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Right, Justice, and Tort Law

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Right, Justice and Tort Law

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I. EXPLAINING AND JUSTIFYING TORT LIABILITY: GIVING COMPENSATION AND DETERRENCE A NORMATIVE FOUNDATION

It often is said that the goals of tort law are compensation for and deterrence of loss. Without further elaboration this statement is not only unhelpful, but also misleading and inaccurate, since compensation and deterrence of all losses is normatively insupportable, descriptively implausible, and analytically impossible. There is no plausible moral argument for requiring others to compensate every person for every loss no matter how it occurred, and neither tort law nor law in general makes any attempt to achieve such universal compensation. Indeed, universal compensation of all losses, so that no one suffers any loss, is analytically impossible, since losses (like energy-matter) do not disappear, but rather are shifted (usually in transmuted form) to others, who then themselves bear uncompensated losses. Similarly, neither tort law nor law in general does or should seek to deter or prevent every loss or all risky conduct. Prevention of all risk of loss, at least in our world, is impossible. Even if everyone were to forbear all action, there would remain the risks of loss due to such inaction—e.g., death due to starvation¹ and thirst or the non-avoidance of naturally occurring risks.

The question, then, is what types of losses should be compensated and what types of risky conduct should be deterred. To answer this question, we must know the normative ground of compensation and deterrence in tort law, which in turn requires that we know the normative ground of law in general.

Many theorists assume that no single normative ground can explain or justify tort law or law in general. They argue that, especially given the complexity of modern societies and legal regimes, a plurality of competing norms (e.g., loss spreading, efficient deterrence, retribution, corrective justice, distributive justice, autonomy, and community) must be invoked to

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¹ 'One must drive (or walk) to the store to buy one's bread'; David G. Owen, *Philosophical Foundations of Fault in Tort Law*, this volume, at 208.

explain or justify the law in general, or any particular area of law such as tort law.² I agree with Ernest Weinrib that any truly pluralistic theory will fail to explain or justify law in general or particular since it will necessarily be radically incoherent and indeterminate. A pluralistic (as opposed to a nihilistic) normative theory will not be completely arbitrary or lack any normative force—indeed, it suffers from a surfeit of reasons and norms. Nevertheless, when in a particular situation two or more of the pluralistic norms conflict—which usually will be the case—the theory will be normatively, descriptively and analytically arbitrary and indeterminate in terms of specifying which competing norm(s) should predominate, unless there is some foundational norm that can resolve conflicts between the competing subnorms. Yet if such a foundational norm exists, the theory at its deepest level is monistic rather than pluralistic. This is not to say that any single norm, no matter how fundamental, can explain and justify *every* aspect of the law in general, or any particular area of law. Humans are ignorant, fallible, diverse, sometimes selfish, and otherwise not always morally motivated. But a successful normative and descriptive theory of law should at least be able coherently to explain and justify the principal features of the existing law. Only a monistic foundational theory holds out any prospect of being able to do so.

The two principal monistic theories of law are (1) utilitarian efficiency theory, based on the foundational norm of maximizing aggregate social welfare, which asserts that the purpose of tort law is and should be *efficient* compensation and deterrence, and (2) the Kantian-Aristotelian theory of Right or justice, based on the foundational norm of equal individual freedom, which asserts that the purpose of tort law is and should be *just* compensation and deterrence. I believe it is clear that the equal freedom theory, rather than the utilitarian efficiency theory, provides the foundation for morality and law in general and for tort law in particular. In this essay, I elaborate the equal freedom theory underlying the concepts of Right and justice, and I argue that this theory and its constituent concept of corrective justice undergird the general structure, content, and institutions of tort law. In a companion essay, I expand and deepen the argument by shifting from the global perspective to a detailed normative and descriptive analysis of one of the central issues in tort law: the standards of care in negligence law.³

² For example, see the essay by Izhak England, *The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law*, this volume.—Ed.

³ See Richard W. Wright, *The Standards of Care in Negligence Law*, this volume.

II. THE FOUNDATIONAL MORAL THEORIES: (UTILITARIAN) AGGREGATE SOCIAL WELFARE VERSUS (KANTIAN) EQUAL INDIVIDUAL FREEDOM

There are two principal types of moral theories. The first 'corporate welfare' type identifies the good with the corporate or aggregate welfare of the community or society as a whole, while the second 'equal individual freedom' type identifies the good with the equal freedom of each individual in the community or society.

The most prominent of the modern corporate welfare theories is utilitarianism, which generally is recast in the legal literature as the Kaldor-Hicks version of economic efficiency. The utilitarian efficiency theory combines a methodological individualism with a corporate substantive definition of the good. The methodological locus of value is the individual, but the good is not defined in individual terms but rather, under the foundational principle of utility or greatest happiness, as the maximization of the aggregate sum of individual welfare for the society as a whole. Each individual counts equally methodologically only, as an equal and fungible addend in the summation of aggregate social welfare. There is no independent concern about the distribution of resources or welfare. Any individual's welfare can and should be sacrificed whenever doing so would produce a greater total sum of aggregate welfare. Each individual is morally required to treat others' interests on a par with one's own. 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.⁴

Utilitarianism is in direct conflict with the strong and pervasive moral sense that people have of autonomy and rights, the sense that one generally should be able to prefer the interests of oneself and one's family and friends in the use of one's own resources and should not be subjected to having one's projects, resources, and welfare sacrificed merely because doing so will produce a greater aggregate welfare for others. Utilitarians have attempted to reconcile utilitarianism with the moral sense of autonomy and rights. They invoke a rule-utilitarian argument that the net benefits of any particular intrusion on autonomy or rights considered in isolation, taking into account the welfare 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.⁵ However, this argument gives the principles of autonomy and right a contingent and derivative status which fails to convey their true sense or force. Moreover, under this argument, the so-called

⁴ See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (rev. edn., 1823), ch. 1, §§ 1-9, ch. 4, §§ 4-6, ch. 13, § 1; JOHN STUART MILL, *UTILITARIANISM* (Oskar Piest ed., 1957) (1861), ch. 2 at 22-3, ch. 5 at 76.

⁵ See MILL, *supra*, note 4, ch. 5, at 66-7, 73-9; JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832) lect. 2.

'autonomy' and 'rights' of individuals still may be sacrificed if the total benefits exceed the total disutility.⁶

Moral theories based on equal individual freedom give an absolute and primary status, rather than a contingent and derivative status, to the autonomy and rights of individuals. The best known and developed of these theories is Kant's moral philosophy. The foundation of Kant's moral philosophy is the idea of free will or freedom. The idea of freedom does not imply completely unrestricted self-determination, but rather self-legislation: self-determination in accordance with universal law. Moral behavior consists in overcoming, through subjecting the maxim of one's actions to the condition of qualifying as universal law, inclinations that are in opposition to the dictates of the moral law.⁷

Freedom, and the moral personality constituted by its possession, is an inherent, internal, 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.⁸

The supreme principle of morality (the categorical imperative) is '[a]ct only according to that maxim by which you can at the same time will that it should become a universal law', which can be reformulated as '[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.'⁹ The categorical imperative bears some affinity to the Golden Rule, '[d]o unto others as you would have them do unto you', which in its various forms appears as a fundamental principle in many religions and moral theories. However, as Kant noted, 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-legislating rational being, regardless of whether you would allow

⁶ For example, if the intrusions on autonomy and rights (e.g., slavery) are limited to an easily identifiable minority (e.g., blacks), so that the majority need not worry about possibly being subjected to such treatment.

⁷ See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., 1991) (1797) *213–14, 221–3, 225–7, 379–80 & n.*, 383, 394, 397, 405.

⁸ *Id.* at *434–5; see *id.* at *223, 237–8.

⁹ IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis W. Beck trans., 1959) (1785), *421, 429.

others to treat you without proper respect.¹⁰ People should be treated as ends in themselves (i.e., as free and equal persons seeking to fully realize their humanity), rather than as mere means to be used to benefit others or society as a whole (as is allowed and indeed required under the utilitarian theory).

III. FROM PRIVATE MORALITY TO PUBLIC LAW: KANT'S DOCTRINE OF RIGHT

In the elaboration of his moral philosophy, Kant distinguishes between a doctrine of Right and a doctrine of virtue. The doctrine of Right focuses on the external aspect of the exercise of freedom—the constraints on action required for the practical operation of freedom in the external world. The doctrine of virtue, on the other hand, focuses on the internal aspect of the exercise of freedom—one subjecting the maxim of one's actions to the condition of qualifying as universal law. The distinction between the external and internal aspects of the exercise of freedom explains the differences between the supreme principle of Right and the supreme principle of virtue, each of which is a corollary of the categorical imperative. The supreme principle of Right is 'so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law', while the supreme principle of virtue is '[a]ct in accordance with a maxim of *ends* that it can be a universal law for everyone to have'.¹¹

Many tort theorists (especially but not only the utilitarians) overlook Kant's distinction between the doctrine of Right and the doctrine of virtue and consequently grossly misunderstand and misstate the implications of Kant's moral philosophy for law in general and tort law in particular. To properly grasp these implications, it is necessary clearly to understand the distinctions between these two doctrines, and especially Kant's distinction between the objective nature of Right and the subjective nature of virtue (a distinction which underlies, e.g., negligence law's distinct standards of care for defendants and plaintiffs, respectively¹²).

The doctrine of Right is that part of Kant's moral philosophy that specifies which moral obligations are also legal obligations, enforceable through external coercion by others. Right consists of the authorization to obligate another through external coercion in accordance with a universal law of freedom. The concept of Right follows, Kant notes, from the idea of freedom:

¹⁰ See *id.* at *430, n.14.

¹¹ KANT, *supra*, note 7, at *231, 395; see *id.* at *218–20, 379–80, 395–7, 406.

¹² See Wright, *supra*, note 3.

[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.¹³

Right can only affect—and hence can only apply to—the external aspect of the exercise of freedom. The internal (ethical or virtuous) aspect of the exercise of freedom—one's subjecting the maxim of one's actions to the condition of qualifying as universal law—cannot be coerced by another.¹⁴

In the doctrine of Right, Kant is primarily concerned with justifying the move from private Right in the (notional) state of nature, which necessarily is limited to private and hence subjective enforcement, to public (juridical) Right in the civil society, which is objectively enforced by public civil authority. Kant begins by asserting one's ethical duty to assert one's moral worth in interactions with others by, among other things, resisting non-rightful coercion by those others ('protective justice'). Viewed not only as an ethical duty but also as a right, 'protective justice' encompasses what Kant identifies as the only innate Right that belongs originally to every person by virtue of his or her humanity—'[f]reedom (independence from being constrained by another's choice)'. Inherent in this innate Right is the authorization to use coercion against another to resist or prevent non-rightful 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'—that is, only if one has subjectively determined that one's use of coercion conforms with the principle of Right.¹⁵

The right of 'protective justice' is essential to the possibility of possession of external things. Through an argument by contradiction, Kant infers as a postulate of practical reason the right to acquire external things through first possession. In the state of nature, possession of external things 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 unilateral action can conclusively bind others. Absent the universal consent of all, which can occur only in civil society, no one has any better right than any other person to acquire any

¹³ Kant, *supra*, note 7, at *231.

¹⁴ Although a person may be coerced into behaving externally so as to further or hinder some end, one cannot be coerced into adopting or rejecting that end as one's own: *see id.* at *219–20, 231–2, 239, 381.

¹⁵ *See id.* at *231, 236–8, 253, 255–7, 305–6, 312. Kantian 'protective justice', which is the *ex ante*, preventive aspect of corrective justice, supplies the moral foundation for most of the self-help defenses to intentional tort actions as well as for the general availability of injunctive relief given the appropriate conditions of Right.

external thing, and the rightful limits of acquisition cannot be conclusively established.¹⁶

Once possession has been established, the obligation of 'commutative [corrective] justice' comes into play.¹⁷ If a person's actions will affect the persons or property of others, those actions must conform to those others' rights—that is, they must be consistent in their external effects with the equal absolute moral worth of those others as free rational beings. Again, in the state of nature, 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 grounds the duty to enter into civil society, in which the authorization to use coercion against others is transferred (with a few exigent exceptions such as self-defense) from each person to public institutions (public Right or 'distributive justice').¹⁸ No matter how much good faith (virtuous respect for Right) a person displays in the state of nature in exercising his protective justice right, he will be unilaterally imposing his will on others, who may have different subjective concepts of Right, and thus his action will not fully conform with the principle of Right. In order for his use of coercion in the state of nature to be provisionally rightful, he must not only subjectively determine that his use of coercion conforms with the concept of Right, but also be willing to enter into the civil condition, where Right is objectively enforced through public civil authority. Moreover, he has the 'protective' (corrective) justice right to compel others with whom he might come into conflict to enter into the civil condition with him, if they are not willing to enter voluntarily.¹⁹

In sum, under the Kantian theory of morality and law, the provision of an objective mechanism for enforcing each person's Right to equal freedom is the primary (arguably sole) reason for the existence of the state. For Kant, the purpose of law and politics is no more or less than the guaranteeing of Right or justice, through public enforcement of the objective and coercively enforceable duty to act in a way that is consistent with the equal freedom of others.

¹⁶ See *id.* at *246–7, 250–3, 256–7, 261–9.

¹⁷ See *id.* at *236, 306.

¹⁸ See *id.* at *306. Kant's elaboration of the doctrine of Right, like Aristotle's *Politics*, focuses on the political resources aspect of distributive justice: the creation and distribution of public offices and power. Yet he does not, as some assume, exclude or ignore the material resources aspect. He affirms the right of the people to tax the wealthy to provide for the needy, recognizes limits on original acquisition based on each person's Right to equal freedom, and notes that the duty of beneficence (an imperfect duty of virtue) usually comes into play because of the nonrightful creation of inequalities of wealth through excessive acquisitions by individuals or unjust distributions by government: see *id.* at *326, 454; IMMANUEL KANT, LECTURES ON ETHICS (Louis Infeld trans., 1930) (reprint of Methuen ed. 1979), 192–5.

¹⁹ See KANT, *supra*, note 7, at *255–7, 264, 268, 307, 312.

IV. DISTINGUISHING THE TWO TYPES OF RIGHT: DISTRIBUTIVE JUSTICE AND CORRECTIVE JUSTICE

Kant did not specifically discuss tort law or its civil law equivalent, the law of delict. Nevertheless, as should already be clear, his doctrine of Right has substantial and specific implications for tort liability. To further develop those implications, it is necessary to explore in more detail the relationship between Kantian Right and the two divisions of substantive justice (distributive and corrective) to which reference has already been made. Corrective justice traditionally has been viewed as the ground and point of tort law, but we will explore distributive as well as corrective justice, since neither type of justice can be fully understood except in conjunction and contrast with the other.

Kant considered Right and justice to be synonymous. He generally referred to Right. We generally refer to justice rather than Right, yet with the understanding that justice has to do with the recognition and enforcement of rights. The classic elaboration of the concept of justice appears in book V of Aristotle's *Nicomachean Ethics*. Although Aristotle did not have an explicit concept of 'Right' or 'rights' in the modern sense, his conception of the fundamental ground of and relationship between morality, on the one hand, and law or justice, on the other, parallels in many respects Kant's subsequent treatment of these issues.

Aristotle's conception of the good, like Kant's, is non-aggregative, egalitarian, and grounded in the equal absolute moral worth of each individual as a free rational being. Aristotle emphatically rejects conceptions of the good that are based on wealth, pleasure, or enjoyment, which are the values that are to be maximized in utilitarian efficiency theories. Instead, he elaborates a conception of the good that is intrinsic to each individual: full realization of one's humanity through activity in accord with a rational principle and in accord with complete virtue over one's life. The goal of politics is the attainment of this common good for each and every citizen of the state, which Aristotle describes as a community of free and equal individuals.²⁰ Law is the instrument by which the state achieves this common good by enforcing the requirements of justice: '[G]overnments which have a regard to the common interest are constituted in accordance with strict principles of justice.'²¹

Aristotle defines justice in its 'particular' sense (as distinguished from its broader and now archaic sense of complete virtue in all our relations with others) as the manifestation in our relations with others of the specific

²⁰ See Wright, *supra*, note *, at 683-5.

²¹ ARISTOTLE, *POLITICS* III.6, at 1279a17-21 (B. Jowett trans.), in 2 *THE COMPLETE WORKS OF ARISTOTLE* (Jonathan Barnes ed., 1984).

virtue of behaving equitably with respect to claims to resources, broadly conceived. He then distinguishes two distinct types of justice—corrective justice and distributive justice—which can be differentiated from one another by their respective domains of application, resources encompassed, criteria of equality, and persons covered.²²

A corrective justice claim is grounded in an individual interaction. It encompasses the resources possessed by the parties to the interaction. The parties to the interaction are considered to be ‘arithmetically’ or absolutely equal regardless of their relative standing on any comparative criterion such as wealth, merit, or need. The persons potentially covered by the corrective justice claim are limited to the parties to the interaction. If one person adversely affects (or threatens) the person or resources of a second person through an interaction that is inconsistent with the absolute equality of the parties to the interaction, the second person has a bilateral corrective justice claim against the first person for rectification (or prevention) of that adverse effect.

A distributive justice claim, on the other hand, is independent of any individual interaction. It is based solely on a person’s status as a member of the political community. It encompasses all the resources that exist in the community. The criterion of equality is that these resources must be distributed among the members of the community in proportion to their relative ranking under some criterion such as merit or need. The persons potentially covered by the distributive justice claim are all the members of the community.

Since justice is concerned with the attainment of the good, and Aristotle defines the common good as each free and equal citizen’s full realization of his humanity through activity in accord with a rational principle and in accord with complete virtue over his life, the absolute equality of the parties in corrective justice must be conceived as an absolute moral equality based on equal freedom which prefigures Kant’s foundational assumption of the ‘absolute inner worth’ of each person. Similarly, Aristotle’s conceptions of justice and the good, reinforced by his rejection of wealth, pleasure, and enjoyment *per se* as components of the good, not only clearly preclude utilitarian efficiency conceptions of distributive justice but also point to the equal freedom of each person as the criterion of equality for distributive justice.

Aristotle declares that the most important function of the state is the ‘power of deciding what is for the public interest [distributive justice], and what is just in men’s dealings with one another [corrective justice]’.²³

²² See ARISTOTLE, *Nicomachean Ethics* V.1–V.4 (W.D. Ross & J.O. Urmson trans.), in 2 *The Complete Works of Aristotle* (Jonathan Barnes ed., 1984) [hereinafter *ETHICS*]; Wright, *supra*, note *, at 688–702.

²³ ARISTOTLE, *Politics*, *supra*, note 21, VII.8 at 1328b13–14.

Distributive justice deals with the public or communal resource-allocation issues. Its aim is a distribution of the community's resources that implements each person's right to equal freedom by giving him an equal opportunity fully to realize his humanity as a self-legislating moral being. Corrective justice, on the other hand, deals with private interactions, and it requires that those engaged in such interactions do so in a way that is consistent with the right to equal freedom of the parties to the interaction, which is reflected in the parties' presumptive equality of entitlement to their existing stocks of resources.²⁴

To put it another way, distributive justice and corrective justice encompass the two different aspects of external freedom: distributive justice defines the scope of a person's positive freedom to have access to the resources necessary to realize her humanity, and corrective justice defines the scope of a person's negative freedom not to have her person or existing stock of resources interfered with by others. Together, distributive justice and corrective justice seek to assure the attainment of the good by each person by providing her with a proportionately equal share of the needed resources (distributive justice) and by safeguarding her person and existing stock of resources from actions by others that are inconsistent with the interacting parties' absolute equality (corrective justice).

The fundamental criterion of equality for both distributive justice and corrective justice is the equal freedom of each person. Distributive justice and corrective justice are aimed at the attainment of different aspects of this equal freedom—the positive and negative aspects, respectively—and thus invoke distinct criteria of proportional and absolute equality as elaborations of the fundamental criterion. Aristotle states that alleged gains and losses or excesses and deficiencies in holdings are neither correctively nor distributively unjust, respectively, even if they are deliberately caused, unless they violate one of these two criteria.²⁵

For a holding—even if deliberately caused—to be unjust as a matter of distributive justice, it must vary from the person's proportionate share under the distributive criterion of equal positive freedom. Conversely, a person who (without her consent) has less than her proportionate share of holdings or goods has a distributive justice right to that share, whether or not anyone has intentionally, mistakenly, or otherwise caused her to have

²⁴ The presumptive equality of entitlement does not assume an absolute entitlement, which would be invaded by any adverse effect. Rather, it assumes that each person has an equal right to have his existing stock of resources secured against actions by others that would be objectively inconsistent with the equal freedom of all: *see infra*, notes 25 & 30 and accompanying text.

²⁵ *See* ARISTOTLE, *ETHICS*, *supra*, note 22, V.8 at 1136a1–3 (emphasis shifted): '[I]f a man harms another by choice, he acts unjustly; and these are the acts of injustice which imply that the doer is an unjust man, *provided* that the act violates proportion or [absolute] equality.'

less than her proportionate share.²⁶ One thus might say that distributive justice rights and duties are subject to a regime of super-absolute liability: no particular type of conduct or activity nor even a causal connection need be established to support a valid distributive justice claim.

The appropriate liability regime for corrective justice is more complex. What sorts of interactions should be said to be inconsistent with the absolute moral worth or equal negative freedom of the interacting parties? Consonant with the consent and assumption of risk doctrines in tort law, Aristotle states that neither a gain nor a loss is unjust (inconsistent with the equal negative freedom of the parties to an interaction) if the person from whom the gain came or the person who suffered the loss, respectively, freely and voluntarily consented to such gain or loss. More particularly, corrective justice is not violated by fully voluntary exchanges or gifts.²⁷

The principal examples Aristotle gives of non-contractual interactions that give rise to corrective justice duties of rectification involve the intentional infliction of unconsented to injury. Yet, contrary to what is sometimes assumed, Aristotle does not limit corrective justice duties of rectification to intentionally inflicted injuries. Such duties apply, at the least, to all 'acts of injustice'. An act is unjust if it is 'voluntary'. Voluntary acts include, but are not limited to, those which the actor knows or intends will result in a loss or gain that is inconsistent with the affected party's right of equal negative freedom. Compulsion in the sense of duress or necessity (i.e., to save life or much more valuable property) does not prevent an act from being voluntary and hence unjust with respect to the losses caused to others, but may, at least in certain situations of necessity that do not involve exposing others to a risk of serious bodily harm, prevent it from being considered morally blameworthy. Ignorance will prevent an act from being voluntary only if it is ignorance of the 'particular circumstances of the action and the objects with which it is concerned', rather than ignorance of what is right or wrong. Aristotle also treats acts as being voluntary and hence unjust, despite the actors' ignorance of the particular circumstances, if the actors are responsible for their ignorance—e.g., as a result of drunkenness, failure to know 'anything in the laws that they ought to know and that is not difficult, [or failure to know] anything else that they are thought to be ignorant of through carelessness; we assume that it is in their power not to be ignorant, since they have the power of taking care.'²⁸ Thus unjust action encompasses not only intentionally harmful action but also subjective negligence.

Even if a person does not *act unjustly*, due to lack of actual or imputed knowledge of the foreseeable consequences, he still through involuntary

²⁶ See *id.* V.9 at 1136b15–1137a4.

²⁷ See *id.* V.5 at 1132b31–1133b28, V.9 at 1136a30–b14, V.11 at 1138a9–14.

²⁸ *Id.* III.5 at 1113b29–1114a3; see *id.* III.1, V.2 at 1131a5–9, V.8 at 1135b6–9.

ignorance may *do what is unjust* by causing an unjust holding or injury. The person who causes such an unjust holding through involuntary ignorance is said to act unjustly 'in an incidental way' rather than a blameworthy way, yet still is subject to a corrective justice duty of rectification. Aristotle divides the injuries in interaction that result from involuntary ignorance into 'mistakes' and 'misadventures'. Mistakes are injuries that were reasonably expectable given typical knowledge, but which were not expected by the actor due to his own involuntary ignorance. Misadventures are injuries that were not reasonably expectable, not because of the actor's own involuntary ignorance, but due to a general lack of knowledge that 'lies outside' the actor.²⁹ Liability for mistakes seems to correspond to objective negligence, while liability for misadventures would seem to be some form of strict (not absolute) liability.³⁰

Injuries due to acts of injustice, being either intentional or the result of subjective negligence, ordinarily constitute wrongdoing—i.e., are morally blameworthy—and thus if sufficiently wrongful render the injurer liable to punishment in addition to rectification of any unjust loss or gain. In certain cases of duress or necessity, such acts might not be morally blameworthy and hence not deserving of punishment. Yet they still would be acts of injustice with respect to the injury inflicted on the victim and would result in the victim's being unjustly treated unless the injury were rectified. Likewise, injuries due to mistakes and (apparently) at least some misadventures are unjust losses that the injurer must rectify. But the mistakes and misadventures, being due to involuntary ignorance rather than being done with actual or imputed knowledge of the foreseeable consequences, do not ordinarily constitute wrongdoing and thus (from a moral blame viewpoint) should be forgiven rather than punished.³¹

In sum, contrary to what is sometimes asserted, the Aristotelian concepts of corrective justice and distributive justice are not empty formalist shells, which can be filled in with practically any moral content, including even utilitarian efficiency. These concepts have a non-aggregative, egalitarian substantive ethical content, prefiguring Kant's normative premise of the

²⁹ See *id.* V.8, V.9 at 1136a23–30.

³⁰ Liability in tort law is strict rather than being absolute or based on negligence if (unlike absolute liability) it is required that the plaintiff's injury have been caused by some special aspect of the defendant's volitional conduct that created an objectively foreseeable risk to others, but (unlike negligence) the required special aspect is not the unreasonableness of the risk. For example, there is strict liability for damage caused by the ultra-hazardous aspect of foreseeably ultra-hazardous activities. Absolute liability is excluded from corrective justice because only *unjust* gains and losses are subject to rectification. Gains and losses are unjust only if they are inconsistent with the equal negative freedom of the parties to the interaction. See *supra*, notes 24 & 25 and accompanying text.

³¹ See ARISTOTLE, *ETHICS*, *supra*, note 22, III at 1109b30–34, V.8 at 1136a5–9; ARISTOTLE, *RHETORIC* I.13 at 1373b27–30 & 1374b4–9, I.14 at 1374b32–34 (W. Rhys Roberts trans.), in 2 *THE COMPLETE WORKS OF ARISTOTLE* (Jonathan Barnes ed., 1984); *supra*, text at notes 28–30.

equal absolute moral worth of each person as a free rational being, that historically has provided and continues to provide a powerful moral foundation for law in general and tort law in particular.

V. THE INDEPENDENCE AND COMPATIBILITY OF DISTRIBUTIVE JUSTICE AND CORRECTIVE JUSTICE

As Aristotle emphasizes, distributive justice and corrective justice are two distinct and independent types of justice. Structurally, distributive justice claims are multilateral claims that are independent of any interaction and potentially apply to all the members of the community, while corrective justice claims are bilateral claims which arise from an interaction and are limited to the parties to the interaction. Substantively, distributive justice employs a criterion of relative equality, according to which resources are distributed among the members of the community in proportion to how they measure relative to one another under the appropriate distributive criterion. Corrective justice, on the other hand, employs a criterion of absolute moral equality, according to which the parties to an interaction (and their entitlements to their existing stocks of resources) are treated as equal, regardless of how much they might vary from one another under the appropriate distributive criterion or any other comparative criterion. Thus, both the structure and substance of distributive justice claims are inapposite for achieving corrective justice, and vice versa. These distinctions have important ramifications for tort law, which, given its focus on interactional injuries, is grounded on corrective justice.

Corrective justice (and hence tort law) protects against actual or threatened interactional injuries to one's person or existing stock of resources regardless of the distributive justice or injustice of the overall division of resources among the parties to the interaction or among the members of the community as a whole. The relative wealth of the parties is irrelevant to tort liability.³² More particularly, the law recognizes a corrective justice right to rectification (including, in the absence of strict necessity, punishment of the deliberate trespasser as well as compensation of the victim) when a needy person takes property from or tortiously injures a well-off person.³³

It is sometimes asserted that, if corrective justice truly is distinct and independent from distributive justice (rather than merely being a corollary principle which serves the subsidiary role of rectifying deviations from the

³² See, e.g., *Vosburg v. Putney*, 47 N.W. 99, 100 (Wis. 1890).

³³ See, e.g., *London Borough of Southwark v. Williams* [1971] 2 All E.R. 175 (Eng. C.A.); cf. *State v. Moe*, 24 P.2d 638 (Wash. 1933) (criminal liability). Moreover, even trespassers, whose possession is correctively unjust with respect to the true owner, are themselves protected against trespasses by others. See, e.g., *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892); *Tapscott v. Cobbs*, 52 Va. (11 Gratt.) 172 (1854).

just distribution), distributive justice and corrective justice are conceptually and practically incompatible. For example, Ernest Weinrib asserts that distributive and corrective justice, being conceptually distinct forms of justice, are alternative rather than complementary justificatory structures, which cannot coherently coexist in the same body of law nor simultaneously apply in any particular situation.³⁴ More specifically, Larry Alexander, noting Robert Nozick's argument that voluntary gifts and exchanges will upset any end-state pattern of distribution, observes that similar disruption of the desired pattern of distribution will result from the rectification of gains and losses required by corrective justice, since losses usually are not offset by quantitatively equal gains (and vice versa).³⁵

In considering whether conflicts may arise between different valid justice claims, we can begin with the clear (yet sometimes contested) truth that properly implemented corrective justice claims cannot themselves be correctively unjust. For example, a person who injures a wrongful aggressor while properly exercising her corrective justice right to defend herself does not have any corrective justice obligation to compensate the aggressor, even though she injured the aggressor deliberately and without the aggressor's consent. The proper implementation of the rectification required by corrective justice simply cannot itself be a violation of corrective justice, although it is done deliberately and without the consent of the person upon whom the duty of rectification is imposed.³⁶ Similarly, a person who has been forced to give up some of his existing stock of resources due to a proper distributive justice (e.g., tax) assessment against him does not have any distributive or corrective justice right to have those resources restored to him, even though the resources were taken deliberately and without his consent. In each of these situations, the unconsented to loss is not only consistent with but also required by the affected individuals' right to equal freedom.

The difficulty arises when we consider whether properly implemented corrective justice claims can be consistent with distributive justice. The issue is how best to reconcile the positive and negative aspects of equal freedom that are embodied in distributive justice and corrective justice, respectively. That issue can only be resolved by invoking the fundamental norm that underlies both types of justice: the promotion of the equal freedom of each person in the community. (Note that resort to such a fundamental norm is only possible in a monistic theory of morality and law.) A proper theory of distributive justice takes account of both aspects of the equal freedom cri-

³⁴ See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 973-4, 979-81 & n.69, 983-5, 987-8 (1988).

³⁵ See Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1, 2-7 (1987).

³⁶ See *supra*, text accompanying notes 13 & 15.

terion: first, the effectiveness of the theory in implementing equal positive freedom and, secondly, the compatibility of the theory with the maintenance of equal negative freedom (security of entitlements to one's existing stock of resources), which also is essential to freedom or autonomy.³⁷

Alexander is correct when he states that corrective justice will necessarily disrupt and thus be incompatible with any *end-state* distributive justice scheme.³⁸ Yet, as Ronald Dworkin notes, corrective justice need not be incompatible with *beginning-state* distributive justice schemes, which provide each person with a fair proportion or amount of resources on which to build his or her life and do not thereafter try to maintain that distribution throughout the person's life.³⁹ The distributive justice schemes that would seem best to satisfy both aspects of the equal freedom criterion are limited, beginning-state, moderate-needs-based schemes, which focus on providing the minimum or moderate needs in terms of food, shelter, clothing, health care, education, adjustments for disabilities, and so forth that will give each person a roughly equal opportunity to lead a reasonably free and meaningful life.⁴⁰

Properly understood, distributive justice and corrective justice are separately necessary and jointly compatible as the positive and negative aspects, respectively, of the fundamental norm of equal freedom. Contrary to Weinrib's assertion, distributive justice and corrective justice may not only coexist in the same body of law, but also apply simultaneously in the same situation. Examples include public takings of private property under the exercise of eminent domain, or private takings of private servitudes for public benefit that are authorized under nuisance doctrine in tort law. In each of these closely analogous situations, the distributive justice claim that supports the taking of the plaintiff's property is not that he has too many resources overall or, even if he does, that he is the only person who has too many resources. These prerequisites for placing the entire burden of the

³⁷ Nozickian libertarians, by beginning with an assumption of absolute unqualified property rights in existing holdings (despite paying lip service to the Lockean Proviso), err in disregarding the positive aspect of equal freedom, while Marxist socialists err in disregarding the negative aspect.

³⁸ See *supra*, text at note 35.

³⁹ See RONALD DWORKIN, *LAW'S EMPIRE* (1986), 297–9. Dworkin's own scheme, which would require a quantitative equality of beginning-state resources, is deficient with respect to both aspects of the equal freedom criterion. It would not properly implement equal positive freedom because it fails to take need into account—e.g., an ascetic hermit would not need nearly as many resources as an experimental physicist to pursue his projects and plans. It would undermine the security of entitlements that is the crux of negative freedom because the mandated quantitative equality of beginning resources, given constantly occurring new births, will require constantly recurring massive redistributions.

⁴⁰ See Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *STAN. L. REV.* 877 (1976). The same considerations should govern selection of the method of levying the burdens of a redistribution: the method chosen (e.g., taxation, eminent domain, or conscripted labor) should be the one that has the least adverse impact on the affected persons' equal freedom.

redistribution on him, without any compensation, will rarely be met. Rather, the distributive justice claim is that his property is required to accomplish some distributive objective—either redistribution of resources to those who have too little,⁴¹ or increasing the total amount of resources in society so that everyone's distributive share can be increased⁴²—and that due to the unique suitability of the plaintiff's property for this objective, an unconsented to taking rather than a voluntary sale is required to prevent him from demanding excessive compensation for his property and thus appropriating an undue share of the public benefit from the project to himself.

Since the distributive justice claim against the plaintiff is of this special sort, and is not based on his having too much or, at least, being the only one who has too much, the taking of his property without full compensation cannot be justified as a matter of distributive justice. Rather than the distributive justice objective being implemented, as in the case of proper taxation, by proportionately assessing all those who have too much and distributing the proceeds to all those who have too little, the plaintiff would be singled out, with no distributive justification, to shoulder involuntarily the full costs of the redistribution. To implement the distributive justice goal properly, those costs must be shifted from him, by fully compensating him, to those who should properly bear the distributive justice burden. If this is not done, the taking of his property without his consent is unjustified and thus gives rise to a corrective justice right to rectification (in this context, compensation).⁴³

VI. THE COMPREHENSIVENESS AND COMPLETENESS OF DISTRIBUTIVE JUSTICE AND CORRECTIVE JUSTICE (HEREIN OF PUNITIVE DAMAGES IN TORT LAW)

Being the positive and negative aspects of the Right of equal freedom, distributive justice and corrective justice exhaust the possible types of substantive justice or Right. The two types differ significantly from one another in both structure and ground, as reflected in their respective domains, persons and resources encompassed, and criteria of equality. Yet each type provides a complete normative structure and ground for resolving particular claims of justice or Right that fall within its respective domain. Thus, contrary to what is assumed by some writers, there is no need to supplement distributive justice or corrective justice by postulating

⁴¹ See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

⁴² See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

⁴³ See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

additional types of substantive justice or by infusing some allegedly missing normative ground or principle.

It is sometimes asserted that retributive justice is a type of justice that is distinct from both distributive justice and corrective justice. However, as Aristotle clearly assumes, retributive justice is a subset of corrective justice rather than a distinct type of justice. Aristotle describes distributive justice and corrective justice as the only two kinds of justice, which govern distributions and interactions respectively. He lists a number of intentional harmings as examples of the non-consensual interactions that constitute one of the two sub-domains of corrective justice, and he prescribes punishment as part of the appropriate rectification for such subjectively wrongful interactions.⁴⁴

When a person in an interaction with another causes a loss to him or reaps a gain for herself that is objectively but not subjectively inconsistent with his equal negative freedom—what Aristotle describes as an ‘involuntary’ mistake or misadventure that results in an unjust injury rather than a ‘voluntary’ (intentional or subjectively negligent) unjust act—there is no basis for punishment or retribution but only for requiring her to see to it that the unjust loss or gain is rectified. However, when her conduct is morally blameworthy because it is subjectively as well as objectively inconsistent with his equal negative freedom, then in addition to any nondignitary loss he may have suffered (which itself requires rectification) he also has suffered a discrete dignitary injury, which is rectified through the imposition of private retribution in the form of punitive damages that she herself must pay.⁴⁵ If, as is often the case, her conduct also constitutes a conscious flouting or reckless disregard of the rules of public peace or order, then there is an additional non-discrete injury to the dignity and security of each and every member of the civil society (or to ‘the state itself’). This non-discrete injury is rectified by imposing public retribution on her in the form of a criminal sentence, which she herself must satisfy.⁴⁶

When the retribution is for the non-discrete wrong done to all the members of society we are in the domain of criminal law. When the retribution is for the discrete wrong done to a particular individual we are in the domain of tort law. Yet tort law, unlike criminal law, is neither primarily focused on nor limited to rectification of injuries caused by subjectively wrongful (blameworthy) behavior, which invokes the retributive aspect of corrective justice. Rather, tort law focuses on rectification of private injuries caused by behavior that was objectively inconsistent with the equal

⁴⁴ See *supra*, text at notes 22–5, 28, & 31.

⁴⁵ See *supra*, text at notes 28–31. Compare David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989).

⁴⁶ See ARISTOTLE, *ETHICS*, *supra*, note 22, V.11 at 1138a9–14; cf. KANT, *supra*, note 7, at *331–3.

negative freedom of the interacting parties, whether or not such behavior was subjectively blameworthy. Such rectification is based on the non-retributive aspect of corrective justice. If the defendant's behavior was also sufficiently morally blameworthy, the retributive aspect of corrective justice kicks in to provide a basis for punitive damages in addition to any actual damages.⁴⁷

A more widespread understanding of the distinct nature and grounds of punitive damages in tort law on the one hand and criminal liability on the other, which traditionally have been conceived as discussed above, would go a long way toward clarifying and resolving much of the current debate on the appropriateness and proper scope of punitive damages in tort law.

VII. THE CORRELATIVITY OF RIGHTS AND DUTIES AND THE UNJUSTIFIED FAILURE OF PROPOSED ALTERNATIVES TO TORT LAW TO ADHERE TO THIS CORRELATIVITY

Jules Coleman argues that there is no necessary conceptual or normative link between the 'grounds of recovery', the 'grounds of liability', and the 'mode of rectification' in any coherent theory of legal responsibility.⁴⁸ However, by asserting an analytic and normative cleavage between the grounds of recovery and the grounds of liability, Coleman has failed to take the concept of a right (or a legitimate claim) seriously. A claim, as opposed to a mere statement of need, is always directed to some person (or persons or group). A legitimate claim—a claim that should be satisfied—is a claim of entitlement or right directed to that person, which assumes a correlative duty on her part to satisfy the claim. The correlativity of the right and the duty is analytic or conceptual. While there can be purely ethical duties with no correlative rights, there cannot be rights without correlative duties.⁴⁹

The normative ground of every right is also the normative ground for its correlative duty and for the mode of rectification triggered by the infringement of that duty. Once the foundational norm of equal freedom that underlies the concept of Right is understood, and its positive and negative aspects have been elaborated in the concepts of distributive justice and corrective justice, respectively, the structure and content of the modes of rectification for infringements of distributive and corrective justice rights will be implicit in the rights themselves. Only in theories of rights such as Coleman's, in which the foundational norm underlying the concept of

⁴⁷ Corrective justice encompasses all interactions. It thus provides the normative foundation not only for tort law and criminal law, but also for, e.g., contract law, the law of restitution, and the transactional aspects of property law.

⁴⁸ See JULES L. COLEMAN, *RISKS AND WRONGS* (1992), 261–5, 285–8, 317, 326–8; Wright, *supra*, note *, at 665–83.

⁴⁹ See KANT, *supra*, note 7, at *383; MILL, *supra*, note 4, at 61–2.

Right is not elaborated, can it seem that rights are merely abstract place-holders that have no or minimal content and thus imply no particular mode of rectification when they are infringed.

It is critically important when assessing a particular legal claim to identify it properly as either a distributive justice claim or a corrective justice claim, to make sure that the claim conforms to the distinct structure and ground of the relevant division of justice.

Distributive justice claims are multilateral. To determine the resources to which a person is entitled as a matter of distributive justice, we must know both the total amount of resources that exist in the community and the person's relative ranking according to the distributive criterion in comparison with all others in the community. 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 requires concurrent assessments against all those who have too much and disbursements to all those who have too little. Allowing a person who has too little to obtain part or all of his deficiency directly and bilaterally 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 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.⁵⁰

Corrective justice claims are bilateral. They are claims 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 corrective justice claim against the person who injured him (and not against anyone else) for rectification of the injury.⁵¹ The particular species of rectification—e.g.,

⁵⁰ See, e.g., *London Borough of Southwark v. Williams* [1971] 2 All E.R. 175 (Eng. C.A.); *State v. Moe*, 24 P.2d 638 (Wash. 1933).

⁵¹ When there are multiple parties involved in the interaction, the injured party may have claims against more than one of the other parties, and there may be counterclaims and cross-claims, but each corrective justice claim is distinct and bilateral in that it asserts a correlative right-duty relationship between two specific parties to the interaction that is distinct from any other corrective justice claims that may have arisen from the particular interaction. If two or more parties to an interaction each have distinct but related corrective justice duties to rectify the injured party's loss (i.e., joint tortfeasors, including employers and their employees), and one of the liable parties fully rectifies the loss, thereby non-voluntarily discharging the other liable parties' duties to the injured party as a side effect of discharging her own duty, she may have a restitutionary corrective justice claim for indemnification or contribution against the other liable parties: see *RESTATEMENT OF RESTITUTION*, (1936) ch. 3, topic 3; Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 *MEM. ST. U. L. REV.* 45, 46, 61-2, 72-3 (1992).

restoration of the appropriated or injured item itself or replacement by some item, service, or money of equal value—often (but not always) may be unimportant. Yet merely offering an apology or a peppercorn for a tortiously broken leg clearly will not suffice. The required mode of rectification is the restoration by the injurer (or someone voluntarily acting on behalf of the injurer) of the injured party's preexisting stock of resources to the extent possible.

Contrary to a common misunderstanding, there is no general requirement that a corrective justice duty be discharged personally by the party who is subject to that duty.⁵² Such a requirement would seem to apply only when the appropriate mode of rectification is punishment. When the appropriate mode of rectification is compensation for the unjust loss, rather than or in addition to punishment, corrective justice merely establishes the duty of the party who caused the unjust loss to see to it that the required compensation occurs. There is nothing in corrective justice which prevents that duty from being discharged voluntarily, on behalf of the party with the duty, by someone else—e.g., that party's insurer or rich aunt. Nor is there any problem from the standpoint of corrective justice if the person who discharges the duty spreads the cost of discharging that duty to others through voluntary market processes—e.g., by raising the prices of its products.

Coleman has frequently argued that, since non-retributive corrective justice duties can voluntarily be discharged on the obligor's behalf by someone other than the obligor, they also can be discharged by compulsory, no-fault, first-party or social insurance schemes.⁵³ This argument ignores the fundamental difference, in terms of the impact on equal negative freedom, between someone's *voluntarily* discharging another's duty and being *compelled* to discharge the other's duty. No one can justifiably be compelled to discharge another's duty in the absence of a prior voluntary contractual agreement to do so.⁵⁴ All of the examples cited by Coleman of permissible discharges of a duty by a person other than the obligor involve that other person's voluntary discharge of the duty, or, weaker yet, merely a voluntary gift to cover the loss that was not intended to (and hence will not) discharge the obligor's duty. Coleman's examples merely support voluntary participation in social insurance or no-fault compensation plans. They do not support compulsory participation in such plans or, absent explicit vol-

⁵² This misunderstanding is especially evident in the writings of the aggregate social welfare theorists, who rely upon it to argue that corrective justice is an archaic, misguided popular illusion given the ultimate bearing of costs under our current liability regimes.

⁵³ See COLEMAN, *supra*, note 48, at 327–8; Wright, *supra*, note *, at 671–4, 680–1.

⁵⁴ Contrary to a common assumption, this proposition does not condemn the principle of vicarious liability or *respondet superior*. An employer or other principal's 'vicarious' liability is based on the principal's own corrective justice responsibility for injuries that are tortiously inflicted by the principal's agent in pursuance of the principal's objectives.

untary waiver, the abolition of the injurer's corrective justice duty to rectify the injury to her victim.

In his recent book, Coleman dances around this problem without really confronting it, attacking instead a variety of straw arguments: e.g., that no obligation can be imposed on a person in the absence of that person's consent or wrongdoing, that wrongdoers rather than innocent individuals should be held liable for losses that neither caused, and that corrective justice duties pre-empt all other duties.⁵⁵ Persons may and do have justifiable legal duties independent of corrective justice due to the requirements of distributive justice, but not (as Coleman supposes) for reasons such as utilitarian efficiency that are inconsistent with Right and justice. Furthermore, the existence of such independent duties in no way affects the continuing validity of any particular corrective justice duty. Just as satisfaction of a particular corrective justice duty does not discharge or displace independent distributive or unrelated corrective justice duties, satisfaction of other duties of justice does not discharge or displace an independent and unrelated corrective justice duty.⁵⁶ Each duty of Right or justice must be discharged by the person subject to the duty or (unless retribution is at issue) by someone *voluntarily* acting on behalf of the person with the duty. There is no justification in Right or justice for *coercively* imposing one person's duty on another, and hence such coercion constitutes a violation of Right and (corrective) justice.⁵⁷

This is not to say that there is no justification for state social insurance schemes. Indeed, such schemes would seem to be mandated by distributive justice. The propriety of such schemes depends on their conformity with the structural and substantive requirements of distributive justice. Yet, even if a state social insurance scheme exists as a proper implementation of distributive justice, the distributive justice arguments underlying it would not justify relieving a tortfeasor from her distinct and independent corrective justice obligation to the victim whom she tortiously injured, absent a voluntary waiver by the victim of his corrective justice rights.⁵⁸

⁵⁵ See COLEMAN, *supra*, note 48, at 389–95.

⁵⁶ See *supra*, note 51, for a discussion of related corrective justice duties.

⁵⁷ Coleman ultimately asserts that corrective justice duties are not discharged, but rather extinguished or prevented from arising, by the creation of a compulsory (private or social) no-fault insurance scheme. As explained in the text, these unsupported assertions are invalid. Coleman suggests that those who 'voluntarily' accept compensation from the no-fault scheme waive any moral corrective justice right: see COLEMAN, *supra*, note 48, at 402–4 & n.7. But what alternative do they have, and what of those who do not accept such compensation? Coleman himself requires that any alternative compensation scheme 'conform to the relevant demands of justice and morality': *id.* at 493 n.7.

⁵⁸ Tort law's collateral source rule affirms the irrelevance to the victim's corrective justice claim against the tortfeasor of the victim's receipt of collateral payments from private or social insurance. The victim's corrective justice right against the tortfeasor is distinct and independent from his contractual corrective justice right against his private insurer or his distributive justice right under the social insurance scheme.

Compulsory no-fault first-party insurance plans not only are inconsistent with corrective justice, but also cannot be justified on distributive justice grounds. They do not attempt to allocate the costs and benefits of the no-fault plan in accordance with the covered parties' relative ranking under the distributive criterion of equal positive freedom. Premiums are universally (and usually uniformly) imposed and losses are universally compensated regardless of the resource position or needs of the persons covered. In addition, the more limited in scope such plans are (e.g., automobile accidents only), the more they fail properly to apply the distributive criterion to *all* the members of the community. Such plans are based on utilitarian loss-spreading rather than on any concept of justice.

Similarly defective are proposals to establish at-fault risk pools, according to which those who behave tortiously would pay into a common fund in accord with some retributive measure or some calculation of *ex ante* expected damages, whether or not they cause any injury, and victims injured by someone's tortious conduct would recover from the common fund. Such schemes are inconsistent with the correlative bilateral rights and duties that are a central feature of corrective justice and ignore the logical and normative correlativity of rights and duties *per se*. Although in such schemes the victim's right to recovery is grounded on tortiously caused injury, the victim's claim is made not against the person who tortiously caused the injury and thus has the correlative duty, but rather (without any normative basis) against all who have behaved tortiously whether or not they caused any injury. Conversely, tortious conduct which has not resulted in any injury is insufficient to establish a corrective justice obligation, since there has been no interference with anyone's equal negative liberty. Nor would such tortious conduct by itself, even if it resulted in injury, establish any distributive justice obligation, since distributive justice obligations are based on entirely different considerations.⁵⁹

VIII. THE INSTITUTIONS OF JUSTICE

The distinct structure and content of distributive justice claims and corrective justice claims often largely determine the appropriate institutions for implementing each type of claim. Proper formulation and implementation of distributive justice claims to material resources (other than each person's own body) 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 distributive criterion of equal positive freedom. Given these informational needs, as well as the *ad hoc* invocation of judi-

⁵⁹ In addition to their lack of justification, such at-fault risk pools suffer from insuperable practical problems.

cial 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 non-scarce 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.

Corrective justice has a much narrower domain than distributive justice. Corrective justice is only concerned with the effects of interactions on the persons and existing stocks of resources of the parties to the interaction, and it only requires that such effects be consistent with the equal negative freedom of the parties to the interaction. For corrective justice, unlike distributive justice, no community-wide counting of resources and comparative ranking of persons is required. Hence courts as well as the legislature have the capacity to implement corrective justice. Indeed, courts ordinarily would seem to be much better suited to the task. They can more readily take into account 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 corrective 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 corrective justice.⁶⁰

IX. CONCLUSION

At the core of the Kantian-Aristotelian concept of Right or justice is the normative premise that the common good to which law and politics should be directed is not the meaningless pursuit of aggregate social welfare, as assumed by the utilitarian efficiency theory, but rather the promotion of the equal (positive and negative) freedom of each individual in the community. Embodied in this concept of the good is the idea of the absolute moral worth of each human being as a free and equal member of the community,

⁶⁰ However, when the goal is widespread *ex ante* prevention of corrective justice violations, rather than *ex post* rectification or specific *ex ante* prevention, the *ad hoc* and limited nature of the courts' jurisdiction once again makes the courts, even with respect to corrective justice, less suitable institutions than the legislature and its administrative delegees. This is especially true when the widespread regulatory effort raises important distributive as well as corrective justice issues.

with an equal entitlement to the share of social resources and the security of currently held resources needed to realize his or her humanity. These normative premises resonate in Kant's moral and legal theory, in Aristotle's theory of ethics, law, and justice, and in a wide variety of ancient and modern moral and political theories.

Most people find the 'equal individual freedom' perspective of the Kantian-Aristotelian theory to be much more attractive than the 'aggregate social welfare' perspective of the utilitarian efficiency theory, at least once they understand what each of these perspectives actually means and entails. The utilitarians, and particularly the legal economists, are thus left to argue that, although the utilitarian efficiency theory may appear to be normatively unattractive, it seems to be the moral theory that actually underlies our law and politics, since it allegedly best (or even solely) explains the content of our existing laws, particularly tort law.

In this essay, I challenged that claim primarily on the global level. I elaborated the Kantian concept of Right and its corollary Aristotelian concepts of distributive and corrective justice and explored their relationship to law in general and tort law in particular. I argued that, far from being mere abstract forms with little or no substantive content, distributive justice and corrective justice, when properly understood as the positive and negative aspects of the Right of equal freedom, are comprehensive and complete normative principles for resolving claims of justice or Right that fall within their respective domains. Tort claims, being based on interactional injuries, fall within the domain of corrective justice. The primary thrust of this essay has been to demonstrate that the concept of corrective justice, understood as the negative aspect of the Right of equal freedom, explains, justifies and illuminates the general structure, content and institutions of tort law, as well as tort law's traditional status as the preferred civil liability regime for discrete non-contractual interactional injuries.⁶¹

⁶¹ I develop the argument further in a companion essay in this volume, in which I focus on the standards of care in negligence law—the doctrinal area that is thought (incorrectly) to provide the best evidence of the alleged success of the utilitarian efficiency theory of law: see Wright, *supra*, note 3.