cannot be valid principles on account of their form alone. Of all the possible ways in which one might go about making allocations of goods and ills between people, some are sound ways and others are unsound ways. The just person uses only the sound ways. She uses only sound principles of procedural justice and leaves unsound ones – like 'when in doubt, follow your prejudices' – to the unjust person. So even the just person's principles of *procedural* justice, if she has any, have healthy flesh on their allocative bones. Even they are principles of substantive justice as opposed to principles of formal justice, even though (using the word 'substantive' in a different sense) they are, *ex hypothesi*, principles of procedural justice rather than principles of substantive justice.

[14] John Rawls famously distinguished principles of 'perfect procedural justice' (which ensure that an independently specified just distribution or correction will emerge from the procedure) from principles of 'pure procedural justice' (which *entail* that a just distribution or correction will emerge, because whatever distribution or correction emerges from the procedure counts as just by definition). See Rawls, *A Theory of Justice* (Cambridge, Mass. 1971), 84–5. Rawls did not consider the possibility of hybrid 'part-perfect, part-pure' principles of procedural justice which partly constitute the justice of an allocation but also partly contribute to its being just according to other independent principles of justice. A classic example of such a hybrid principle is the principle that justice is not done unless it is seen to be done, which turns one aspect of due process – viz. the openness of the decision-making – into a logically necessary but not logically sufficient condition of a just outcome.

5. The forms of justice and the forms of law

In the valuable Aristotelian insight that the concerns of the just person are distinguished from those of other morally virtuous people by their form, we find, at long last, our first serious proposal for linking justice to law. Maybe the form of justice, or one of the forms of justice, is also the form of law. In the hands of some legal scholars, sometimes known as legal formalists, this idea was built up into the grotesquely self-congratulatory doctrine that law, so long as it remains true to its own distinctive form, cannot but be just.[15] For it is then *formally* just. Alas, as I pointed out a moment ago, there can be no justice at all in so-called formal justice.[16] The forms of justice are also, by the same token, the forms of injustice. So the mere fact that law has a certain form and remains true to it can't ensure that it is in any way just. But maybe it *can* explain, all the same, why law is the kind of thing that *ought* to be just. Maybe the form of law

[15] Or in one respect just, even though possibly unjust in other respects. This much less self-congratulatory (but still too self-congratulatory) variation is the one ventured by H.L.A. Hart in *The Concept of Law* (Oxford 1961) at 155–7 and at 202, and usefully classified as 'moderate formalism' by David Lyons in 'On Formal Justice', *Cornell Law Review* 58 (1973), 833. For a sophisticated contemporary rewriting of the more radical legal formalist position, see Ernest Weinrib *The Idea of Private Law* (Cambridge, Mass. 1995).

[16] A recent attempt to resurrect the idea that being formally just is a distinct way of being just is Matthew Kramer's in 'Justice as Constancy', above note 13. Alas Kramer pays an excessive price for this attempt. It forces him to the conclusion that being just is not necessarily a way of being good, i.e. a moral virtue. (I should add that I may be misunderstanding the aim of Kramer's article. As mentioned above, he is one of those who speak interchangeably of formal justice and *procedural* justice. If he is defending the idea that being *procedurally* just is a distinct way of being just, then fine. But in that case he has no warrant for his conslusion that being just is not necessarily a way of being good, for there *is* moral virtue in following sound principles of procedural justice. This is true of sound principles of procedural justice belonging to all the categories enumerated in note 14 above.)

matches the form of justice (or one of the forms of justice) and that is why law necessarily holds itself out for evaluation specifically in the dimension of justice and injustice. Whatever takes justice's form, you may say, stands or falls by justice's lights, for necessarily – by its very form – it purports to be just.

So what is the form of law? The first problem with this question is that it is not clear what it means. Are we talking about the form that individual laws take, or the form of whole legal systems, or the form of legal arguments, or the form of legal institutions? All of these things are labelled, on occasions, by the abstract noun 'law'. For the moment I will assume that we are interested in the form that individual laws take, on the simple ground that we can at least imagine these figuring on someone's rational horizons, as reasons for and against action. But then we have another problem. The next problem is that there is not really much of any interest to say about the form that individual laws take. The most important step forward in twentieth-century jurisprudence came, after all, with H.L.A. Hart's dawning realisation that individual laws do not really have much in the way of a distinctive form. Many of his predecessors had laboured long and hard to squeeze all laws into a single form (e.g. 'commands of the sovereign backed up by the threat of a sanction' or 'directives to officials to apply sanctions if certain conditions are met') in the hope that by their form alone some things might give themselves away as laws. Hart showed us why any such hope is a vain one: laws come in diverse forms and share those diverse forms with many things that are not laws.[17] Probably the most one can say of the form of laws, as such, is that all of them take the form of rules.[18] If some consideration is mentioned in legal argument or legal thinking which is not a rule that does not stop it from being legally relevant, of course, but it

[17] *The Concept of Law*, 26ff.
[18] Ibid, 77–8.

does stop it from being a law. It is in the nature of all laws to be rules – in other words, to hold themselves out as settling what is to be done on more than one occasion – and it is therefore in the nature of legal systems, as Hart memorably explained, to be systems of rules.[19]

You may say that there is little here for legal formalists and their friends to get their teeth into, little that could serve to associate law with justice. But some have found enough to chew on. Some, including Hart himself, have thought that the mere fact that all laws are rules is enough to associate laws with justice.[20] The thinking, it seems, goes something like this. Whenever there are rules there are considerations which hold themselves out as settling what is to be done on more than one occasion. This means that each rule potentially applies to more than one person. This means in turn that, when rules are used, people can always compare how the rules were applied to them with how they were applied to other people. They can ask whether the benefits and burdens of the rule were correctly allocated among those who were affected by the rule. And this is surely a question of distributive justice, for it is a question of whether certain goods and ills were correctly divided up among various candidates. Thus whenever a rule is in play, a question of justice is necessarily in play, and since all laws are rules, the same necessarily applies to laws. The very form of laws is accordingly a form of justice. True enough, it doesn't follow from this that merely by being a system of rules, i.e. merely be being what it necessarily is, a legal system exhibits any modicum of justice. Perhaps, as I claimed above, that would indeed be too self-congratulatory a conclusion. What does follow, however, is that if the law's rules are sound then the law is just, and, more importantly, that *it is in the name of justice that the law should aim to*

[19] Ibid, 95–6.
[20] Ibid., 156–7.

have sound rules. For while one-off decisions and actions may exhibit many other moral virtues, justice it is the special virtue of the rule-user. And this in turn makes justice the special virtue – the first virtue, if you like – of the law and its institutions.

This line of thought harbours many interlaced confusions and non-sequiturs. The most important, for our purposes, are these. First, it does not follow from the fact that rules apply on more than one occasion that they apply to more than one person. I have a rule not to drink alcohol and it is a rule that applies, and moreover purports to apply, to nobody but me. This is a rule not of justice but of temperance – one designed specifically for me with my distinctive set of inclinations towards overindulgence. Although legal rules are typically of broader application than this, they need not be. The rule that Queen Elizabeth II is to reside at Windsor Castle for the duration of her reign is a possible legal rule – and it one designed specifically for her. Secondly, there is no reason to suppose that the benefits and burdens of a rule, even when it does apply to more than one person, need to be divided up at all. Why assume that they are in short supply? If I have a rule that instructs me to tell no lies, then I comply with it by telling no lies. Normally I have an inexhaustible stock of lies not to tell, so my not telling one to you doesn't use a up non-lie that I might have saved for someone else. So I don't need to divide up the benefit of my rule, or allocate it according to some other kind of proportion. The only situation in which this is not true is the special situation in which I must lie to avoid my telling another lie. If the two lies will be to two different people, then admittedly a question may arise – and if it does arise it is admittedly a question of distributive justice – of who is to be lied to. But this question does not arise on account of the fact that I have a rule. It arises because I have a one-off decision to make in the face of a moral conflict. It just happens, incidentally, to be a conflict involving a rule. The rule itself is a rule, not of justice, but of honesty.

What is true that people may *interpret* any rule purporting to apply to more than one person as if it were a ground of allocation between those people. It does not follow that this is what it is. What rule it is depends on how it figures on the rational horizon of the rule-user. If I betray a friend and not another then the first may wonder what he did to deserve it, why he was picked out for bad treatment, etc. But the answer may be: nothing, nothing at all. When I betrayed him I wasn't distributing the benefits and burdens of the rule 'don't betray your friends'. I wasn't distributing anything. I was just plain violating the rule, and if the friend I betrayed wants to complain about this, it is my disloyalty he should begin by complaining about, for the rule I violated is a rule of loyalty. If he thinks there is an added insult – i.e. an injustice – in the fact that I didn't betray my other friend instead, or as well, then he judges me by his rules, not mine. I am simply an ordinary moderately loyal soul aiming not to betray anyone, and occasionally failing. Whereas my aggrieved friend who complains of injustice mistakes me for some kind of allocation-fanatic who spends time deciding whom he should betray, given that he is going to betray someone.

Do some people perhaps read law in this rather bizarre way? Do they interpret a legal system as a kind of allocation-fanatic in respect of its own rules, always covertly dividing up the benefits and burdens of those rules as between different people in different cases when, taken at face value, the rules mention no such rationing? Is adherence to the rules of precedent, in the view of some, secretly capped at a certain quota, so that whenever the law says to the Court of Appeal 'follow the decisions of the House of Lords' and I lose a case in the Court of Appeal *per incuriam* I should not only complain about the judicial infidelity to law, but also point to someone else in another case properly decided who somehow got my share of judicial fidelity as well as her own? It sounds like a childish reaction, the reaction

of somebody who has grasped the forms of justice but hasn't yet grasped the substance.[21] Perhaps some people do interpret all legal rules this way. But if they do, and they do it only with law and not with (say) their friends and colleagues, it must presumably be because there is *something else* about law apart from the fact that laws are rules that leads people to interpret those rules automatically as rules of justice. So this line of inquiry simply leads us back, by a circuitous route, to the original question of why law should be held up to the light of justice, rather than some other moral light. The answer cannot be that laws are rules, for there can be rules of honesty, loyalty, trustworthiness, courage, temperance, etc. as well as rules of justice. We still want to know why sound legal rules couldn't equally belong to any of these other categories of rules,[22] but must somehow always be interpreted as attempting or purporting to be *just*.

6. Equity as justice's rebellion against law

The foregoing remarks told against the proposal that every act of following a rule, even if it is a sound rule, is a manifestation of justice. But the false association of justice with rules, and hence with laws, also needs to be broken in the other direction. Not every manifestation of justice is an act of following a sound rule. For some just rulings are not governed by nor capable of being elevated to any sound rule of justice. They are based on a weighing of allocative considerations in their raw, unruly form.

[21] Cf Jean Piaget's famous study *The Moral Judgment of the Child* (New York 1965) which explains how children develop an ability to frame problems as problems of justice, i.e. as allocative problems, before they come to be able to distinguish sound allocations from unsound ones.

[22] Cf. *NE* 1129^{b}19ff, in which Aristotle observes that the law enforces rules of courage, temperance, even-temperedness, etc.

Solomon's justice was justice *ad hoc*, and none the worse for that. Likewise the justice of a modern-day arbitrator who, unlike a judge in a court of law, looks at the merits of a case before him without being bound to explain how his decision on this case has been or would be generalised to any other decision he might make on any other case.

On this point it is worth returning to some cautionary remarks of Aristotle's. He argues that the very nature of laws – what we might call their 'ruliness' – makes them prone to overgenerality, and hence injustice. 'The reason', he says,

> is that all law is universal but about some things it is not possible to make a universal statement which is 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.[23]

The result is that laws inevitably call, on occasions, for adjustment at their point of application to remove the error. And this, says Aristotle,

> is the nature of the equitable, a correction of law where it is defective owing to its universality. ... It is plain, then, what the equitable is, and that it is just and is better than one kind of justice [viz. legal justice]. It is evident also from this who the equitable man is; the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has law on his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character.[24]

These remarks confirm my earlier point that, for Aristotle, there is no such thing as a principle of formal justice. Some principles

[23] *NE* 1137^{b}12–17.
[24] *NE* 1137b26–1138^{a}2.

that are of the correct form to be principles of justice are nevertheless unsound (e.g. the principle that one should always take the share which one has a legal right to take, the following of which makes one 'a stickler for one's rights in a bad sense') and these principles would not, therefore, be relied upon by a just person. But we also need to note another important implication of this Aristotelian view. It is very commonly thought, and not only among lawyers, that it is justice which puts pressure on the law to be ruly, i.e. to rule on further cases whenever it rules on one case. If Aristotle is right – and I think he is – then in fact the pressure is mainly, although not exclusively, in the opposite direction. It is law which mainly puts pressure on justice to be of general application, and this pressure is a pressure which justice sometimes finds deeply uncomfortable, and thus occasionally rebels against. There are some just rulings, to put it another way, which are not amenable to being rendered as rules; but legal systems, being systems of rules, will tend to insist on trying to render them as rules all the same, a tendency which, for the sake of justice itself, sometimes needs to have its wings clipped. That, as Aristotle explains, is where equity comes into play. So not only does the fact that legal systems are systems of rules fail to explain why they ought to be just; the fact that they ought to be just also tells *against* legal systems being too true to their ruly natures.

7. *Justice in adjudication*

You may say that we are not much further forward. Everything so far has been rather negative. We have heard of some unsuccessful attempts to link law with justice but, so far, nothing very hopeful has emerged. But this is not quite true. For our critique of the view that the law's ruliness is what holds it up to the light of justice also revealed a few more promising ideas. Of these, the most promising is this one. It is that laws, like other rules, are forced into the forms of justice only at the point at

which their benefits and burdens fall to be *rationed*, and not before. At this point, it seems, questions of interpersonal allocation, and hence questions of justice, cannot but enter into the horizons of the rule user. For the most part the benefits and burdens of legal rules do not have to be rationed at all. I don't have a quota of contracts to make and break this week, so the legal rules to the effect that I am empowered to make contracts but forbidden from breaking them have no built-in allocative dimension. They are basic rules of trustworthiness. But they do come to have a secondary allocative dimension, or secondary allocative implications, whenever a case for breach of contract comes before the courts. For at this point the court cannot but face up to the question of who is to bear the costs of the alleged breach, and in what proportions, and on what grounds, etc. It is now a situation in which there are no winners without losers, no gains without losses, and questions of how to allocate these gains and losses cannot but arise. Some of these questions may be corrective questions about whether and how to restore the parties to some *status quo ante* or *status quo alter*; some may be distributive questions about how to divide up the costs, or how to scale the penalties, in the event of multiple wrongdoers or multiple contributions to wrongdoing; some may be procedural questions about how to go about deciding any or all of these things, e.g. by rearranging the burdens of proof. All of these are questions of justice. They do not arise because there are rules involved. Questions of justice arise equally whether there are applicable rules or not. They arise, in other words, irrespective of whether we are judges or arbitrators, irrespective of whether we decide in the name of the law or without reference to the law, irrespective of whether our approach to the decision is rule-based or *ad hoc*. The reason they arise is not that laws are involved but that *adjudication* is involved.

The connection of justice to law, on this view, turns out to be indirect and non-exclusive. It comes of the combination of two facts: first, that adjudicative institutions should be just above

all; second, that adjudicative institutions are, in a sense, the lynchpin of all legal systems. Recall Hart's discovery that individual laws have nothing much in the way of a distinctive form. This was famously coupled with his no less important discovery that *legal systems* have a great deal in the way of a distinctive form. Each is a system of rules created and applied by people and institutions that are themselves also subject to the rules of the system. And for the system to be a legal system, at least some of those institutions need, as Hart explained, to be adjudicative institutions, i.e. courts.[25] It is no legal system if there are no institutions that are charged with resolving disputes that arise from the non-observance of the rules, or from the incompleteness or obscurity of the rules. Indeed, as Hart didn't spell out but others have added, the presence of courts turns out to be more crucial to the existence of a legal system than the presence of any other legal institutions.[26] One may have a legal system with no legislature and no police force and no legal professions – that is to say a purely customary legal system – but one has no legal system at all until one has courts, i.e. adjudicative institutions charged with administering a system of rules by which they themselves are bound (and indeed, as Hart said, constituted).

The fact that these adjudicative institutions are bound and constituted by rules is by no means irrelevant, I should stress, to what they should do in order to be just. One effect of the fact that courts are adjudicating problems arising under a system of rules is that, among the many goods and ills that they have to allocate between litigating parties, there are the extra goods and ills of fulfilled and frustrated legitimate expectations, these

[25] *The Concept of Law*, above note 15, 94–5.

[26] Raz, *The Authority of Law* (Oxford 1979), 105ff. Something like this thought also provides Dworkin with his starting point in *Law's Empire* (Cambridge, Mass. 1986), at 14–15, although he would not express it as I do. Dworkin goes on, in my view, massively to exaggerate its implications.

legitimate expectations having been forged by the rules themselves. This means that the fact that a certain institution is a court of law, and not a mere arbitrator, does sometimes make a difference to what answer it should give to questions of justice. Perhaps the underlying mistake of some legal formalists is to think that the *only* goods and ills that have to be allocated between litigating parties are the goods and ills of fulfilled and frustrated expectations, so that so long as the law doesn't frustrate any of the expectations it creates, but fulfils them all by sticking to the rules, it cannot but be just. There are three mistakes here. The first mistake is the neglect of the other things that must still be allocated apart from the frustrated and fulfilled expectations (such as the losses and the penalties). The second mistake is the mistake of thinking that justice would always be in favour of *minimising* frustrated expectations on both sides when in fact, were the expectations morally abhorrent ones, justice might be in favour of *maximising* frustrated expectations on both sides. The third mistake is to think that whatever expectations the law itself creates cannot but be legitimate ones, even when they are morally abhorrent. We should not slip into any of these mistakes. Thus while the fact that courts of law are administering a system of rules may make some difference to how they ought to answer questions of justice, this fact can't be relied upon to make *all* the difference. If they are to be just, the courts should still not surrender to a rule that cannot be justly applied; in that case, justice would have the courts either change the rule (by distinguishing or overruling) or depart from the rule in favour of a conclusion that would be just on its raw unruly merits (by resort to equity).[27]

[27] Of course, the judicial obligation of fidelity to law may sometimes militate against the courts taking either of these routes. But this only goes to show that occasionally judges are not morally well-placed to fulfil their definitive adjudicative mission to be just. In such cases – as Lord Denning's remarkable judicial *oeuvre* illustrates – there is always a temptation for judges to behave

But beyond all these mistakes there lurks the biggest mistake of all. The fact that legal systems are systems of rules can admittedly make a difference to what answer courts should give to questions of justice. But the fact that courts invariably have to face questions of justice in the first place has little to do with the fact that legal systems are systems of rules. It has everything to do with the fact that courts are adjudicative institutions. Any adjudicative institution, whether or not it is administering a system of rules, ought to be just above all. In this respect courts are in exactly the same position as arbitrators.

8. Extending the priority of justice

Those who want to see justice prioritised by other institutions – for example by legislatures and regulatory bodies – are saying, in effect, that they want these institutions to adopt the ethos of adjudicative institutions. They want them to develop rational horizons in which every problem is seen first and foremost as an allocative (be that either distributive or corrective) problem. This ambition acquired contemporary philosophical currency in the Rawlsian claim that 'justice is the first virtue of social institutions'.[28] For Rawls the whole problem of social organisation fell to be constructed, first and foremost, as a problem of who gets how much of what and why. Recall that the question confronted by our cypher-like representatives in Rawls' original position is the question of how much of everything each of them will end up getting once the veil of ignorance is lifted and they are released into the real world. Some

like arbitrators, to emphasise the first part of their oath at the expense of the second, to dispense '*justice* according to law' rather than 'justice *according to law*'. The formalists, of course, underestimate the extent to which the two parts of this oath may be in tension with each other.

[28] *A Theory of Justice*, above note 14, at 3.

critics of Rawls, commonly known as 'communitarians', portrayed the main failing of this mechanism as its individualistic conceptualisation.[29] People were represented, in the original position, as atomistic individuals concerned only to look after themselves, free of any attachments to each other and devoid of any joint pursuits. No doubt this is a problem for the Rawlsian project, but it is easily remedied by allowing groups, communities, social classes, nations, etc. to be represented in their own right in the original position. This would instantly eradicate the individualism. But it would not eradicate another aspect of the Rawlsian scheme, which some critics seem to confuse with its individualistic conceptualisation.[30] This is its preoccupation with allocation. The original position is an adjudicative environment, a kind of grand court of social design, and the society it designs, it designs in its own image. It sets up social institutions on the assumption that all of them must exist first and foremost to judge or to arbitrate in social conflict. It may conflict between competing individuals or between competing groups, communities, etc. – in other words, it may be a more individualistic or a more 'communitarian' conflict – but the decisions to be faced are all to be faced as responses to actual or potential disputes between rival contenders, in which every winner has a corresponding loser, and the question before each institution is accordingly which shall win and which shall lose. As faced by social institutions, according to this Rawlsian view, all moral conflicts are to be interpreted primarily as allocative conflicts calling for adjudication.

There are many opacities in Rawls' explanation of this view. In particular he never makes it clear which institutions are

[29] For the most measured critique of the 'communitarian' critique, see Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (2nd ed., Oxford 1996).

[30] E.g. Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge 1982), 168–173.

supposed to count as social institutions in the relevant sense. Is Marks and Spencer or British Telecom a social institution? How about the Methodist Church or the Daily Telegraph? Or well-known charities like the Children's Society and the Royal National Institute for the Blind?[31] That justice is the first virtue of all these institutions may well seem counterintuitive. In particular, isn't charity a more natural candidate to be the first virtue of charities? The problem is tricky and cannot be discussed here.[32] To reduce complications, I will leave non-governmental social institutions on one side for present purposes and read the Rawlsian claim as intended to apply principally to the institutions of government, including but not limited to those with law-making powers. Rawls' reason for regarding justice as the first virtue of *these* institutions seems to be that all of them find themselves in what he calls 'the circumstances of justice'.[33] In particular, all of them preside over scarce public resources and all must therefore put at the centre of their attention the question of who is going to get how much of what and why. It is all very well for an institution to be generous, or loyal, or temperate, or courageous (it may be said) when they have plenty of goods to go round and no expense need be spared in the eradication of ills. But the same doesn't hold when whatever one does must

[31] We are not helped much by a restriction Rawls adds to the effect that his own proposed principles of justice are those that apply to the institutions making up the 'basic structure' of a society (*A Theory of Justice*, above note 14, 7–8). This is not supposed to qualify the thesis that justice is the first virtue of social institutions, but merely to leave open the possibility that social institutions outside 'the basic structure' should be animated by *different principles* of justice. Besides, if one believes – as I do – that voluntary organisations play a social role of constitutional importance then the unclarity in the notion of a 'social institution' is echoed as an unclarity in the notion of 'the basic structure'.

[32] I discuss it further in my paper 'The Virtue of Charity and the Uses of Law', forthcoming.

[33] *A Theory of Justice*, above note 14, 126ff.

have losers as well as winners. Then justice necessarily comes first. One is inevitably in a Solomonic position, and one must inevitably think adjudicatively. Wasn't this, indeed, precisely what I said in the previous section? Didn't I say that justice must be the first virtue of the courts precisely because once we get to court there cannot be winners without losers? In which case isn't Rawls right to think that the same point applies more generally across the affairs of government? And in particular doesn't it apply to law-making bodies other than the courts – e.g. to the whole gamut of legislatures and regulators – whose law-making activities cannot but be conducted within the limits of scarce public resources? In which case isn't it indeed the case that we should read every legal rule as an allocative rule, or a purportedly allocative rule, and hence hold it up to the light of justice in judging its quality?

9. First response: accidental allocation

One answer to this question is snappy but ultimately unsatisfying. The answer is that the best way for scarce resources to be institutionally allocated is not necessarily for the relevant institutions to have predominantly allocative rational horizons. With courts and arbitrators we have no logical option. It is part of their nature to decide who wins and who loses *by asking who wins and who loses*. That is the very question that confronts them, and the fact that they are confronted by this question – not the mere fact that the question can be asked – is what makes them adjudicative institutions. But with other governmental institutions it is logically open to us to conceal from them, or at least to downplay, the allocative character of their activities. A court stops being a court if it stops being confronted with the question of who wins and who loses, but a hospital does not, under the same conditions, stop being a hospital. For much of its history the National Health Service included rather few explicit adjudicative mechanisms. Rationing of medical treatment was

real enough but it was usually the more or less accidental outcome of various bureaucratic mechanisms and professional interventions which did not directly confront the relative positions of winners and losers. The rules (legal and otherwise), although they had allocative consequences, did not manifest themselves as allocative rules on the rational horizons of the NHS's own rule-users. Possibly this meant that many of the allocations were unjust ones. But not necessarily. As with all other practical problems an indirect strategy of allocating without attempting to allocate might have a better hit rate, and this means a better hit rate *even by the standards of justice itself.* Surely the same may hold of legislatures, regulators, government departments, and other public authorities?

This response merits at least three rejoinders. The first is that it mainly serves to postpone the moment of truth. We still want to know whether the standards of justice are the most important standards by which to judge the actions of the NHS and its ilk. It may be true – although the matter is morally problematic – that a wedge sometimes needs to be driven between the standards we should use in evaluating the actions of certain people and institutions and the standards they themselves should use in acting.[34] But be that as it may the question remains of whether rules of justice are the right ones for *anyone* to prioritise so far as the activities of the NHS are concerned. To say that sometimes less injustice will be inflicted by the NHS if the NHS has other rational horizons than those of justice simply concedes, for the sake of argument, that the answer is yes. And besides, to move onto the second rejoinder, there is a particular difficulty in driving the relevant wedge in the case of justice. We already mentioned that at least some rules of procedural justice are arguably such that they affect constitutively, and not merely

[34] The most important contemporary study of this type of asymmetry is Derek Parfit's *Reasons and Persons* (Oxford 1984), especially chs 1–3.

instrumentally, the justice of the resulting allocation. This makes it more difficult to conceive of an action that has accidentally just results, for the idea of an accidentally just procedure has a paradoxical air about it. Can we imagine a case in which *audi alterem partem*, for instance, is unintentionally complied with? Finally, and most straightforwardly, one may doubt whether (even apart from any constitutive contribution that needs to be made by just procedure) an accidental allocation – one not being deliberately adjusted for allocative results at any level in the organisation – really is very likely to be a just one under today's cultural conditions. In the face of rapid technological change, ever-widening social pluralism, and constantly changing public expectations, practices that might once have served to allocate justly – assuming for a moment that this is indeed the object of the exercise – are apt to call for constant reappraisal if just allocations are not to rapidly descend into being unjust ones. This is the main purpose of the rules against 'indirect discrimination' familiar from British anti-discrimination law. They are needed to tackle the accidentally discriminatory effects of actions and practices undertaken without discriminatory intentions, and indeed – in some cases – without any allocative intentions at all. We may sometimes regret the extent to which these rules insinuate allocative preoccupations into the work of institutions like the NHS, but if we do regret this it surely cannot be because such institutions really allocate better when they do not have allocative preoccupations. The undeniable moral force of many indirect discrimination claims shows that often enough they do not.[35] Rather, our regret must come of the fact that allocating is not the only job they have to do, and that allocative preoccupations sometimes seem to distract them from other

[35] It is not for nothing that the phenomenon of indirect discrimination, or at least a version of it, is sometimes known as 'institutional discrimination'. For further discussion see Christopher McCrudden, 'Institutional Discrimination', *Oxford Journal of Legal Studies* 2 (1982), 303.

objectives they should serve and other horizons, accordingly, that they should cultivate.

10. Second response: non-scarce and non-allocable goods

This brings us to a second and more fruitful response to the Rawlsian view. This response amounts to a denial that all governmental activity genuinely takes place under 'the circumstances of justice' as described by Rawls. The suggestion is not that the government is failing to take advantage of resources that, if deployed, would put an end to some of the alleged scarcity (although personally I think that this suggestion has some truth to it). The suggestion, rather, is that not all the goods over which the government presides are, in the relevant sense, 'resources'. Not all, to put it another way, are scarce goods amenable to allocation. There are two kinds of counterexamples. First, even among goods that are amenable to allocation, some are not scarce. Just as there is an unlimited number of lies that it is open to me not to tell, so there is an unlimited number of lies that it is open to the Department of Trade and Industry not to tell. In the same vein, there is no quota of official abstention from torture which needs to be distributed by the police or the army. There is in principle an infinite amount of official abstention from torture to go round. If the police and army have legal duties not to torture people it is begging the question in favour of the Rawlsian view to interpret these as duties of justice, i.e. allocative duties. Barring special features which give them an allocative dimension they are straightforward duties of humanity, duties not intentionally to inflict suffering. Secondly, even among those goods which are admittedly scarce, some are not amenable to allocation. Some public bodies preside over non-excludable public goods like the cultivation of the arts, the development of an attractive built environment, the cleanliness of the air, the prevention of epidemics, or the elimination of intolerance. In a Rawlsian vein one may think that planning authorities, to take

but one example, should be concerned first and foremost with the resolution of conflicts between developers and local objectors, so that their duties to consider objections are mainly allocative duties. Who should get how much natural light? Who should bear the costs of providing for increased car-use in the neighbourhood? And so on. But perhaps planning authorities should sometimes put questions of this type in second place behind the question of how to bring about the most spectacular cityscape, never mind who gets how much out of it. Perhaps planning authorities should be visionary or creative as well as, or even as opposed to, being just, in which case they should think in non-allocative as well as, or rather than, allocative terms. For apart from the private goods that they allocate among applicants and objectors there are also public goods over which they preside, and among those public goods are some inexcludable public goods which are goods all round, not (or not only) goods for any person or group in particular. That London be more spectacular is one example of just such a good.

What is true, of course, is that the governmental activities I just mentioned as non-allocative inevitably have allocative *consequences*, and so can always be given an allocative spin in terms of those consequences. The rule against police torture can be interpreted as a ranking of the interests of suspected terrorists above the interests of those they may be about to kill or maim. The practice of favouring spectacular cityscapes can be read as feeding the appetites of an aesthetic elite at the expense of providing habitable homes for ordinary folk. These interpretations focus on distributive proportionality. But the question is not whether we *can* interpret the activities of such social institutions in this allocative way. The question is whether we *should* do so. One objection to this way of conceiving all activities of government – and the one which strikes me as most significant – is that it is a reductive way of conceiving the values thereby implicated. Goods that are not scarce or not allocable are revalued in terms of goods that are both scarce and allocable in

order to make an allocative issue of them. Police torture is reduced to a mere quantum of suffering (or something like that) in order to be traded off against the suffering of other people thereby avoided; the argument that a humane person or institution does not deliberately inflict suffering even in order to prevent greater suffering then cuts no ice. Beautiful environments are regarded as mere vehicles for pleasure, say, so that the pleasure taken in them by some people can be compared with the lack of pleasure they give to others, or with the greater pleasure others might get from other uses of the same resources. The NHS, in the same vein, has to be regarded as a *mere* service, so that the amount of service each person gets can be compared with the amount that other people get, never mind that the price of this way of looking at the health service is that other goods – such as the inexcludable public good of spontaneous public compassion – cannot any longer thrive within its walls. And so on. Such reductivism is central to the Rawlsian project. All goods over which social institutions preside are reduced to 'social primary goods', understood as allocable scarce resources.[36] The avoidance of torture, the cultivation of spectacular cityscapes, the provision of compassionate health services, and so on, are not themselves primary goods but rather further 'secondary' goods to be bought or transacted, and hence held up for allocation, in terms of primary goods. Hence they are not to be approached by government under their own native descriptions but under other descriptions, as the preoccupations of sectional interest groups vying for a bigger share of scarce public expenditure or a larger share of civil liberties, etc. They are brought under the circumstances of justice artificially by converting them into other

[36] *A Theory of Justice*, above note 14, 54–55. The exception is the social primary good of self-respect, which is not an allocable scarce resource, for it is not a resource at all. My own view is that once Rawls admits self-respect to the list of social primary goods his whole edifice comes tumbling down. So it is not surprising that he postpones consideration of it to the end of the book.

things which are both scarce and amenable to allocation. I know of no general reason to think that this reductive Rawlsian move, this enforced governmental obliviousness to goods that are not allocable and/or not scarce, is either necessary or desirable. I know of no general reason to think, in other words, that the rational horizons of governmental institutions ought to be manipulated to conceal (or consign to the background) the wealth of non-allocative moral considerations, so that it cannot but be the case that justice becomes their first virtue.

11. The virtues of law

Let me end by bringing the discussion back to the law. When some people say that justice is the proper aspiration for the law, its first virtue, they are maybe just saying in an abbreviated way that justice is the proper ambition for the administration of the law by courts, tribunals, and so on (i.e. for legal adjudication). In that case I have no quarrel with them. This conclusion is sound, and is already enough by itself to explain why judges are known as Mrs Justice such-and-such and Lord Justice so-and-so, why a statute bearing on the workings of the courts and their officers might be called the Administration of Justice Act, why some countries might label the department concerned with supervising the courts the Ministry of Justice, and so on. But some people baulk at the idea that the quest for justice is limited to the administration of the law in the courts. No, they say, we want *just laws too*, not merely justly administered laws. But if people do say this, then I suspect they may be missing the point.

When I say that it is the administration of the law that should be just I don't mean that the law itself should be *less* than just. I mean it should be *more* than just. Naturally the law should be just, but it should also be honest, humane, considerate, charitable, courageous, prudent, temperate, trustworthy, and so on, and when these virtues cannot all be manifested together it should not be regarded as a foregone conclusion that any one of

them has a general priority. Through its doctrines and institutions the law should, to put it another way, exhibit all the moral virtues that befit the many very different things that it does. Some of the things it does – e.g. the regulation of discrimination – call for a specifically just response.[37] But not all are like this. In regulating charities, for instance, the law itself should be charitable enough to understand and accommodate (in their own terms) the actions of charitable people. In regulating healthcare it should be compassionate enough to understand and accommodate (in their own terms) the compassionate actions of healthcare workers. And so on. It is only when these various worthwhile endeavours have broken down or gone awry to the extent that adjudication is needed that the priority of justice swings in automatically, for at this point, with a dispute underway, the problem cannot but become an allocative one. To prioritise justice earlier in the story is, in my view, a counsel of despair. For justice is the first virtue of those institutions – adjudicative institutions – whose job it is to mop up when things have already gone wrong. Not only corrective justice, but justice *tout court*, is a remedial virtue.[38] It is a virtue for dispute-resolvers and dispute-anticipators. The law, on the other hand, has many roles to play in getting things to go right in the first place, in guiding and facilitating people's worthwhile actions. It aims too low if it always conceives all these worthwhile activities in advance as potential or actual sources of dispute, in need of adjudication, and hence fails to exhibit the other virtues needed to understand them in their own terms.

[37] I have argued for this view in 'Discrimination as Injustice', *Oxford Journal of Legal Studies* 16 (1996), 353.

[38] Here I echo Sandel, *Liberalism and the Limits of Justice*, above note 30, at 30–32 and 171–172, although I obviously reject his assumption that the only alternative to a public culture in which justice takes priority is a public culture in which some kind of solidarity takes priority. Why are we looking for a *first* virtue at all? Sandel's quickly becomes the 'one true path' all over again.