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Principles of Justice

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THE PRINCIPLES OF JUSTICE†

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Justice is the end of government.
It is the end of civil society.[1]

INTRODUCTION

I am very pleased to be participating in this Symposium in honor of John Finnis, whose work displays an unusually deep, broad, and detailed understanding of both morality and law and of the proper relationship between them. In this Article, I attempt to follow in Finnis's footsteps by exploring the principles of justice that embody that proper relationship.

There are significant differences of opinion as to the extent of the actual relationship between morality and law in different societies. Yet most people agree that the law *should* be morally sound, that moral principles often do underlie the law, and that the moral principles that do underlie the law should be used by judges to interpret and apply the law, at least in difficult cases. Moreover, it generally has been assumed that the moral principles that do, or should, underlie the law are principles of justice. Indeed, it has often been stated that the sole purpose of law is, or should be, the implementation of justice.

What are the principles of justice? Although there are many references to justice in court opinions, few provide any detailed elaboration of the concept, and many seem conclusory in nature. Noting this, some claim that justice is a question-begging concept which, beyond the formal justice notion of treating like cases alike, has no inherent substantive content and thus provides little or no guidance to legislators, judges, jurors, or ordinary citizens. This claim is incorrect. In both theory and everyday practice, the concept of justice has long been thought to encompass not merely a formal equality (treating like

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1 THE FEDERALIST No. 51, at 358 (James Madison) (Benjamin Fletcher Wright ed., 1961).

cases alike), but also a substantive equality which requires giving each person his or her "due"—what is his or hers as a matter of right—a requirement that is usually understood to be in direct conflict with the basic principles of aggregate social welfare theories such as utilitarianism or its modern variant, economic efficiency.[2]

The elaboration of this substantive equality and its implications for morality, justice, and law form the core of the "natural law" (or "natural right") theory of law, which goes back at least as far as Aristotle and has been most fully elaborated and ably defended in recent times by Finnis. In his monographs *Natural Law and Natural Rights*[3] and *Aquinas*,[4] Finnis provides a sophisticated elaboration and reformulation of the natural law theory of Thomas Aquinas, which itself is an elaboration and reformulation of Aristotle's account. Finnis's exposition of the moral principles underpinning the concept of justice makes evident the continuity and persistence of those principles in the history of natural-law theorizing, from its roots in the classical theory of Aristotle to the medieval theory of Aquinas and the Enlightenment theories of Kant and Locke.[5] However, when Finnis turns to the concept of justice, he runs into an apparent confusion in Aquinas's theory that leads him to fail to distinguish clearly, as Aristotle did, (a) between the dubious concept of "general justice" and the central concept of "particular" justice, and (b) between the two substantive divisions of particular justice: distributive justice and interactive justice. These distinctions, I believe, are crucial to a proper understand-

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2 *See, e.g.*, H.L.A. Hart, *Problems of Philosophy of Law*, *in* 6 THE ENCYCLOPEDIA OF PHILOSOPHY 264, 274–75 (Paul Edwards ed., 1967).

> The equal extension to all of the fundamental legal protections of person and property is now generally regarded as an elementary requirement of the morality of political institutions, and the denial of these protections to innocent persons, as a flagrant injustice. . . .
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> . . . [I]t seems clear that utilitarian principles alone cannot give any account of the moral importance attached to equality and in general to the notion of the just, as distinguished from an efficient, distribution as a means of happiness.

Id.

3 JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

4 JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY (1998).

5 Although Finnis makes few references to Kant's theory, and the few references he makes usually refer to perceived weaknesses in Kant's theory, many of the arguments in his monograph on Aquinas—for example, on human freedom and dignity, persons as "ends in themselves," the supreme principle of morality, and internal versus external freedom and the proper role of the state with respect to each—are very similar in content and phraseology to those of Kant and were developed more explicitly, prominently, and systematically by Kant than by Aquinas (or by Aristotle).

ing of the concept of justice and to the proper resolution of concrete issues of justice and law.

To fully understand the concept of justice and its relationship to law, it is necessary to understand the moral principles that underlie the concept. So I will begin by briefly summarizing those moral principles, as they have been consistently elaborated in natural law theory from Aristotle to Finnis, prior to focusing directly on the concept itself.

I. THE BASIC MORAL PREMISE: THE EQUAL DIGNITY OF PERSONS

Natural law theory is based on rational reflection on the nature, conditions, and experience of being a human being in a world with other such beings. As Finnis states,

> By nature—that is, precisely as human persons—all human beings are both free and equal. "Free" here refers both to the radical capacity for free choices, in which one is master of oneself, and to one's freedom from any justified domination by other human persons; to be free is to be—unlike a slave—an end in oneself.[6]

Every individual member of the human species, as a rational being, has the "dignity of being a person."[7] This dignity flows from the consciousness of one's choosing and acting self as a self-determining being,[8] the "experience *of the unity (including continuity)* of [one's] being."[9] As Finnis states,

> The very *form* and lifelong *act(uality)* by which the matter of my bodily make-up is constituted the unified and active subject (me myself) is a factor, a reality, which Aristotle calls *psyche* and Aquinas calls soul {anima} . . . . [T]he essence and powers of the soul are given to each individual complete (as wholly undeveloped, radical capacities) at the outset of his or her existence as such. This is the root of the dignity we all have as human beings.[10]

The fundamental moral significance of persons' status as free and equal individuals, each with his or her own life to shape and live, is also emphasized by Immanuel Kant. The foundation of Kant's moral philosophy is the idea of free will or freedom, by which he did not mean unrestricted pursuit of one's desires, but rather the opposite—fully realizing one's humanity by subjecting one's actions to the universal moral law in order to free oneself from animal inclinations in

6 FINNIS, *supra* note 4, at 170 (footnotes omitted); *see also id.* at 136, 240.
7 *Id.* at 176.
8 *See id.* at 41.
9 *Id.* at 177.
10 *Id.* at 178–79 (footnotes omitted).

opposition to that moral law.[11] According to Kant, freedom, as well as the moral personality constituted by its possession, is an inherent defining characteristic of each rational being. The possession of free will or freedom is what gives each rational being moral worth—an absolute moral worth that is equal for all rational beings.

> [M]an regarded as a *person* [rather than a mere animal], that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.[12]

One determines one's character and individual identity as a person by the choices one makes and the actions one takes in pursuit of the basic goods of human existence. These basic goods (which Finnis lists as life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion)[13] "provide reason to act and lend point to individual or group life as an open-ended whole."[14] Being able to and having to choose among the basic goods and the modes of partici-

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11 *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS *213–14, 221–23, 225–27, 379–80 & n.*, 383, 394, 397, 405 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

12 *Id.* at *434–35.

13 *See* FINNIS, *supra* note 3, at 90. Kant has a similar list of (morally obligatory) ends, which are encompassed by one's own perfection (including cultivation of one's physical, mental, moral, and social capacities) and the happiness of others (through beneficence, charity, respect, friendship, etc.). He distinguishes these morally obligatory ends from one's own happiness, an end which one naturally has and hence for which the concept of duty is inapplicable, and the perfection of others, an end which others can only set and pursue for themselves. *See* KANT, *supra* note 11, at *385–88, 391–93, 418 n.*, 448–73. Thus, Finnis's description of Kantian ethics—that it "knows the *bonum rationis* [good of practical reasonableness] but no other basic, intelligible human good"—seems mistaken. FINNIS, *supra* note 4, at 138–39. The major difference between Kant on the one hand and Finnis (and Aquinas and Aristotle) on the other is that, for Finnis, knowledge of the basic human goods is induced from human experience, *see id.* at 87–89, whereas Kant claims to deduce them from the supreme principle of morality (the categorical imperative), *see* KANT, *supra* note 11, at *215–17, 225–26. However, Kant adds,

> [A] metaphysics of morals cannot dispense with principles of application, and we shall often have to take as our object the particular *nature* of man, which is known only by experience, in order to *show* in it what can be inferred from universal moral principles. But this will in no way detract from the purity of these principles or cast doubt on their a priori source.

Id. at *216–17.

14 FINNIS, *supra* note 4, at 41.

pating in those goods "is the primary respect in which we can call ourselves both free and responsible."[15] This choice is the subject-matter of the basic good of practical reasonableness, which "both *is* a basic aspect of human well-being and *concerns* one's participation in all the (other) basic aspects of human well-being. Hence its requirements concern fullness of well-being . . . [or] all-round flourishing"[16] through one's conscious shaping and implementation of a coherent and rational plan of life which takes proper account of each of the basic goods.[17] As Finnis observes,

> [When one reaches the age of reason] one is immediately confronted with the rational necessity of deliberating, so far as one can, *about oneself* and about the direction, the integrating point, of one's whole life, so that one treats oneself as an end in oneself to which other things are related as quasi-means, and either does or fails to do "what is in oneself."[18]

The ultimate good for any person is thus not mere pleasure "or any other real or imagined internal feeling,"[19] including happiness "in the common, casual sense of that word."[20] It rather is "*beatitudo* or *felicitas,* happiness in the sense of *fulfilment,*"[21] which is "a kind of synthesis of [the basic human goods]: satisfaction of all intelligent desires and participation in all the basic human goods (whatever they are), and thus a fulfilment which is complete and integral (integrating all its elements and participants)."[22]

Aquinas's *beatitudo,* Finnis notes, is the same as Aristotle's *eudaimonia*: a "flourishing" or "fulfilment"[23] of one's humanity accom-

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15 FINNIS, *supra* note 3, at 100.

16 *Id.* at 102–03.

17 *See id.* at 88–89, 93–96, 103–05. Finnis identifies several methods or requirements of practical reasonableness, *see id.* at 102–27, which, however, all seem to be encompassed by the requirement of forming and pursuing a coherent and rational life plan which properly takes into account all the basic goods and the multiplicity of others with whom one co-exists. Finnis himself states that "all the requirements are interrelated and capable of being regarded as aspects one of another," *id.* at 105, and treats them as all being "aspects of the real basic good of freedom and reason," *id.* at 126–27. In his monograph on Aquinas, he takes a more unitary approach to the good of practical reasonableness, encapsulating it in the supreme principle of morality, "love of neighbor as oneself." FINNIS, *supra* note 4, at 126; *see also infra* Part II.

18 FINNIS, *supra* note 4, at 41 n.68 (parentheticals omitted); *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 48–51 (1974).

19 FINNIS, *supra* note 3, at 95.

20 *Id.*

21 FINNIS, *supra* note 4, at 85.

22 *Id.* at 85–86.

23 *Id.* at 105.

plished and constituted by the "integral directiveness of practical reason"[24] to all the basic goods, which is "the organizing *point* of individual and social choice, as something attainable (so far as is possible in one's circumstances) by one's own or our own actions as we are. It is this: *virtue in action.*"[25] As with Finnis, Aquinas, and Kant, Aristotle identifies the morally significant distinguishing characteristic of a human being as the capacity to live one's life in accord with a rational principle. The highest good or happiness for a human being is activity in accord with a rational principle ("activity of soul") and in accord with complete virtue in a complete life,[26] rather than "some plain and obvious thing, like pleasure, wealth, or honour."[27] Those who treat pleasure or enjoyment as the good are "vulgar," and a life aimed at such is "a life suitable to beasts."[28] Similarly, the acquisition of wealth or property is not a good in itself, but rather is "undertaken under compulsion"[29] as a necessary means to an end. It is properly aimed at and limited by what is needed for a virtuous life, and it is justly censured when it is undertaken for its own sake, as a good in itself.[30]

II. THE COMMON GOOD AND THE SUPREME PRINCIPLE OF MORALITY

References to the "common good" or "common advantage" by Aristotle or Aquinas are sometimes misinterpreted as referring to some aggregative (for example utilitarian) or organic (for example communitarian) conception of an overall social good. However, as Finnis clearly explains, these phrases do not refer to any such aggregative or organic social good, but rather to the concurrent, interdependent, and harmonious flourishing or fulfilment of each individual in the community, which can only be attained (given the nature and conditions of human existence) through cooperation and coordination in communities.[31]

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24 *Id.* at 107.

25 *Id.*

26 *See* ARISTOTLE, NICOMACHEAN ETHICS bk. 1, ch. 7 (W.D. Ross & J.O. Urmson trans.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1729 (Jonathan Barnes ed., 1984); *see also id.* bk. 1, ch. 9, at 1099b25–1100a5.

27 *Id.* bk. 1, ch. 2, at 1095a14–a23; *see also id.* bk. 1, ch. 5, at 1095b22–b31; *id.* bk. 1, ch. 8, at 1099a12–a16.

28 *Id.* bk. 1, ch. 5, at 1095b13–b22.

29 *Id.* bk. 1, ch. 5, at 1096a6–a8.

30 *See* ARISTOTLE, POLITICS bk. 7, ch. 1, at 1323a36–1324a1 (B. Jowett trans.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1986 (Jonathon Barnes ed., 1984); *see also id.* bk. 1, ch. 10, at 1258a38–b8.

31 *See* FINNIS, *supra* note 4, at 113–16, 120–22, 242–52; FINNIS, *supra* note 3, at 147–56, 168–69.

Aristotle rejects Plato's conception of the state as an organic unity. He instead views the state as a diverse plurality of free and equal citizens, with the diverse plurality being necessary for the self-sufficiency (complete fulfilment or flourishing) of each citizen.[32] Aristotle states,

> [A] state is a community of families and aggregations of families in well-being, for the sake of the perfect and self-sufficing life. Such a community can only be established among those who live in the same place and intermarry. Hence there arise in cities family connexions, brotherhoods, common sacrifices, amusements which draw men together. But these are created by friendship, for to choose to live together is friendship. The end of the state is the good life, and these are the means towards it. And the state is the union of families and villages in a perfect and self-sufficing life, by which we mean a happy and honourable life.[33]

A person alone cannot be self-sufficient, not only because of individual needs and common interests, but also because "man is by nature a political [social] animal."[34] It is only in the limited sense of the necessity of the state for the complete or self-sufficing life of each of its citizens that the state is "prior to the individual."[35] The attainment of each person's well-being (self-sufficiency) through community is "certainly the chief end, both of individuals and of states."[36]

Since practical reasonableness is directed to the fullest possible attainment of the good, and this good is a shared good for all human beings, the directiveness of practical reasonableness "has no rational stopping-place short of a universal *common good*: the fulfilment of all human persons," a directiveness which is expressed, Finnis states, in the master principle of morality, "*love of neighbour as oneself*."[37] This principle is often restated as the golden rule, "[d]o unto others as you

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32 *See* ARISTOTLE, *supra* note 30, bk. 2, ch. 2, at 1261a14–b15; *id.* bk. 7, ch. 8, at 1328b15–b22; *see also* Martha C. Nussbaum, *Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato*, *in* ESSAYS ON ARISTOTLE'S ETHICS 395, 395–97, 415–27 (Amélie O. Rorty ed., 1980) [hereinafter ARISTOTLE'S ETHICS].

33 ARISTOTLE, *supra* note 30, bk. 3, ch. 9, at 1280b33–1281a4; *see also id.* bk. 7, ch. 2, at 1324a22–a23 ("Now it is evident that that form of government is best in which every man, whoever he is, can act best and live happily."); *id.* bk. 7, ch. 9, at 1329a21–a24 ("[A] city is not to be termed happy in regard to a portion of the citizens, but in regard to them all.").

34 ARISTOTLE, *supra* note 30, bk. 1, ch. 2, at 1253a2–a3; *see* ARISTOTLE, *supra* note 26, bk. 9, ch. 9, at 1169b17–b21.

35 ARISTOTLE, *supra* note 30, bk. 1, ch. 2, at 1253a25–a26.

36 *Id.* bk. 3, ch. 6, at 1278b24–b25; *see also id.* bk. 1, ch. 2, at 1252b28–1253a32.

37 FINNIS, *supra* note 4, at 132 (emphasis in original); *see also id.* at 126–29.

would have them do unto you,"[38] which is found in various versions in many religions and moral theories.[39] It is the "architectronic"[40] moral principle from which, keeping in mind the basic human goods, all other moral principles can be inferred or deduced.[41]

As Finnis observes, the "love of neighbor as oneself" principle functions in Aquinas's ethics as does the supreme principle of morality—the "categorical imperative"—in Kant's ethics.[42] The categorical imperative is, Kant states, "Act only according to that maxim by which you can at the same time will that it should become a universal [moral] law,"[43] which Kant reformulates as "Act so that you treat humanity, whether in your own person or in that of another, always as an

38 *Id.* at 128, 139–40.

39 I am indebted to Alexander Tsesis for the following examples. In Judaism the earliest formulation of this rule is found in *Leviticus* 19:18: "Love thy neighbor as thyself, I am the Lord." The renowned first century rabbi Hillel, when asked by a potential convert to explain the Torah while he stood on one foot, replied, "What is hateful to you, do not to your neighbor: that is the whole Torah, while the rest is commentary thereof; go and learn it." BABYLONIAN TALMUD, *Shabbath* 31a, *translated in* THE BABYLONIAN TALMUD 140 (I. Epstein ed. & trans., 1987). Jesus stated, "Whatever you would want people to do to you, so do unto them likewise; this is the law and the prophets." *Matthew* 7:12. Many scholars believe Confucius's teaching was along the same lines. "Tzu-kung asked, 'Is there one word which can serve as the guiding principle for conduct throughout life?' Confucius said, 'It is the word altruism (*shu*). Do not do to others what you do not want them to do to you.'" *Analects* 15:23, *in* A SOURCE BOOK IN CHINESE PHILOSOPHY 44 (Wing-tsit Chan ed. & trans., 1963) [hereinafter CHINESE PHILOSOPHY]. "Confucius said, '[Tseng Tzu], there is one thread that runs through my doctrines. . . .' After Confucius had left, the disciples asked [Tseng Tzu], 'What did he mean?' Tseng Tzu replied, 'The Way of our Master is none other than conscientiousness (*chung*) and altruism (*shu*).'" *Analects* 4:15, *in* CHINESE PHILOSOPHY, *supra*, at 27. Professor Chan explains the significance of this passage as follows: "All agree . . . on the meanings of *chung* and *shu* . . . . [*C*]*hung* means the full development of one's [originally good] mind and *shu* means the extension of that mind to others . . . . Here is the positive version of the Confucian golden rule." *Id.* at 27 (commenting on *Analects* 4:15); *see generally* H.T.D. ROST, THE GOLDEN RULE: A UNIVERSAL ETHIC (1986).

40 FINNIS, *supra* note 4, at 128.

41 *See id.* at 127–28, 138–39.

42 *See id.* at 131 n.g. Finnis notes further,

> [The categorical imperative functions] in content though not in literary form like the "first moral principle" in the moral theory outlined by Grisez [and himself]: "In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will towards integral human fulfilment."

Id. (quoting Grisez).

43 IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *421 (Lewis White Beck trans., MacMillan 1990) (1784).

end and never as a means only."[44] Kant himself noted the categorical imperative's similarity to the golden rule. However, Kant argued, the categorical imperative is both broader in scope and more demanding than the golden rule. It is morally wrong under the categorical imperative to fail to respect the absolute moral worth of anyone, including yourself, as a self-determining rational being, regardless of whether you would allow others to treat you without proper respect.

> [The golden rule] is only derived from the [categorical imperative] and is restricted by various limitations. It cannot be a universal law, because it contains the ground neither of duties to one's self nor of the benevolent duties to others (for many a man would gladly consent that others should not benefit him, provided only that he might be excused from showing benevolence to them).[45]

Finnis acknowledges that the "love of neighbor as self" principle and its variant, the golden rule, apply "preeminently" to one's moral obligations to others rather than to oneself (especially if read literally).[46] However, he notes, there clearly are moral duties to oneself.[47] He seems to argue that these moral duties to onself can be derived from the neighbor principle through a sufficiently deep understanding of the (common) good of others:

> [T]o love one's neighbour is to will the neighbour's good—and not just this or that good, but good somehow integrally; and nothing inconsistent with a harmonious whole which includes one's own good (likewise integrated in itself and with others' good). Thus the love-of-neighbour principle tends to unify one's goals.[48]

Whether understood as "love of neighbor as oneself," the golden rule, or Kant's categorical imperative, the supreme principle of morality in natural law theory, in both its conception of human good and its conception of the equality of persons, stands in direct opposition to

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44 *Id.* at *429. In yet another formulation, Kant states, "The rational being must regard himself always as legislative in a realm of ends possible through the freedom of the will, whether he belongs to it as member or as sovereign." *Id.* at *434; *see also id.* at *432–34. Compare Kant's second formulation with Finnis's argument that preserving and promoting the common good by refusing to sacrifice the innocent for the "greater good" of others "makes sense only if *the common good* is taken to include exceptionless respect for the good—and the rights—of all the members of the community considered one by one as *ends in themselves*." FINNIS, *supra* note 4, at 168 n.160 (second emphasis added).

45 KANT, *supra* note 43, at *430 n.14; *see also* KANT, *supra* note 11, at *450–51.

46 *See* FINNIS, *supra* note 4, at 127.

47 *See id.* at 126 n.114, 138 n.30.

48 *Id.* at 127.

the supreme principle of morality in utilitarianism, which was given its most explicit expression by Jeremy Bentham.

Bentham's principle of utility, or "greatest happiness," mandates actions which produce the greatest total utility (happiness understood as pleasure or preference-satisfaction) for the citizenry in the aggregate.[49] The principle was first suggested to him when he read the slogan, "the greatest happiness of the greatest number,"[50] a slogan which was sometimes used by him and is still sometimes used by others to describe the principle of utility.[51] However, the principle of utility focuses solely on "the greatest happiness"—maximizing the total utility for the citizenry in the aggregate—rather than focusing also or instead on maximizing the distribution of that utility to "the greatest number." Indeed, simultaneously maximizing both the total sum and the distribution of utility is logically impossible.[52] There is no independent weight given in the utilitarian theory to the distribution of happiness (or wealth or power) or to the promotion of individuals' equal freedom. On the contrary, each individual's freedom and interests are subordinated to the maximization of the total utility of the citizenry in the aggregate.

As Bentham's successor in the utilitarian school, John Stuart Mill, emphasized, "[T]he happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator."[53] In the sentences which immediately follow this passage, Mill asserts, "In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. 'To do as you would be done by,' and 'to love your neighbor as yourself,' constitute the

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49 *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 15 (London, MacMillan 1876) (1789).

50 Mary Warnock, *Introduction* to JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM 7 (Mary Warnock ed., 1962).

51 *See, e.g.*, BENTHAM, *supra* note 49, at 17 n.1; JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 72, 74 (rev. ed. 1990).

52 *See* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 47 n.1 (1990). Kymlicka continues,

> It is impossible for any theory to contain a double maxim, and any attempt to implement it quickly leads to an impasse (e.g., if the two possible distributions are 10: 10: 10 and 20: 20: 0, then we cannot produce both the greatest happiness and the happiness of the greatest number).

Id.; *see also* FINNIS, *supra* note 3, at 116.

53 JOHN STUART MILL, UTILITARIANISM, *in* 10 COLLECTED WORKS OF JOHN STUART MILL 218 (J.M. Robson ed., University of Toronto Press 1963) (1861).

ideal perfection of utilitarian morality."[54] This assertion is based on the erroneous assumption that to love your neighbor as yourself, or to do unto others as you would have them do unto you, would require you in everything you think or do to weigh the interests of each and every other person equally with one's own interests or the interests of one's family, friends, or groups. However, as Finnis and Kant note, thought and action guided by such complete impartiality of interest would lead to complete self-abnegation and to the destruction of personhood, rather than to its complete fulfilment, and thus is not a principle that any rational person would adopt as the supreme principle of morality.[55] It is an implausible interpretation of the golden rule.

The conception of equality in utilitarianism is quite different from the equal freedom norm that underlies natural law theory. In utilitarianism, each individual counts equally methodologically only, as an equal and fungible addend in the calculation of the aggregate sum.[56] Any individual's freedom or interests can and should be sacrificed whenever doing so would produce a greater total of aggregate happiness for society as a whole. It is not permissible to prefer one's own interests or projects, or those of one's family members or friends, over those of any other person except to the extent that doing so would produce a greater total happiness for the citizenry in the aggregate. Utilitarians thus reject the idea of individual autonomy or rights, at least insofar as those rights are understood (as they usually are) as being independent of or in conflict with the principle of utility. Bentham was quite dismissive of the idea of rights, especially al-

54 *Id.*

55 *See, e.g.*, KANT, *supra* note 11, at *393 ("[A] maxim of promoting others' happiness at the sacrifice of one's own happiness, one's true needs, would conflict with itself if it were made a universal law."); *see also id.* at *451–52. In his initial discussion of the golden rule, Finnis ties it to the principle of impartiality between persons and to the perspective of the ideal neutral observer or spectator, and he equates the impartiality principle with the often-cited moral requirement that one's moral judgments be universalizable. *See* FINNIS, *supra* note 3, at 107–08. However, as Kant notes, the requirement that one's moral judgments be universalizable, which is fundamental in the golden rule and Kant's categorical imperative, is distinct from and indeed incompatible with the requirement of complete impartiality of interest between persons that constitutes the principle of utility. As Finnis recognizes, in order to be able to lead one's own life, it is often necessary to be able, in private decisions concerning one's own commitments and the allocation of one's own resources, to prefer one's own interests and the interests of one's family, friends, and groups over the interests of others. *See id.* at 107–08, 112–14, 144–45, 304; FINNIS, *supra* note 4, at 117.

56 *See* MILL, *supra* note 53, at 257 ("[O]ne person's happiness, supposed equal in degree (with the proper allowance made for kind), is counted exactly as much as another's."); *id.* at 258 ("[T]he truths . . . of arithmetic are applicable to the valuation of happiness, as of all other measurable quantities.").

leged natural rights.[57] Mill, however, recognized the powerful appeal of the related concepts of justice and right and attempted to integrate them into the utilitarian theory:

> The interest involved is that of security, to every one's feelings the most vital of all interests. . . . [N]othing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves. . . . Our notion, therefore, of the claim we have on our fellow creatures to join in making safe for us the very groundwork of our existence gathers feelings around it so much more intense than those concerned in any of the more common cases of utility that the difference in degree (as is often the case in psychology) becomes a real difference in kind. The claim assumes that character of absoluteness, that apparent infinity, and incommensurability with all other considerations, which constitute the distinction between the feeling of right and wrong and that of ordinary expediency [utility] and inexpediency.[58]

Utilitarians since Mill have made similar "rule-utilitarian" arguments in an attempt to reconcile utilitarianism with the natural law principles of equal dignity, equal freedom, rights, and justice. They argue that the net benefits of any particular intrusion on individuals' autonomy or rights considered in isolation, taking into account the happiness or interests only of the parties directly affected, would be outweighed by the widespread social insecurity and anxiety that would result if such intrusions were generally permitted, and thus would be contrary to the principle of utility. However, these arguments give the principles of autonomy, freedom, right, and justice a contingent and derivative status which fails to convey their true sense or force. Moreover, under these arguments, the "autonomy" and "rights" of individuals still may be sacrificed if the total benefits exceed the total disutility—for example, if the intrusions on autonomy and rights (such as slavery or racial discrimination) are limited to an easily identifiable minority (such as blacks), so that the majority which benefits from such intrusions need not worry about also being subjected to such treatment.[59]

In sum, utilitarianism (and its modern variant, economic efficiency theory) are completely at odds with the moral premises, princi-

57 *See* BENTHAM, *supra* note 49, at 1–7; Jeremy Bentham, *Anarchical Fallacies, in* NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 53 (Jeremy Waldron ed., 1987).

58 MILL, *supra* note 53, at 251.

59 *See, e.g.*, FINNIS, *supra* note 3, at 116; KYMLICKA, *supra* note 52, at 18–44; MURPHY & COLEMAN, *supra* note 51, at 72–75, 80–81; Hart, *supra* note 2.

ples, and implications of natural law theory. The moral good in natural law theory is the full realization of one's humanity as a free and equal being, while the moral good in utilitarianism is pleasure or preference-satisfaction, and the moral good in the economic-efficiency theory is resource wealth as measured by one's willingness and ability to pay for those resources.[60] The equal freedom theory focuses on the promotion of each person's equal freedom to pursue a morally meaningful life. It thus places primary emphasis on the equal distribution of the good. The utilitarian efficiency theories, on the other hand, focus solely on maximizing the total sum of the good (pleasure, preference-satisfaction, or wealth). There is no independent concern with how that total sum is distributed among individuals.

III. JUSTICE AND LAW

As noted above, under natural law theory the sole purpose of the state, and thus of politics and law, is the attainment of the common good—the human flourishing or fulfilment of each person in the community.[61] The conditions which are properly specifiable by law for the attainment of this common good are the principles of justice.[62]

What are these conditions—that is, what is the proper scope and content of the principles of justice? It is at this point that I believe a confusion or uncertainty appears in Finnis's elaboration of natural law theory, a confusion or uncertainty which he inherits from Aquinas and is ultimately traceable to Aristotle's loose and inconsistent use of terminology in his original elaboration of the concept of justice. In the remainder of this Article, I explore and attempt to cut through the sources of this confusion. In this Part, I focus on the scope or

60 *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 8–9 (4th ed. 1992). For further discussion of the inadequacy of the utilitarian conception of the good, see FINNIS, *supra* note 3, at 95–97, 114, KYMLICKA, *supra* note 52, at 12–18, and MURPHY & COLEMAN, *supra* note 51, at 75–79.

61 *See* ARISTOTLE, *supra* note 30, bk. 1, ch. 1, at 1252a1–a6; *id.* bk. 1, ch. 2, at 1252b28–b30; *id.* bk. 3, ch. 9, at 1280a31–b13; FINNIS, *supra* note 4, at 114–15, 132; *see also supra* text accompanying notes 32–36.

62 *See* ARISTOTLE, *supra* note 30, bk. 3, ch. 6, at 1279a17–a19 ("[G]overnments which have a regard for the common interest are constituted in accordance with strict principles of justice . . . ."); *id.* bk. 3, ch. 12, at 1282b14–b16 ("[The] greatest good" is the end of political science, "of which the good is justice, in other words, the common interest."); FINNIS, *supra* note 4, at 132–33; FINNIS, *supra* note 3, at 164–66; KANT, *supra* note 11, at *318 ("By the well-being of a state is understood . . . that condition in which its constitution conforms most fully to principles of Right [justice]; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.").

domain of justice. In the next Part, I discuss the content of the substantive principles of justice.

From Aristotle to the present time, the concept of justice has generally been understood, in its central or focal sense, as consisting of (a) equality or fairness (b) in interpersonal relations (c) that are properly subject to regulation through legal rights and duties.[63] Aristotle emphasizes that justice pertains to our relations with others.[64] He distinguishes and then conjoins the other two elements—equality and (rightful) law—that are encompassed by the concept of justice:

> Let us then ascertain the different ways in which a man may be said to be unjust. Both the lawless man and the grasping and unequal man are thought to be unjust, so that evidently both the law-abiding and the equal man will be just. The just, then, is the lawful and the equal, the unjust the unlawful and the unequal.[65]

Several ambiguities are apparent in this passage, which Aristotle himself recognizes. Most obviously, is the just the lawful, the equal, or only that which is both lawful and equal? The question is the perennial one of the nature of the relationship between law and morality, or more specifically between law and justice interpreted as the equal or equitable. Are law and justice the same or distinct, and if they are the same, in which direction does the identity run: Is whatever is lawful also just, or is something lawful only if it is just?

Much of Aristotle's discussion of this issue employs confusing and inconsistent terminology. Recognizing the strong association between the concepts of law and justice (which, he notes, leads to the Greek word for justice, *dikaion*, having the sense of either or both lawful and equal[66]), Aristotle treats as "legally just" or "politically just" whatever is part of the positive law of the community. He distinguishes the legally

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63 The concept of justice is narrower than the concept of fairness with which it is sometimes confused. While a broad array of actions and situations are said to be unfair, it is not common to describe them as unjust unless they also involve the other two elements listed in the text. Finnis notes some especially broad, metaphorical uses of the word "justice," such as when one speaks of "doing oneself justice" by actually doing as one is capable of doing. FINNIS, *supra* note 3, at 161. In the same vein, we sometimes speak of "doing justice to a meal"—that is, consuming and enjoying it as it deserves, given its merit as a meal. These metaphorical uses of the term obviously fall outside the central meaning of justice.

64 *See* ARISTOTLE, *supra* note 26, bk. 5, ch. 1, at 1129b27–1130a13.

65 *Id.* bk. 5, ch. 1, at 1129a31–b2.

66 *See supra* text accompanying note 65. Aristotle describes equity as a form of justice which is "better than one kind of justice"—the "legal justice" of the written law—since it resorts directly to the fundamental principles of natural justice as "a correction of legal justice" where the latter is defective owing to its generality. ARISTOTLE, *supra* note 26, bk. 5, ch. 10, at 1137b6–b27; *see also* ARISTOTLE, RHETORIC bk. 1,

or politically just from what is "just without qualification"[67]—what is "naturally" or morally just. In other passages, he makes the same distinction using different terminology—for example, "general [natural] law" versus "special [positive] law," or "universal [natural] law" versus "particular [positive] law."[68] Moreover, he sometimes uses "legal justice" in an even narrower sense, as referring to those details of the positive law which are left open by the general principles of natural law:

> Of political justice, part is natural, part legal,—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent—e.g., that a prisoner's ransom shall be a mina, or that a goat and not two sheep shall be sacrificed, and again all the laws that are passed for particular cases.[69]

Thus, despite his use of loose and inconsistent terminology, Aristotle seems to clearly distinguish positive law ("legal justice") from morality and justice (natural justice or natural law). He explicitly declares that there may be unjust laws as well as just laws, depending on the particular government.[70] Law is truly or "naturally" just (equitable), rather than merely "legally" just (lawful), only insofar as it is "rightly framed":

> [A]ll lawful acts are *in a sense* just acts, for the acts laid down by the legislative art are *lawful*, and each of these, *we say*, is just. . . . [The law] command[s] some acts and forbid[s] others; and the rightly-framed law does this rightly, and the hastily conceived one less well.[71]

However, the relationship between law, morality, and justice is thrown into even deeper confusion by Aristotle's use of the words "lawful" and "equal" to distinguish between what he refers to as the

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ch. 13, at 1374a25–b23 (W. Rhys Roberts trans.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE 2152 (Jonathon Barnes ed., 1984).

67 ARISTOTLE, *supra* note 26, bk. 5, ch. 6, at 1134a25–a26.

68 ARISTOTLE, *supra* note 66, bk. 1, ch. 10, at 1368b7–b9 (distinguishing between "general law"—"all those unwritten principles which are supposed to be acknowledged everywhere"—and "special law"—"that written law which regulates the life of a particular community"); *id.* bk. 1, ch. 13, at 1373b1–b9 (distinguishing between "universal law"—"the law of nature" or "natural justice"—and "particular law"—"that which each community lays down and applies to its own members: this is partly written and partly unwritten").

69 ARISTOTLE, *supra* note 26, bk. 5, ch. 7, at 1134b18–b22; *cf.* FINNIS, *supra* note 4, at 266–69 (discussing Aquinas's treatment of this distinction and the related concept of *determinatio*).

70 *See* ARISTOTLE, *supra* note 30, bk. 3, ch. 11, at 1282b1–b12.

71 ARISTOTLE, *supra* note 26, bk. 5, ch. 1, at 1129b13–b26 (emphasis added).

"wide" and "particular" senses of justice, respectively. Aristotle equates justice in the sense of "lawful" with complete virtue as manifested in our relations with others, which he calls "justice in the wide sense."[72] To begin to make sense of this highly unusual use of the words "justice" and "lawful," one must realize that, unlike later natural law theorists, Aristotle thought that the law could and should be used not only to secure the external conditions necessary for the attainment of the common good, but also, through legally mandated habituation to morally proper conduct,[73] to secure each person's internal virtuous character or disposition toward the common good:

> [T]he laws in their enactments on all subjects aim at the common advantage . . . so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political society. And the law bids us to do both the acts of a brave man . . . and those of a temperate man . . . and similarly with regard to the other excellences and forms of wickedness; commanding some acts [the virtuous ones] and forbidding others [the vicious ones]; and the rightly-framed law does this rightly, and the hastily conceived one less well.
>
> This form of justice, then, is complete excellence [virtue]—not absolutely, but in relation to others. . . . And it is complete excellence in its fullest sense, because it is the actual exercise of complete excellence. It is complete because he who possesses it can exercise his excellence towards others too and not merely by himself . . . . Justice in this sense, then, is not part of excellence but excellence entire, nor is the contrary injustice a part of vice but vice entire. What the difference is between excellence and justice in this sense is plain from what we have said; they are the same but being them is not the same; what, as a relation to others, is justice is, as a certain kind of state without qualification, excellence.[74]

In sum, according to Aristotle, if the positive law of a community is "rightly framed," it is directed toward attaining each person's completely virtuous disposition in his or her relations with others, so that a person who is "lawful" or "law-abiding" will be completely virtuous. The end of law being justice, we can then equate the attainment of

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72 *Id.* bk. 5, ch. 2, at 1130b6–b21.

73 *See id.* bk. 10, ch. 9, at 1179b20–1180a24.

74 *Id.* bk. 5, ch. 1, at 1129b14–1130a14; *see also id.* bk. 1, ch. 13, at 1102a7–a10 ("The true student of politics . . . wishes to make his fellow citizens good and obedient to the laws."); *id.* bk. 5, ch. 2, at 1130b22–b25 ("[P]ractically the majority of the acts commanded by the law are those which are prescribed from the point of view of excellence taken as a whole [rather than from the point of view of 'particular' justice]; for the law bids us practise every excellence and forbids us to practise any vice."); ARISTOTLE, *supra* note 30, bk. 3, ch. 9, at 1280a31–b14.

such complete virtue (through law) with what Aristotle calls "justice in its wide sense."

Aristotle distinguishes "justice" in the wide sense of complete virtue from "particular" justice, which he initially describes as a specific ("particular") virtue, one of the many virtues encompassed by the wide sense of "justice." He identifies the just person as being "equal" and the unjust person as being "grasping and unequal."[75] Note once again Aristotle's loose and ambiguous phrasing. In one sense, every virtue involves behaving equally or equitably, since Aristotle conceives of each virtue as a disposition, in one's passions and actions, to choose the "equal," "intermediate," or "mean" (Aristotle uses these terms interchangeably) between excess and deficiency in pursuit of various goods or ends.[76] In a narrower sense, appropriate to justice as a distinct ("particular") virtue, the "equal" is the intermediate between being "grasping" (claiming too much) and "yielding" (claiming too little) with respect to those instrumental goods "with which prosperity and adversity have to do."[77] The "grasping" person is disposed to take what belongs to others, while the "yielding" person is disposed to allow others to take what belongs to her (without her consent).[78] Aristotle explains,

> There is . . . another kind of injustice which is a part of injustice in the wide sense . . . . [T]he force of both lies in a relation to others but the [particular sense] is concerned with honour or money or safety—or that which includes all of these, if we had a single name for it—and its motive is the pleasure that arises from gain; while the [wide sense] is concerned with all the objects [ends] with which the good man is concerned.[79]

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75 *See supra* text accompanying note 65.

76 *See* ARISTOTLE, *supra note* 26, bk. 2, ch. 5, at 1106a3–a6; *id.* bk. 2, ch. 6, at 1106a25–1107a8.

77 *Id.* bk. 5, ch. 1, at 1129b3–b4. The "being yielding" conception of deficiency is not explicit in Aristotle's account of particular justice, perhaps because being yielding—unlike being grasping—is not unjust, since one cannot be unjust to oneself. *See* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 690–91 (1992).

78 The virtue of justice focuses on one's dealings with others' persons or instrumental goods, while the virtue of liberality focuses on one's dealings with one's own instrumental goods. *Compare* ARISTOTLE, *supra* note 66, bk. 1, ch. 9, at 1366b8–b11 ("Justice is the excellence through which everybody enjoys his own possessions in accordance with the law; its opposite is injustice, through which men enjoy the possessions of others in defiance of the law."), *with* ARISTOTLE, *supra* note 26, bk. 4, ch. 1, at 1119b22–1120a18 (stating that prodigality and meanness are the excess and deficiency, respectively, and liberality is the virtuous mean in one's disposition to share one's resources or wealth with others).

79 ARISTOTLE, *supra* note 26, bk. 5, ch. 2, at 1130a21–b5.

Given his assumption that all of morality (as it relates to others) is a proper subject of positive law, Aristotle's wide sense of "justice" includes all of the essential elements of the concept of justice that we identified above: (a) equality or fairness (b) in interpersonal relations (c) that are properly subject to regulation through legal rights and duties. Nevertheless, the wide sense of "justice" likely was a linguistic stretch even in Aristotle's time. After briefly introducing it in his *Ethics*, Aristotle quickly sets it aside[80] and thereafter focuses in both the *Ethics* and the *Politics* on the narrower, "particular" sense of justice.[81]

Later natural law theorists recognize that treating virtue—one's internal disposition to choose morally proper ends—as subject to legal regulation or enforcement is inconsistent with the foundational premise of each person's basic dignity as a free and equal, *self-determining*, rational being.[82] Finnis insightfully discusses Aquinas's divergence from Aristotle on this issue. He persuasively argues that, despite statements by Aquinas which might easily be interpreted otherwise, Aquinas does not regard persons' attainment of complete virtue as a proper subject of law. Rather, Aquinas limits the role of the state and law to the regulation of *external acts* which might affect the "peaceful condition needed to get the benefits {utilitas} of social life and avoid the burdens of contention"[83]—that is, which implicate justice in the (particular) sense of rightful claims to personal security

80 *See id.* bk. 5, ch. 2, at 1130b18–b21.

81 Note, for example, Aristotle's references to the substantive criteria of "particular" justice— "proportional" and "arithmetic" equality—in the following passage:

> [P]olitical justice . . . is found among men who share their life with a view to self-sufficiency, men who are free and either proportionately or arithmetically equal, so that between those who do not fulfil this condition there is no political justice but justice in a special sense and by analogy. For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice; for legal justice is the discrimination of the just and the unjust.

Id. bk. 5, ch. 6, at 1134a26–a32. The substantive criteria of "proportional" and "arithmetic" equality are discussed in Part IV.

82 *See* FINNIS, *supra* note 4, at 239–42, 247–52. Acknowledging that Aquinas's articulation of this fundamental point is "not as clear as we may wish," Finnis adds that "[w]hen Kant and Mill announce positions similar to Aquinas', their attempted justifications are, at bottom, at least as sketchy." *Id.* at 239. Here especially it seems to me that Finnis slights Kant's contributions. This point lies at the heart of Kant's moral philosophy and is argued by him fully, forcefully, repeatedly, and consistently. *See* Wright, *supra* note 77, at 647–61; *see also supra* text accompanying notes 11–12, 42–45; *infra* text accompanying notes 84–94, 109.

83 FINNIS, *supra* note 4, at 227; *see also id.* at 221–28; *id.* at 230–31 (equating disturbing others' peace with violations of justice). However, Finnis defends legally mandated habituation to the "justice-related" virtues:

and instrumental goods rather than "justice" in the wide sense of complete virtue.

Kant is much more explicit, emphatic, and consistent on this fundamental point. In the elaboration of his moral philosophy, he distinguishes between a doctrine of virtue (ethics) and a doctrine of Right (justice). The doctrine of virtue focuses on the internal aspect of the exercise of freedom—one's shaping and living one's life by choosing and acting in accordance with the proper ends. The doctrine of Right, on the other hand, focuses on the external aspect of the exercise of freedom—the constraints on action required for persons' mutual practical exercise of their freedom in the external world. It specifies which moral obligations are also legal obligations, enforceable through coercion by others.[84] The concept of Right follows, Kant notes, from the idea of freedom:

> [I]f a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.[85]

Each person has the right, indeed the ethical duty, to assert her moral worth in interactions with others by, among other things, resisting nonrightful coercion by those others. This right is the only innate right that each person originally has due to her equal dignity as a rational being: "*Freedom* (independence from being constrained by another's choice)."[86] Inherent in this innate right is the authorization to use coercion against another to resist or prevent nonrightful aggression by that other against one's person or property. Yet this right exists only if one's protective conduct is "intrinsically *right* in terms of its form"[87]—that is, only if one has subjectively determined that one's use of coercion conforms with the principle of Right.[88] If one's actions will affect other persons' external exercise of their freedom, those actions must conform to those others' rights—that is, they must

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> [Governments may seek] to promote justice-related virtues by requiring patterns of conduct which should habituate its subjects to the acts of these virtues, [but] the law cannot rightly demand that people acquire, or be motivated by, these virtuous states of character or disposition. As Aquinas reiterates, the law's requirements (though not its legitimate objectives) are exhausted by "external" compliance.

Id. at 233–34 (citation omitted).

84 *See* KANT, *supra* note 11, at *218–20, 379–80, 396–97, 406.

85 *Id.* at *231; *see also id.* at *231–32, 239.

86 *Id.* at *237; *see also id.* at *236–38, 305–06.

87 *Id.* at *306 (parenthetical omitted).

88 *See id.* at *231, 253, 255–57, 306, 312.

be consistent in their external effects with the equal absolute moral worth of those others as free rational beings. Hence the supreme principle of Right: "[S]o act *externally* that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law."[89]

In the (notional) state of nature, in which there are no legal institutions, the determination of whether one's actions conform to the principle of Right is necessarily internal and subjective. It is the unilateral, subjective nature of private Right in the state of nature that justifies the creation of the civil society, in which the authorization to use coercion against others is transferred (with a few exceptions for exigent circumstances such as self-defense) from each person to public institutions, and thus becomes a matter of public Right (law). No matter how much good faith (virtuous respect for Right) a person exercises in the state of nature in asserting her rights, she will be unilaterally imposing her will on others, who may have different subjective concepts of Right, and thus her action will not fully conform with the principle of Right. In order for her use of coercion in the state of nature to be provisionally rightful, she must not only subjectively determine that her use of coercion conforms with the principle of Right, but also be willing to enter into the civil condition, where Right is objectively enforced through public civil authority.[90] Moreover, she has the right to compel others with whom she might come into conflict to enter into the civil condition with her, if they are not willing to enter voluntarily.[91]

This argument applies, *inter alia*, to the appropriation or use of external resources. Through an argument by contradiction, Kant infers as a postulate of practical reason the right to acquire external resources through first possession (in the absence of any alternative means of original acquisition specified by law). In the state of nature, possession of external resources is practically dependent on, and its extent is determined by, the would-be possessor's ability to control them by defending them against aggression by others. Yet the rightful possession thereby acquired is provisional rather than conclusive, since no person by his unilateral action can conclusively bind others. Absent the universal consent of all, no one has any better right than any other person to acquire any external resource, and the rightful limits of acquisition cannot be conclusively established. Thus, the necessity of possession of external resources for the practical exercise of

89 *Id.* at *231 (emphasis added).

90 *See id.* at *257, 312.

91 *See id.* at *256, 307, 312.

freedom, coupled with the requirement that such possession conform with the principle of Right, mandates entry into the civil condition.[92]

These justifications for the existence of the state and coercive law apply only to the potential effects of persons' actions on others' external exercise of their freedom—that is, only to matters of Right. They do not apply to persons' internal exercise of their freedom—that is, matters of virtue. Indeed, Kant notes, the notion of using coercion to force individuals to be virtuous is incoherent, since virtue consists of one's own *free choice* of the proper ends.[93] The external coercion of law can only affect the external aspect of the exercise of freedom. The internal (ethical or virtuous) aspect of the exercise of freedom—a person's freely choosing her ends—cannot be coerced by another. Although a person may be coerced into behaving externally so as to further or hinder some end, she cannot be coerced into (freely) adopting or rejecting that end as her own.[94]

Once a person's attainment of virtue is rejected as a proper (or indeed feasible) subject of law, the wide sense of "justice" as complete virtue in our relations with others is fatally undermined. Aristotle derived (invented?) the wide sense of "justice" by combining the linguistic association of the just and the lawful with the assumption that law properly encompasses all of morality. His derivation fails once the latter assumption is abandoned. No wonder, then, that this wide sense of "justice" is, as Finnis states, "now forgotten."[95]

Yet, despite their abandonment of its crucial presupposition—that virtue is properly subject to legal regulation—Aquinas and Finnis retain Aristotle's wide sense of "justice" as complete virtue. Aquinas usually calls it "legal justice,"[96] which is especially confusing since the phrase literally implies (and was used by Aristotle to reference)[97] the positive law of the community, yet Aquinas has abandoned Aristotle's assumption that virtue is a proper subject for law. To avoid this bla-

92 *See id.* at *246–47, 250–53, 255–57, 261–69, 312. Finnis, noting that Aquinas fails to provide any explicit argument for the existence of coercive law, supplies an argument which parallels Kant's. *See* FINNIS, *supra* note 4, at 242, 247–51; *see also infra* text accompanying note 119.

93 *See* KANT, *supra* note 11, at *379–81.

94 *See id.* at *219–20, 239, 381. The supreme principle of virtue is, "Act in accordance with a maxim of *ends* that it can be a universal law for everyone to have." *Id.* at *395.

95 FINNIS, *supra* note 4, at 118.

96 FINNIS, *supra* note 4, at 130 n.e, 215–16 n.a; *see also* FINNIS, *supra* note 3, at 193–94 n.VII.2.

97 *See supra* text accompanying notes 66–69.

tant incongruity, Finnis uses the phrase "general justice."[98] He acknowledges that this revised concept of "general justice," having been severed from law, "transcends" Aristotle's conception, in which justice is limited to what is positive law or properly subject to being positive law.[99] Thus, in his discussion of the three elements that delimit the concept of justice,[100] Finnis treats the element of "lawfulness" as merely meaning "conforming to standard" or to any moral duty, regardless of whether it is a duty that is properly subject to enforcement through law.[101]

Finnis's discussions of "general justice" muddy the water even further. Although he usually emphasizes the element of "other directedness" (interpersonal relations),[102] he sometimes even dispenses with this element, apparently to enable the concept of "general justice" as complete virtue to encompass duties to oneself as well as to others.[103] More significantly, he argues that Aristotle's distinction between "justice" as complete virtue ("general justice") and justice as a specific ("particular") virtue—behaving equitably (rather than "graspingly") with respect to claims to instrumental goods—is "fragile" and "elusive,"[104] and he treats the forms or principles of "particular" justice as being (also or instead) the forms or "concrete" specifications of "general justice."[105] He does not explain how these forms or specifications, which are thought to provide the basic structure and content of law, can be forms or specifications of "general justice," which, being complete virtue, is not a proper subject of law.

Finnis's merging of "general justice" and "particular" justice may be due to his recognition that vices other than the vice of being

98 FINNIS, *supra* note 4, at 118–19, 130 n.e, 216 n.a; FINNIS, *supra* note 3, at 164–65, 193–94 n.VII.2.

99 *See* FINNIS, *supra* note 3, at 194 n.VII.2.

100 *See id.* at 161–64; *cf. supra* text accompanying note 63.

101 *See* FINNIS, *supra* note 3, at 164–65; *see also* FINNIS, *supra* note 4, at 216 n.a.

102 FINNIS, *supra* note 4, at 188; *see* FINNIS, *supra* note 3, at 161, 164.

103 *See* FINNIS, *supra* note 4, at 118 ("This willingness to treat common good . . . as the point of one's actions as they bear on individuals (including oneself) is called 'general justice.'"). Finnis comments,

> One has no rights *vis-à-vis* oneself, and in that strict sense no "duties to oneself" and cannot do oneself a wrong {iniuria} or injustice . . . . But many of the responsibilities entailed by the good of practical reasonableness concern conduct which has no direct relationship to others (and in an extended sense of justice one's duties to oneself—e.g. of cleanliness and, more important, of regulating oneself by reason's rule . . . —are duties of "justice" . . .).

Id. at 138 n.30.

104 *Id.* at 215–17 n.a.

105 *Id.* at 133; FINNIS, *supra* note 3, at 166, 169 n.10, 171, 304.

"grasping"—for example, cowardice, laziness, drunkenness, and lust—may "implicate one in [particular] injustice" by causing acts or situations that are deemed unjust.[106] However, appreciation of this point should lead one not to a more inclusive conception of "justice-related" virtues that are the proper subjects of law, but rather to an understanding that "particular" justice is a matter of objective Right rather than subjective virtue.

Aristotle himself, who initially discusses "particular" justice as a virtue, subsequently observes that a person may not have the vice of being unjust ("grasping") and yet perform acts which are unjust or, even without acting unjustly, be responsible for unjust holdings or injuries.[107] Similarly, Finnis states,

> Although Aquinas' main discussion of right(s) is in the context of justice considered as a virtue . . . he makes it clear that justice's primary demand is that the relevant "external acts" *be done*; they need not be done out of respect for justice, or as a manifestation or result of good character. So: the good of justice {bonum iustitiae} is not the "clean hands" (better: clean heart) of those who are to do justice but rather—what Aquinas puts at the head of his treatise on justice—justice's very object: the *right(s)* of the human person entitled to the *equal treatment* we call justice.[108]

The distinction between the objective nature of justice or Right and the subjective nature of virtue is emphasized repeatedly by Kant. The external exercise of freedom, which is the focus of the doctrine of Right (justice), depends on sufficient access to instrumental goods and sufficient security against interferences by others with one's instrumental goods and one's bodily security. The security of one's person and property would be ephemeral if they were only protected against those who act with a vicious (grasping) motivation or disposition. Assessments of virtue or vice (moral blame or merit) take into account a person's subjective capacity and effort in attempting to ascertain and satisfy the objective moral duties that are derived from the supreme principle of morality (the categorical imperative). If one's rights in one's person and property turn on the subjective physical and mental capacities of others with whom one (usually unpredictably) interacts, those "rights" are nominal and worthless. Rather, one must be secured not merely against vicious conduct by others, but also against objectively specifiable conduct by others which, if generally al-

106 FINNIS, *supra* note 3, at 164–65; *see also* FINNIS, *supra* note 4, at 224–25, 232–33; Bernard Williams, *Justice As a Virtue*, *in* ARISTOTLE'S ETHICS, *supra* note 32, at 189.

107 *See* ARISTOTLE, *supra* note 26, bk. 5, ch. 6, at 1134a16–a23; *see also id.* bk. 3, ch. 1; *id.* bk. 3, ch. 5; *id.* bk. 5, chs. 8–9; Wright, *supra* note 77, at 695–700.

108 FINNIS, *supra* note 4, at 137–38; *see also id.* at 187–88, 232–34.

lowed to occur without any recourse by those adversely affected, would (contrary to the supreme principle of Right) reduce rather than enlarge everyone's equal external freedom. Thus, as Kant repeatedly emphasizes, an action's *legality* (moral Rightness) is judged by its external conformity with the objective requirements of the relevant moral duty, while its *morality* (virtuous or vicious character) is judged by the actor's internal subjective capacity and efforts to ascertain and conform her conduct to those objective requirements.[109]

So justice in its central sense is neither complete virtue ("general justice") nor the specific ("particular") virtue of acting with an "equal" (non-grasping) disposition in one's relations with others that involve those others' instrumental goods. It continues to be describable as (a) equality (b) in interpersonal relations (c) that are properly subject to regulation through legal rights and duties. However, we can now add two important details to this description. First, the only interpersonal relations that are properly subject to regulation through law are those that are the focus of Aristotle's "particular" justice: those relations with others that affect those others' external exercise of their equal freedom, by affecting their access to instrumental goods and the security of their instrumental goods and their person. Second, the relevant notion of equality is not a virtuous "equal" (non-grasping) disposition in one's actions, but rather conformity with some objective criterion of equality, yet to be specified, that implements each per-

109 *See* KANT, *supra* note 11, at *214, 218–32, 312, 382 n.*, 379–80, 381–83 & n.*, 389–94, 401, 404–05, 446–47, 463. Compare Kant's account with that of Oliver Wendell Holmes:

> The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare [common good]. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

OLIVER W. HOLMES, THE COMMON LAW 86–87 (Mark De Wolfe Howe ed., Harvard Univ. Press 1963) (1881).

son's Right to equal external freedom. The specification of that criterion, which differs for the two distinct types of substantive justice, is the topic of the next Part of this Article.

IV. The Two Kinds of Substantive Justice: Distributive Justice and Interactive Justice[110]

Aristotle identifies two distinct kinds of "particular" justice, distributive justice and "corrective" or "rectificatory" justice, which ever since his initial elaboration have generally been recognized as the two basic types or "forms" of substantive justice:

> Of particular justice and that which is just in the corresponding sense, one kind [distributive justice] is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution [civil society] . . . , and another kind [corrective or rectificatory justice] is that which plays a rectifying part in transactions. Of [the latter kind] there are two divisions: of transactions some are voluntary and others involuntary—voluntary such transactions as sale, purchase, usury, pledging, lending, depositing, letting . . . , while of the involuntary some are clandestine, such as theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness, and others are violent, such as assault, imprisonment, murder, robbery with violence, mutilation, abuse, insult.[111]

As Finnis and others have noted, Aristotle's terminology once again is not as clear and precise as one would like. First, Aristotle includes within the second kind of justice both voluntary and involuntary "transactions," even though "transaction" implies (at least to modern ears) a voluntary interaction.[112] "Interaction" should be substituted for "transaction." Second, the words "corrective" or "rectificatory" place the focus on *remediation* of the second kind of injustice rather than on the injustice itself. Finnis substitutes "commutative," the term which Aquinas uses, although he acknowledges that it also has been interpreted too narrowly (as referring solely to voluntary exchanges).[113] The most descriptively straightforward term, which I will use, is "interactive."

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110 The discussion in this Part borrows from Wright, *supra* note 77, and Richard W. Wright, *Right, Justice and Tort Law*, *in* Philosophical Foundations of Tort Law 159 (David G. Owen ed., 1992).

111 Aristotle, *supra* note 26, bk. 5, ch. 2, at 1130b30–1131a9.

112 *See* Finnis, *supra* note 3, at 178.

113 *Id.* at 178–79. Finnis describes Aristotle's "corrective" justice as focusing solely on remediation and as ignoring the underlying wrong or injustice that justifies the remediation. *See id.* However, Aristotle's discussions of corrective justice pay consid-

Finnis's initial discussions of "particular" justice (which he also refers to as the concrete specifications of "general justice") accept and employ Aristotle's distinction between distributive justice and interactive justice.[114] He states that "all problems of justice . . . are intended to find a place in one or [the] other or (under different aspects) both of these two classes of 'particular justice.'"[115] Yet he immediately denies that these classifications have any fundamental significance, asserting that "other classifications . . . could be found"[116] and declaring that "[t]he distinction between distributive and commutative justice is no more than an analytical convenience, an aid to orderly consideration of problems."[117] Indeed, he eventually jettisons Aristotle's classifications, claiming that "[t]he effort to understand and work with [Aristotle's] distinctions—say, between 'distributive' and 'commutative' [justice]—sheds little light on the substantive issues of justice."[118]

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erable attention to the nature of the underlying injustice. *See* Wright, *supra* note 77, at 691–702. As Finnis notes, Aquinas's discussions of "commutative" justice contain similar ambiguities regarding its scope. *See* FINNIS, *supra* note 4, at 216.

114 *See* FINNIS, *supra* note 4, at 133; FINNIS, *supra* note 3, at 166, 177–78.

115 FINNIS, *supra* note 3, at 166; *see also id.* at 169 n.10.

116 *Id.* at 166.

117 *Id.* at 179.

118 FINNIS, *supra* note 4, at 188. One can only speculate as to what led Finnis to this position. One possible cause may have been frustration in attempting to follow and make coherent sense of Aristotle's loose and inconsistent terminology, which Aquinas apparently transplanted and multiplied with even further cross-cutting classifications. *See id.* at 188 ("Aquinas' efforts to follow Aristotle in classifying types of justice—its species, parts, and associated forms—yield no really clear and stable analytical pattern."); *see also id.* at 215–17 n.a.

Another possible cause may have been Finnis's own occasional confusion and uncertainty in applying the two types of substantive justice, which apparently led him to believe that almost any situation could be described in light of either or both types of justice, making it not very worthwhile to distinguish between the two. *See, e.g.*, FINNIS, *supra* note 3, at 169 n.10 (treating the opportunity of exercising some form of private ownership as "a requirement of commutative [interactive] justice in so far as, if everyone in a community is deprived of the opportunity of private ownership, for inadequate reasons, then *each* is being treated unfairly, regardless of the like treatment of the others"); *id.* at 179 (treating "apportionment of damages where there is contributory negligence or [apportionment] of the costs of litigation" as a "matter of distributive justice"). Finnis writes,

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

Id.; *see also id.* (describing a judge's "duty to apply the relevant legal rules . . . [as] one of commutative justice"); *id.* at 182 (treating the foreseeability limitations and frustration doctrines in contract law as matters of distributive justice because they take into

This is a most puzzling position for Finnis to take, since he himself regularly distinguishes between the two types of problems or issues that are addressed by distributive justice and interactive justice, respectively. Indeed, he identifies and distinguishes these two types of problems as the fundamental justifications for the existence of the state and coercive law:

> What is it that solitary individuals, families, and groups of families inevitably cannot do well? In what way are they inevitably "incomplete"? In their inability (1) to secure themselves *well* against violence (including invasion), theft, and fraud, and (2) to maintain a fair and stable system of distributing, exploiting, and exchanging the natural resources which, Aquinas thinks, are in reason and fairness—"naturally" (not merely "initially")—things common to all. That is to say, individuals and families cannot well secure and maintain the elements which make up the *public good* of justice and peace . . . . And so their instantiation of basic goods is less secure and full than it can be if public justice and peace are maintained by law and other specifically political institutions and activities, in a way that no individual or private group can appropriately undertake or match . . . .
>
> Suppose nobody was badly disposed, unjust, recalcitrant. Would there be need for states with their governments and laws?
>
> . . . .
>
> What is matter for public authority is matter for law: the sword and the balance. It is matter for judgements, with often irreparable finality of outcome, given by impartial judges representing the *princeps* before whom all who seek justice are equal. None of us can rightly be simultaneously prosecutor, judge, and witness. Private persons and bodies are not equipped for *judgement*, especially judgement according to publicly established *law*, and so cannot rightly impose the irreparable measures which may be needed to restore justice and peace. So they are incomplete, *imperfecta*, and in need of completion by the order of public justice.[119]

As we have previously discussed, the sole point or purpose of law in natural law theory is the realization, to the extent practicable, of the common good through the implementation of justice—the creation and maintenance of those external conditions which are essential for each person's external exercise of his or her equal freedom.[120] In

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account the parties' mutual perceptions of the risks covered by the contract); *id.* at 188–90 (viewing bankruptcy law's pro-rata satisfaction of creditors' corrective justice claims as a matter of distributive justice).

119 FINNIS, *supra* note 4, at 247–49; *see also supra* text accompanying notes 86–92.

120 *See supra* text accompanying notes 32–36, 61–62, 86–94, 109.

the above quote, Finnis identifies the two distinct problems faced by a theory of justice: (1) providing for a fair distribution among the members of society of the instrumental goods which are necessary or useful for persons' exercise of their external freedom and (2) assuring sufficient security of individuals' persons and existing stocks of instrumental goods in their interactions with others. As Finnis states elsewhere, it is precisely these two problems that are the focus of distributive justice and interactive justice, respectively:

> [T]he problems of realizing the common good through a co-ordinated ensemble of conditions for individual well-being in community can be divided into two very broad classes. *First*, there are problems of *distributing* resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and burdens—in general, the *common stock* and the *incidents of communal enterprise*, which do not serve the common good unless and until they are appropriated to particular individuals. The theory of distributive justice outlines the range of reasonable responses to these problems. *Second*, there are all the other problems, concerning what is required for individual well-being in community, which arise in relations and dealings [that is, interactions] between individuals and/or groups, where the common stock and what is required for communal enterprise are not directly in question. The range of reasonable responses to these problems is outlined in what I shall call . . . the theory of *commutative* justice.[121]

Immediately after supposedly abandoning the distinction between distributive justice and interactive justice, Finnis provides, in lieu of the distinction, a list of issues which begins with the issue of distributive justice and then continues with a (somewhat redundant) variety of interactive-justice issues:

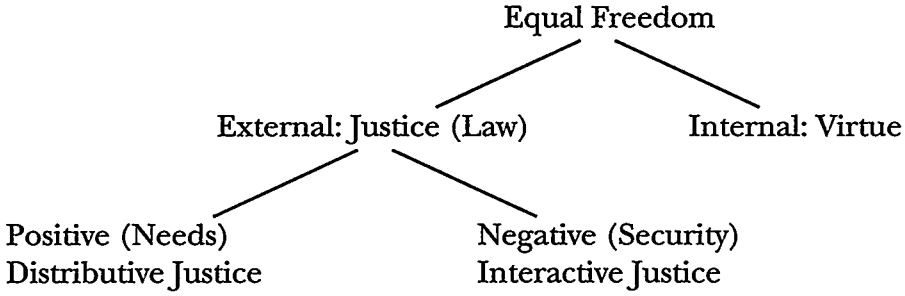
> [Distributive justice:] Some of these issues . . . concern fairness in giving others their share of some pool of benefits or burdens involved in living in community with each other, in carrying out my own share of such burdens and responsibilities, and in managing, exploiting, and disposing of natural resources. [Interactive justice:] Some concern the wrongness of choosing to impose some harm or loss on another or others. Some concern the wrongness of not avoiding such imposition of harm or loss. Some concern fairness in bargaining and exchange, especially (but not only) in recompensing others for what they lose in conferring some benefit upon one. Some concern the requirements of fairness in compensating those upon whom one has imposed some harm or loss without their free

121 FINNIS, *supra* note 3, at 166.

and informed consent. Some concern the appropriateness of denouncing and punishing offences.[122]

Re-characterizing the "forms" of justice as "issues" while focusing on the same distinct substantive problems appears to be mere re-labeling.[123] The distinction between distributive justice and interactive justice is expendable only if the problems and issues that are thought to be governed by each are not fundamentally distinct, do not involve significantly different criteria of justice or equality, and do not require different types of legal institutions for their proper resolution. None of these conditions are satisfied.

As Finnis's own discussions make clear, the problems and issues that are the focus of distributive justice are fundamentally distinct from the problems and issues that are the focus of interactive justice. The two divisions of substantive justice deal with the two different aspects of external freedom.



Distributive justice defines the scope of persons' *positive freedom*—their access to the resources needed to go about their lives. Interactive justice defines the scope of persons' *negative freedom*—the security of their persons and of their existing stocks of resources in interactions with others. Together, distributive justice and interactive justice seek to assure the attainment of the common good (the realization, to the extent practicable, of each person's humanity) by providing each person with her fair share of the social stock of instrumental goods (distributive justice) and by securing her person and her existing stock of instrumental goods from interactions with others that are inconsistent with her status as a rational being with equal, absolute moral worth (interactive justice). As Finnis succinctly states, "General justice can be specified into the forms of *particular justice*, primarily fairness in the distribution of the benefits and burdens of social life,

122 FINNIS, *supra* note 4, at 188.

123 Finnis's heading for the section where this re-labeling occurs is, "Justice: Forms or Issues?" *Id.* at 187.

and proper respect for others {reverentia personae} in any conduct that affects them."[124]

Both distributive justice and interactive justice are based on the same fundamental normative premise of the absolute equality of human beings as free rational beings with equal dignity and moral worth, who, under the supreme principle of morality, are entitled to be treated with equal concern and respect. However, as one should expect given the different problems and issues involved, the specification of this equality differs for the two types of substantive justice.

Aristotle uses a contrived analogy with "geometrical proportion" and "arithmetical proportion" to contrast the different criteria of equality in distributive justice and interactive justice, respectively. To be distributively just, he argues, a distribution must satisfy a criterion of equality understood in terms of a geometrical proportion—an equality of ratios. All individuals in the political community are measured against some distributive criterion (for example, merit and/or need), and instrumental goods (or related burdens) are allocated to different individuals in the same proportion as their respective measurements.[125] However, when considering the justice of personal interactions, the persons involved in the interaction are considered to be absolutely ("arithmetically") equal, no matter how unequal they may be in terms of merit or need or any other comparative criterion:

> [Rectificatory justice] has a different specific character from [distributive justice]. For the justice which distributes common possessions is always in accordance with the kind of proportion mentioned above [geometrical proportion based on comparative measurements of merit or need, etc.]. . . . But the justice in [interactions] is a sort of equality indeed, and injustice a sort of inequality; not according to [geometrical] proportion, however, but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it; for in the case also in which one has received and the other has inflicted a wound, or one has slain and the other been slain, the suffering and the action have been unequally distributed; but the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant. For the term "gain" is applied

124 *Id.* at 133.

125 *See* ARISTOTLE, *supra* note 26, bk. 5, ch. 3, at 1131a10–1131b24.

> generally to such cases, even if it be not a term appropriate to certain cases, e.g. to the person who inflicts a wound—and "loss" to the sufferer; at all events when the suffering has been estimated, the one is called loss and the other gain. . . . [C]orrective justice will be the intermediate between loss and gain. . . . Now the judge restores equality; it is as though there were a line divided into unequal parts; and he took away that by which the greater segment exceeds the half, and added it to the smaller segment. And when the whole has been equally divided, then they say they have their own—when they have got what is equal. . . . The equal is intermediate between the greater and the lesser according to arithmetical proportion [that is, as their arithmetic mean]. . . . [T]o have more than one's own is called gaining, and to have less than one's original share is called losing, e.g. in buying and selling and in all other matters in which the law has left people free to make their own terms; but when they get neither more nor less but just what belongs to themselves, they say that they have their own and that they neither lose nor gain.[126]

Analogizing corrective (interactive) justice to "arithmetical proportion" facilitates a simple, formal contrast to distributive justice as "geometrical proportion." But it does so at a substantial cost in clarity, and it depends on simplifying assumptions that deprive it of descriptive validity. For heuristic purposes (to allow the analogy to arithmetical proportion), Aristotle in the quoted passage treats any interaction that results in an unjust loss as notionally involving both unjust gain and unjust loss, with the unjust gain being equal to the unjust loss. Then, since the parties' pre-interaction holdings are also presumed to be equal, the judge restores those pre-interaction holdings by applying an arithmetic mean (average) to their post-interaction holdings.[127] Aristotle himself indicates that his analogy to arithmetical proportion and its underlying assumption of an unjust gain equal to the unjust loss should be read only as a metaphorical heuristic device. Note, for example, in the quoted passage, his caveat about the general applicability of the term "gain" and his "as though" qualification to the discussion of corrective justice in terms of arithmetical proportion. Immediately afterward, he moves from the heuristic, which relies on the presumed equality of both the pre-interaction holdings

126 *Id.* bk. 5, ch. 4, at 1131b26–1132b18.

127 For example, let *A* equal the parties' respective (presumed equal) pre-interaction holdings and *B* equal the unjust loss or (presumed equal) unjust gain. Then, the post-interaction holdings are *A+B* and *A-B*, respectively, and the arithmetic mean (average) of the post-interaction holdings is *A+B+A-B* divided by two, which is *A*. The arithmetic mean is implemented by taking *B* from the defendant and transferring it to the plaintiff. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 116 (David Ross trans., Oxford Univ. Press 1984) (explaining arithmetical proportion as a heuristic device).

and the unjust gain and loss, to the more general situation of unjust gain or loss and concludes that corrective justice simply requires that each person "have his own"—that any unjust loss (or gain) to his pre-interaction holdings be remedied.

What, then, is the criterion of equality in interactive justice? It is an "equality indeed," which does not employ any comparative criterion such as virtue, merit, or need. "[T]he law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it."[128] In other words, the equality is the absolute equality or dignity of each human being. Interactions which cause adverse effects to another's person or property are unjust if they are inconsistent with that person's right to equal negative freedom. Aristotle discusses many of the factors that are relevant to such an inquiry, including intent, mistake, foreseeability, and consent.[129]

Since distributive justice and interactive justice address quite different problems and issues and employ quite different criteria of equality to resolve those problems and issues, it is critically important when assessing a particular legal claim to identify it properly as either a distributive justice claim or an interactive justice claim to make sure that the claim is properly structured and resolved by the appropriate legal institution, using the proper criterion of equality.[130]

A distributive justice claim is a claim—based simply on one's status as a member of the relevant political community—to one's fair share of the community's instrumental goods, including material resources and civil rights. Proper formulation and implementation of distributive justice claims to material resources ideally require knowledge of the total amount of such resources in the community, as well as the relative ranking of each member of the community under the relevant distributive criterion.[131] All those persons who have too little under the distributive criterion have distributive justice claims against all those who have too much. Thus, proper implementation of distributive justice claims to material resources requires concurrent assessments against all those who have too much and disbursements to all

128 ARISTOTLE, *supra* note 26, bk. 5, ch. 3, at 1132a4–a6.

129 *See* Wright, *supra* note 77, at 695–702.

130 As Finnis notes, some problems may involve both types of substantive justice issues. *See supra* text accompanying note 115. In such situations, it is especially important to sort out and avoid confusing the two distinct types of issues. For a brief discussion of a few such situations and further discussion of institutional considerations, see Wright, *supra* note 77, at 708–10 & nn. 380–81.

131 *See* FINNIS, *supra* note 3, at 173–75 (discussing some of the relevant comparative criteria).

those who have too little. Allowing a person who has too little to obtain part or all of his deficiency directly from another person who has too much would not be a proper implementation of distributive justice. It would result in his being improperly preferred over all others who have too little and in the other person's being improperly disadvantaged compared to all others who have too much. Such unequal treatment cannot be supported as a matter of distributive justice. Indeed, his unjustified unilateral attempt to satisfy his deficiency from the other's existing stock of resources would be a violation of corrective justice.[132]

Given the types and amount of information needed to properly resolve distributive justice claims, as well as the ad hoc invocation of judicial authority by litigants and the limited number of parties subject to the jurisdiction of the court in any particular legal action, the proper administration of distributive justice claims to scarce material resources (rather than nonscarce political resources such as voting rights and other civil liberties) is obviously well beyond the capacity of the courts. Only the legislature or its administrative delegee has the institutional competence to assemble, tabulate, and (re)distribute the material resources of society in accordance with the relevant distributive criterion.

Interactive justice has a much narrower domain than distributive justice. An interactive justice claim is a claim by one person that another person has adversely affected the claimant's person or existing stock of resources by behavior that is inconsistent with the claimant's right to equal negative freedom. The injured party has a bilateral interactive justice claim against the person who injured him (and not against anyone else) for rectification of the injury. Resolution of such a claim does not require or permit any relative ranking of the parties to the interaction with each other or with anyone else in terms of virtue, wealth, general merit, or need, but rather focuses on the consistency of the defendant's conduct with the claimant's right to equal negative freedom. (The claimant's own conduct may be evaluated on similar grounds and compared on these narrow grounds with that of the defendant under rules of comparative responsibility.) No community-wide tallying of resources and comparative ranking of persons are required.

Hence, courts as well as the legislature have the capacity to implement interactive justice. Indeed, courts ordinarily would seem to be much better suited to the task. They can more readily take into ac-

132 *See, e.g.*, State v. Moe, 24 P.2d 638 (Wash. 1933); London Borough of Southwark v. Williams, 2 All E.R. 175 (C.A. 1971).

count and learn from the concrete detail and variety of actual experience. If properly instituted, they are more insulated from the ebb and flow of interest group politics. That fact plus the ad hoc and limited nature of their jurisdiction should make them less likely than the legislature (or its administrative delegees) to confuse interactive justice issues with distributive justice issues, utilitarian efficiency arguments, or arguments of pure self-interest. Finally, the courts' ability, not shared by the legislature, to focus on the details of numerous particular interactions makes them—or some administrative equivalent—indispensable to the general implementation of interactive justice.

V. Conclusion

Natural law theory has employed more than its fair share of loose, misleading, and inconsistent terminology, which prevents a comprehensive, detailed synthesis of that theory by even the most talented, knowledgeable, and perceptive theorist. Nevertheless, over the long history of natural law theory from Aristotle onward, there is little disagreement (at least among the major theorists) about the most basic premises and principles of that theory as they relate to morality, justice, and law. Those principles provide a powerful and detailed basis for the formulation, interpretation, and criticism, as appropriate, of the positive law of any community.

John Finnis is the most talented, knowledgeable, and perceptive natural law theorist of our time. I am at best an amateur dabbler. Yet, it seems to me that the substantive principles of distributive justice and interactive justice which directly and distinctly address the two most basic problems in persons' attempting to attain the common good are too fundamentally important, normatively and analytically, to be cast aside. I hope I have misread Finnis as doing so. If not, I hope he can be convinced to put them back in his natural law theory, or that (as always) he will be gentle in showing me the error of my ways. Regardless, I look forward to further edification by the master.

Errata

Page 878, line 6: For federal norms read federal norms that prohibit state conduct.
Page 897, footnote 152, line 9: For under law read under state law.
Page 907, line 31: For chances read chance.