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Aristotle on Political Justice (symposium)

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> Justice belongs to the *polis*; for justice is an ordering of the political community . . . .
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> *Aristotle, Politics*[1]

In his contribution to this Symposium, Professor Ernest J. Weinrib presents a formalist theory of private law.[2] According to this view, the function of tort and contract law is not to promote the public good, whether conceived in instrumental terms such as economic efficiency, or in noninstrumental terms such as liberty or social justice. Instead, private law embodies the concept of corrective justice. Corrective justice focuses solely on the interaction between private individuals; it holds that one who has wrongfully harmed another must pay compensation for the harm, thus restoring equality between the parties.

Weinrib's account of corrective justice is part of a broader theory of legal formalism.[3] Formalism holds that law is essentially autonomous and separate from politics. Legal justification involves the working out of principles that are immanent in the law, rather than looking to the instrumental realm of politics. In particular, private law is intelligible only as an internally coherent system insulated from political concerns.[4]

Professor Weinrib's writings constitute one of the most powerful contributions in recent years to legal theory in general and to tort theory in particular.[5] In these works, he draws on an impressive range of philosoph-

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1. Aristotle, Politics I.2, at 1253a37-39 (Carnes Lord trans., 1984) (author's translation) [hereinafter Politics]. Unless otherwise indicated, I have followed the translations of Aristotle's works cited herein, but have translated certain key terms consistently in each work. Thus, *aretê* is translated as "virtue," *koinônia* as "community," and *politeia* as "regime."

2. Ernest J. Weinrib, Corrective Justice, 77 Iowa L. Rev. 403 (1992) [hereinafter Weinrib, Corrective Justice].

3. *See* Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949 (1988) [hereinafter Weinrib, Legal Formalism].

4. *See* id. at 950-52, 985-99.

5. In addition to the works cited supra notes 2 and 3, see Ernest J. Weinrib, Aristotle's Forms of Justice, *in* Justice, Law and Method in Plato and Aristotle 133 (Spiro Panagiotou ed., 1987); Ernest J. Weinrib, Understanding Tort Law, 23 Val. U.L. Rev. 485 (1989); Ernest J. Weinrib, The Special Morality of Tort Law, 34 McGill L.J. 403 (1989); Ernest J. Weinrib, Right and Advantage in Private Law, 10 Cardozo L. Rev. 1283 (1989); Ernest J. Weinrib, Liberty, Community, and Corrective Justice, 1 Can. J. L. & Juris. 3 (1988) [hereinafter Weinrib, Liberty]; Ernest J. Weinrib, Law as a Kantian Idea of Reason, 87 Colum. L. Rev. 472 (1987); Ernest J. Weinrib, Causation and Wrongdoing, 63 Chi.-Kent L. Rev. 407 (1987); Ernest J.

ical sources, including Aquinas, Kant, and Hegel. Above all, he relies on Aristotle's account of justice in the Nicomachean Ethics.[6]

In this Essay, I challenge Weinrib's reliance on Aristotle in support of his theory of legal formalism. In particular, I argue that Aristotle's conception of justice is essentially political. According to that conception, private law is not an autonomous realm, but instead expresses the community's view of justice and the common good.

I. ARISTOTLE'S ACCOUNT OF JUSTICE IN THE POLITICS

Aristotle's political conception of justice is developed most fully in his *Politics*.[7] That work begins by tracing the development of human community from the household to the *polis*. The *polis* is the final or complete community because it is the one in which human nature is most fully realized.[8] In this sense, "man is by nature a political animal."[9]

For Aristotle, the concept of justice can be fully understood only in relation to man's political nature. In a key passage which summarizes his understanding of the inherently political character of justice, he writes: "Justice (*dikaiosunê*) belongs to the *polis*; for justice (*dikê*) is an ordering of the political community, and justice (*dikê*) is judgment as to what is just (*dikaion*)."[10]

In this sentence, Aristotle formulates the relationship between three different aspects of justice: (i) justice as a virtue belonging to individuals (*dikaiosunê*); (ii) as an institution of the *polis* (*dikê*); and (iii) as a substantive state or condition (*to dikaion*). The individual virtue of justice, he maintains, is realized only within the *polis*, which is a community with respect to the good and the just.[11] An individual isolated from the *polis* would be brutal and savage.[12] The virtue of justice is inculcated through law (*nomos*) and institutional justice, which is an ordering of the political community with a view to what is substantively just.[13] Finally, Aristotle understands substan-

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Weinrib, The Insurance Justification and Private Law, 14 J. Legal Stud. 681 (1985); Ernest J. Weinrib, Toward a Moral Theory of Negligence Law, 2 Law & Phil. 37 (1983).

6. Aristotle, Nicomachean Ethics bk. V (William D. Ross trans. & James O. Urmson rev.), *in* 2 The Complete Works of Aristotle 1729, 1781-97 (Jonathan Barnes ed., rev. Oxford trans., 1984) [hereinafter Ethics].

7. Politics, supra note 1. In order to accurately represent Aristotle's thought, I shall follow his use of masculine language. For perspectives on the relationship between Aristotelianism and modern feminism, see Linda R. Hirshman, The Book of "A," 70 Tex. L. Rev. 971 (1992); Martha C. Nussbaum, Aristotle, Feminism, and Needs for Functioning, 70 Tex. L. Rev. 1019 (1992); Lawrence B. Solum, Virtues and Voices, 66 Chi.-Kent L. Rev. 111 (1990).

8. Politics, supra note 1, I.2, at 1252b27-1253a19.

9. Id. I.2, at 1253a3-4; III.6, at 1278b18-19; *see also* Ethics, supra note 6, I.7, at 1097b11-12 ("man is political by nature") (author's translation).

10. Politics, supra note 1, I.2, at 1253a37-39 (*Hê de dikaiosunê politikon; hê gar dikê politikês koinônias taxis estin, hê de dikê tou dikaiou krisis.*) (author's translation).

11. Id. I.2, at 1253a16-18 (Man "alone has a perception of good and bad and just and unjust and other things [of this sort]; and community in these things is what makes a household and a *polis*.").

12. Id. I.2, at 1253a3-7, 1253a26-28, 1253a31-37.

13. See id. I.2, at 1253a31-39.

tive justice in terms of the common good: "The political good is justice (*to dikaion*), and this is the common advantage."[14]

According to the *Politics,* then, justice is essentially political in several respects: it constitutes the good as well as the bond of the political community; it is expressed through the law and institutions of the *polis*; and its function is to make individuals into citizens who respect the common good and the good of others.

II. Aristotle's Account of Justice in the Ethics

This political conception underlies Aristotle's account of justice in book V of the *Ethics*. He begins that discussion by distinguishing between general and particular justice. In its general sense, justice means *lawfulness*.[15] Aristotle explains that

> the laws laid down by the legislative art are lawful, and each of these, we say, is just. Now the 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 community.[16]

Thus Aristotle's conception of justice is fundamentally inconsistent with legal formalism as articulated by Weinrib. While formalism insists on a "rigorous separation" between law and politics,[17] Aristotle maintains that law is essentially political and is determined by the legislator with a view to the common good. This political conception pervades Aristotle's account of justice in the *Ethics.*

After discussing general justice or lawfulness—which he identifies with the whole of virtue in relation with others[18]—Aristotle proceeds to focus on particular justice. Particular justice is the virtue that relates to external goods such as honor, money, and security.[19] Particular justice is related to general justice as a part to a whole.[20] In turn, particular justice assumes

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14. Id. III.12, at 1282b16-17; *see also* Aristotle, Rhetoric I.6, at 1362b26-27 (W. Roberts trans.), *in* 2 The Complete Works of Aristotle, supra note 6, at 2152 [hereinafter Rhetoric] (justice is a good, because it is "advantageous to the community") (author's translation).

15. Ethics, supra note 6, V.1, at 1129a32-b1, 1129b11-19; V.2, at 1130a23-24, 1130b9-10.

16. Id. V.1, at 1129b13-19; *see also* id. VIII.9, at 1160a11-14 ("[I]t is for the sake of advantage that the political community too seems both to have come together originally and to endure, for this is what legislators aim at, and they call just that which is to the common advantage.").

17. Weinrib, Legal Formalism, supra note 3, at 952.

18. Aristotle explains that

> practically the majority of the acts commanded by the law are those which are prescribed from the point of view of virtue taken as a whole; for the law commands us to practice every virtue and forbids us to practice any vice. And the things that tend to produce virtue taken as a whole are those of the acts prescribed by the law which have been prescribed with a view to education for the common good.

Ethics, supra note 6, V.2, at 1130b22-27. In this way, general justice or lawfulness may be said to constitute complete virtue, although "not absolutely, but in relation to others." Id. V.1, at 1129b27-28.

19. Id. V.2, at 1130b2.

20. Id. V.2, at 1130b11-15.

two forms, distributive and corrective justice.[21] As forms of particular justice, which is in turn a part of justice in the general sense, both distributive and corrective justice are essentially forms of lawfulness. For this reason, they ultimately reflect Aristotle's political conception of law and justice.

A. *Distributive Justice*

The role of politics is clearest in the case of distributive justice. This form of justice relates to "distributions of honour or money or the other things that fall to be divided" among the members of the political community.[22] As Aristotle makes clear in the *Politics,* "honours" includes political offices.[23] Thus the paradigm case of distributive justice is the allocation of authority in the *polis*. Aristotle calls this allocation of power the constitution or regime (*politeia*).[24]

The distribution of power in the regime is the most fundamental, as well as the most controversial, issue in politics. Aristotle alludes to this issue in the *Ethics.* All agree, he writes,

> that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with virtue.[25]

For Weinrib, this discussion, which establishes no substantive criterion of equality or merit, exemplifies the formal nature of Aristotle's account of distributive justice.[26] This is not Aristotle's last word on the subject, however. He returns to the problem in book III of the *Politics*, in connection with the political controversy over the regime.[27] The democratic faction argues that justice requires that all citizens have an equal share of authority; the oligarchic faction asserts that justice dictates that citizens rule in proportion to their material stake in society. Evaluating these claims, Aristotle finds that each has some validity, but that each reflects only a partial conception of justice, which is biased due to the interests of the competing factions.[28] He concludes, instead, that justice requires that authority be distributed on the basis of "political virtue," or the capacity to contribute to the purpose of the *polis*, which is the good life for human beings.[29]

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21. *See* id. V.2, at 1130b30-1131a9. For a structural diagram of Aristotle's account of justice, see Marlena G. Corcoran, Aristotle's Poetic Justice, 77 Iowa L. Rev. 837, 847 (1991).
22. Ethics, supra note 6, V.2, at 1130b31-33.
23. Politics, supra note 1, III.10, at 1281a28-32.
24. Id. III.6, at 1278b8-12.
25. Ethics, supra note 6, V.3, at 1131a23-28.
26. Weinrib, Corrective Justice, supra note 2, at 409-10.
27. Politics, supra note 1, III.9-13.
28. Id. III.9, at 1280a7-31, 1281a9-10; III.13, at 1283a23-1284a3.
29. Id. III.9, at 1280b39-1281a8.

Weinrib acknowledges that distributive justice cannot be insulated from politics.[30] That form of justice, he says, requires that distributions to be made in proportion to a criterion, but does not itself provide a method of determining which particular criterion is appropriate. Thus, "[t]he purpose of a specific distribution is not elaborated from within distributive justice," but must be authoritatively determined by the political process—an instrumental realm characterized by "the interplay of power, persuasion, sympathy, and interest."[31]

Weinrib's account, however, fails to capture Aristotle's conception of distributive justice. For Aristotle, the controversy over the regime is not simply a power struggle or a debate about collective ends; instead, it is a debate about *justice*. Both sides agree that justice requires distribution according to merit, but they disagree over what constitutes merit in this context.[32] Resolving this dispute is the province of political argument, and ultimately of political philosophy.[33] Thus, distributive justice is inescapably political.

The determination of the regime has important consequences for law. According to Aristotle, laws are—and should be—made with a view to the regime: democratic regimes enact democratic laws, oligarchic regimes adopt oligarchic laws, and so on.[34] Law therefore is political not only in ways discussed above, but also in the sense that it reflects the particular interests and values that characterize the regime.

B. Corrective Justice

While Weinrib recognizes a limited role for politics in distributive justice, he takes an uncompromising position with regard to corrective justice. According to Weinrib, corrective justice is concerned solely with the immediate interaction between private individuals, considered abstractly as the doer and the sufferer of harm. No extrinsic purpose or collective goal can intrude into this interaction.[35] The principles of corrective justice are not imposed by the legislature from without, but are elaborated by the judiciary from within.[36] Thus, corrective justice "has no political aspect"; it "yields a completely non-instrumental and non-political understanding of law."[37]

Once more, Weinrib's position does not accord with that of Aristotle. Aristotle defines wrongdoing, for purposes of corrective justice, as voluntarily inflicting an injury contrary to law.[38] For corrective justice to operate,

30. Weinrib, Legal Formalism, supra note 3, at 988-92.
31. Id. at 989-90.
32. Politics, supra note 1, III.12, at 1282b17-21.
33. Id. III.12, at 1282b23-24.
34. *See* id. III.11, at 1282b8-13; IV.1, at 1289a11-25.
35. Weinrib, Legal Formalism, supra note 3, at 992-95.
36. Id. at 995; *see also* id. at 982.
37. Id. at 992, 995.
38. Ethics, supra note 6, V.11, at 1138a8-9; Rhetoric, supra note 14, I.10, at 1368b7-8.

the law must determine what is to constitute a legal injury.[39] Aristotle observes that the law which performs this function may be either "that written law which regulates the life of a particular community," or the "unwritten [law] which [appears] to be acknowledged everywhere."[40] He maintains, however, that enacted laws "should themselves define all the points they possibly can and leave as few as may be to the decision of the judges," since legislation is "prospective and general," rather than influenced by the passions evoked by a particular case.[41]

In general, then, individual cases ought to be governed by enacted laws. As we have seen, these laws are made by the legislator with a view to the good of the political community.[42] Contrary to Weinrib's view, therefore, the law that governs corrective justice is not purely "private law," a law that focuses solely on the private interests of the parties. Instead, the law in corrective justice is inherently political, in the sense it is directed toward the good of the community.[43] To put the point differently, for Aristotle, there is no such thing as relations of justice that consist in the purely immediate interaction of individuals. Instead, relations of justice are always mediated by the law and institutions of the *polis*, which are oriented toward the common good.

III. The Basis of Juridical Equality

Finally, let us turn to a crucial issue in Weinrib's account: the basis of juridical equality. According to Aristotle, particular justice involves equality between persons.[44] The two forms of particular justice are characterized by

39. Aristotle describes injury in terms of the deprivation of a good or the infliction of a harm, rather than the violation of a right. Rhetoric, supra note 14, I.13, at 1373b29-31. In addition, as I argue below, the law of corrective justice is ultimately directed toward the common good. Weinrib is mistaken, therefore, when he approaches corrective justice as a system of right uninformed by a conception of the good.

40. Id., I.10, at 1368b8-9.

41. Id. I.1, at 1354a32-b16. Aristotle's position that corrective justice should be governed by legislation reflects his general view of the relation between legislative and adjudicative reason as elements of practical reason (*phronêsis*). *See* Ethics, supra note 6, VI.8. According to Aristotle, legislative reason is the architectonic or supremely directive element of practical reason as applied to the affairs of the *polis*. Id. VI.8, at 1141b24-25. Legislative reason is essentially superior to adjudicative reason, because the former determines general principles while the latter applies those principles to particular cases. Id. VI.8, at 1141b24-33.

Aristotle's conception of equity appears to constitute an exception to the superiority of legislative reason, for it allows the judge to correct the law "where it is defective owing to its universality." Id. V.10, at 1137b26-27. The exception is only apparent, however, because the role of the judge in this instance is "to say what the legislator himself would have said had he been present, and would have put into his law if he had known." Id. V.10, at 1137b20-24. According to Aristotle, then, even in equity the judge ought to be guided by his conception of what the legislator would have decided had he foreseen the particular case.

42. *See* supra text accompanying notes 16 & 17.

43. Accordingly, Aristotle approves of various regulations of private economic activity for the common good—regulations that seem incompatible with the notion that the law governing private transactions is wholly nonpolitical. *See, e.g.*, Politics, supra note 1, VI.4, at 1319a6-19 (laws regulating land ownership); VI.8, at 1321b12-17 (superintendence of market by city officers). *Cf.* id., I.10, at 1258a38-b7 (implicitly approving of restrictions on usury).

44. Ethics, supra note 6, V.3, at 1131a10-28; V.4, at 1131b32-1132a2.

different types of equality. Distributive justice allocates a good to persons in proportion to their merit under a given criterion.[45] Corrective justice, on the other hand, is based not on "proportional" but on "arithmetical" equality.[46] In a passage on which Weinrib focuses, Aristotle explains that in corrective justice

> 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 difference made by the injury, and treats the parties as equal, if one is doing wrong and the other is being wronged, and if one has inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, . . . the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant . . . .[47]

As Weinrib observes, in this passage Aristotle recognizes a sort of equality which, in contrast to the proportional equality of distributive justice, does not involve a comparison of the moral worth of the parties.[48] "By ignoring considerations of worthiness," he argues, corrective justice "obviously stands apart from Aristotle's general concerns" in the *Ethics*, which are "to elucidate the excellences of character that mark proper human functioning."[49] For this reason, Aristotle ultimately is incapable of giving an account of the equality that underlies corrective justice.[50] For such an account, Weinrib asserts, it is necessary to look to the natural right theories of Kant and Hegel, who base private right on the abstract equality of private individuals.[51]

Weinrib's approach to this passage is flawed in two respects. First, he fails to recognize the connection between Aristotle's account of corrective justice and his general concern with virtue in the *Ethics*. Second, a close reading of Aristotle suggests a different account of the basis of juridical equality—an account inconsistent with Weinrib's effort to base equality on abstract right.

A. Corrective Justice and Virtue

Let us begin with the relationship between corrective justice and virtue. Corrective justice is one form of particular justice, which in turn is a part of general justice, which Aristotle identifies with virtue in general toward others.[52] Particular justice is the virtue of fairness in relation to external goods.[53] Corrective justice involves the application of this virtue to

45. Id. V.3, at 1131a10-b16; V.4, at 1131b27-32.
46. Id. V.4, at 1131b32-1132a2.
47. Id. V.4, at 1132a2-10 (translation modified).
48. Weinrib, Corrective Justice, supra note 2, at 419.
49. Id. at 471.
50. Id.
51. Id. at 421-24.
52. *See* supra text accompanying notes 421-24.
53. *See* Ethics, supra note 6, V.1, at 1129b2-11; V.5, at 1134a1-13.

private transactions.[54] Thus, Aristotle's account of corrective justice is simply one facet of his treatment of virtue in general.

Why, then, does Aristotle state that in corrective justice it makes no difference whether a good man injures a bad man or *vice versa*? Although distributive and corrective justice are both concerned with virtue, they are related to it in different ways. Distributive justice takes as its criterion the virtue of *persons*. By contrast, corrective justice focuses on the virtue (or vice) of *actions*. Whether or not the defendant is a bad man, fraud and adultery are unjust acts.[55] Aristotle's point is not that corrective justice is indifferent to virtue altogether, but rather that it focuses on the virtue of the act rather than on that of the agent.

While it may still seem that corrective justice is remote from the *Ethics'* central concern with virtue, this overlooks the reciprocal relationship between virtue and action. According to Aristotle, every virtue is acquired by performing the acts that correspond to that virtue: one "become[s] just by doing just acts, temperate by doing temperate acts, brave by doing brave acts."[56] The legislator's object is to make the citizens good by enacting laws that require them to act in accordance with the various virtues.[57] Corrective justice performs this function in the context of private interactions. By requiring citizens to act justly in their private dealings with others, corrective justice inculcates the disposition to act in this way—in other words, inculcates the virtue of particular justice in transactions.[58]

Corrective justice, however, is related to virtue in an even more fundamental way. This point emerges when we reflect on the public or private character of corrective justice. Is corrective justice a virtue of individuals as rulers or as private persons? Because it relates to private dealings, the virtue of particular justice with regard to transactions would appear at first glance to be private rather than public. Contrary to what one would expect, however, Aristotle does not define this virtue in terms of honesty in transactions. Instead, he describes it as *corrective* justice—a form of justice "which plays a *rectifying part* in transactions."[59] This is a virtue that primarily belongs not to the private participants in a transaction, but to the public official who corrects injustice in the transaction—the judge.

If we return to Aristotle's main discussion of corrective justice,[60] we can see it is the judge who plays the central role in this account. The injurer displays the vice of particular injustice (*pleonexia*), while the victim suffers injustice. In this account, only the judge displays the virtue of particular justice. Justice consists of an "intermediate between loss and gain," and it is the judge who achieves this by taking away the gain of the injurer and

54. *See* id. V.4, at 1131b33.

55. *See* id. V.2, at 1131a6-9.

56. Id. II.1, at 1103a31-b2.

57. Id. II.1 at 1103b2-6; V.1, at 1129b19-26.

58. *Cf.* id. II.1, at 1103b14-15 ("[B]y doing the acts that we do in our transactions with other[s] we become just or unjust.").

59. Id. V.2, at 1131a1 (emphasis added).

60. Id. V.4.

restoring it to the victim.[61] "This is why," Aristotle writes, "when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice."[62]

In its paradigm sense, therefore, corrective justice is the virtue exercised by the judge in rectifying injustice in a private transaction. Corrective justice must be understood not merely in terms of private right, but in terms of political virtue.[63]

In short, Weinrib has failed to show that Aristotle's account of corrective justice is irreconcilable with his general view of virtue in the *Ethics*. On the contrary, corrective justice is an integral part of that view. This undermines Weinrib's effort to base juridical equality on abstract right.

B. Equality and Citizenship

What, then, is the basis of equality in corrective justice? Why does it take the form of arithmetical equality? Aristotle does not address these questions directly in the *Ethics*. Once more, however, the *Politics* may shed some light on the problem.

A central theme in the *Politics*, as we have seen, relates to the controversy between the oligarchic and democratic factions over the just regime.[64] At times Aristotle approaches this dispute in terms of the distinction between proportional and arithmetical equality.[65] The oligarchic view is based on the inequality of property, and maintains that political power should be allocated in proportion to wealth.[66] The democratic position, on the other hand, is based on the equality of free status.[67] Because all free men are equal with respect to that status, all should have an equal share in power—a view which leads to the rule of the majority.[68] The democratic argument thus can be characterized as one based on arithmetical equality, in which each free man counts for one.[69]

Of course, Aristotle concludes proportional rather than arithmetical equality constitutes the appropriate basis for allocating political power, in

61. Id. V.4, at 1132a7-b21.

62. Id. V.4, at 1132a19-21.

63. This interpretation of corrective justice as a political virtue is consistent with Aristotle's discussion of the virtue of rulers and citizens in the *Politics*. *See* Politics, supra note 1, III.4, at 1277b7-32. In that discussion, Aristotle concludes that practical reason is the only virtue that is peculiar to the ruler. The other virtues, including justice, belong to both ruler and ruled, but are most fully exemplified by the ruler. Thus, all of the virtues, including justice, are essentially political rather than private in nature. It is fully consistent with this that the virtue of particular justice in transactions should be displayed most fully by a public official, the judge, rather than by the private participants in a transaction.

64. *See* supra text accompanying notes 27-29.

65. Politics, supra note 1, V.1, at 1301b30-1302a8; VI.2, at 1317b2-10.

66. Id. III.9, at 1280a22-31; V.1, at 1301a31-33, 1301b30-1302a7.

67. Id. III.8, at 1280a4-6; III.9, at 1280a22-24; V.1, at 1301a28-30 (Democracy "arose as a result of those who are equal in any respect supposing they are equal simply, for because all alike are free persons, they consider themselves to be equal simply. . . . ").

68. Id. VI.2, at 1317b1-12, 1318a2-10.

69. Id.

accordance with his theory of distributive justice.[70] Nonetheless, his account of arithmetical equality in the *Politics* may provide insight into the foundation of equality in corrective justice. In particular, I suggest it is reasonable to view juridical equality for Aristotle as based on the equality of free status. According to this account, all free men are arithmetically equal with respect to that status. To injure another violates his freedom and disturbs the equality between injurer and victim, giving rise to an unjust gain and loss. The role of corrective justice is to annul this injustice and thereby restore equality.

To this point, the interpretation I am advancing would appear to be wholly consistent with Weinrib's position, which also views juridical equality as based on freedom. Weinrib's Kantian conception of freedom, however, is fundamentally different from Aristotle's view. According to the Kantian understanding, freedom is rooted in the ability of the individual will to abstract from all particular content, and thereby to attain the capacity for free self-determination.[71] Corresponding to this view is an abstract conception of the equality of autonomous individuals.[72] It is this view of freedom and equality that lies at the basis of what Weinrib, following Kant and Hegel, refers to as private or abstract right.

This Kantian account of private freedom is apolitical: it considers individuals in abstraction not only from their particular characteristics, but also from their membership in a political community. It represents the freedom of individuals in a state of nature, prior to the formation of civil society and government.[73] By contrast, Aristotle rejects all such nonpolitical conceptions of liberty in favor of an understanding of freedom as rooted in community.

For Aristotle, a free man may be defined as one who "exists for himself and not for another."[74] An isolated individual is not self-sufficient, however: he is not capable of attaining the complete human good through his own efforts, but only through participation in the life of the *polis*.[75] This is what it means to say that man is by nature a political animal.[76] An individual exists "for himself," therefore, insofar as he also belongs to the community.

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70. *See* id. III.9, at 1280a15-18; V.1, at 1301b30-38; supra note 45. With respect to the capacity to exercise some offices, however, all citizens might be equal in merit. In such instances, proportional equality would result in arithmetically equal shares, while in other cases differences in merit would lead to different shares. This seems to be what Aristotle means when he says that "arithmetical equality should be used in some cases, and in others equality according to merit." Politics, supra note 1, V.1, at 1302a3-8.

71. Weinrib, Corrective Justice, supra note 2, at 422-23; *see also* Weinrib, Liberty, supra note 5, at 8, 16.

72. Weinrib, Corrective Justice, supra note 2, at 423.

73. *See* Immanuel Kant, The Metaphysics of Morals *242, *306-07 (Mary Gregor trans., 1991) (1797) (identifying "private Right" with "Right in a state of nature").

74. Aristotle, Metaphysics I.2, at 982b26-27, *in* 2 The Complete Works of Aristotle, supra note 6, at 1552. *Cf.* Politics, supra note 1, VIII.2, at 1337b17-21 ("What is [done] for one's own sake or for the sake of friends or on account of virtue is not unfree . . . ."); Rhetoric, supra note 14, I.9, at 1367a31-32 ("[I]t is the mark of a free man not to live at another's beck and call.").

75. *See* Politics, supra note 1, I.2, at 1252b30-1253a28.

76. *See* id. I.2, at 1253a2-28.

For Aristotle, freedom is ultimately political: to be a free man is to be a citizen of the *polis*.[77]

The freedom of a citizen is twofold. On one hand, citizens participate in ruling the community.[78] On the other hand, they are subject to being ruled. In this respect, they must be governed as free men who, because they exist "for themselves," are to be ruled for their own good rather than for the good of their rulers.[79] Aristotle emphasizes, however, that the liberty of the ruled should not be understood simply as the ability to do whatever one wants.[80] It is only in the *polis* that individuals are capable of achieving their full good; hence to live in accordance with laws that promote the good of the community and its way of life "should not be supposed to be slavery, but preservation."[81] For Aristotle, then, freedom is subject to regulation for the public good. By the same token, freedom is not indifferent to virtue: as we have seen, the law commands the performance of those acts which tend to produce virtue, "with a view to education for the common good."[82] In particular, the law seeks to inculcate the virtue of particular justice, the disposition to respect the good of the community and that of one's fellow citizens.

The freedom of citizenship thus has both a public and a private aspect, which may be summed up in the formula "ruling and being ruled."[83] Corresponding to these two elements are the two different forms of justice and equality we have considered. With respect to ruling, justice requires that, in a community made up of persons who are broadly similar in political capacity, all members share in authority.[84] As we have seen, however, this does not mean that all citizens must have an arithmetically equal share.[85] Instead, under the principles of distributive justice, political authority ought to be allocated in proportion to the contribution each group of citizens makes to the end of the community.[86]

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77. We can put the same point in terms of the capacity for practical reason. For Aristotle, as for Kant, freedom is rooted in practical reason. It is by virtue of having reason that an individual has the status of a free man. *See* id. I.2, at 1252a27-34; I.5, at 1254b3-23; I.13, at 1260a4-13. According to Aristotle, however, practical reason is most fully realized not in an individual's private affairs, but through participation in the political community and its deliberations on justice and the common good. *See* id. I.2, at 1253a7-18; Ethics, supra note 6, VI.5, at 1140b4-11; VI.8, at 1141b30-1142a11. Indeed, it is the fact that man has reason or speech (*logos*) that most clearly marks him as a political animal. Politics, supra note 1, I.2, at 1253a7-18.

78. *See* Politics, supra note 1, III.1, at 1275a22-32, 1275b17-20.

79. *See* id. III.6, at 1278b31-1279a21.

80. On the democratic idea of freedom as doing what one wants, see id. V.9, at 1310a28-34; VI.2, at 1317b12-15; VI.4, at 1319b30-32. For Aristotle's criticism of this view, see id. V.9, at 1310a34-35; *see also* id. VI.4, at 1318b38-a1.

81. Id. V.9, at 1310a28-35.

82. Ethics, supra note 6, V.2, at 1130b22-27, *quoted* supra note 18.

83. *See* Politics, supra note 1, III.4, at 1277a25-27, 1277b7-16.

84. *See* id. I.12, at 1259b1-6; II.2, at 1261a31-b4; III.6, at 1279a8-13; III.17, at 1287b40-1288a5; VII.3, at 1325b7-10.

85. *See* supra text accompanying notes 27-29, 64-70.

86. Politics, supra note 1, III.9, at 1280a15-17, 1280b39-1281a7.

In his private capacity, on the other hand, a citizen is free insofar as he is recognized as existing "for himself," and therefore as having a good of his own. In this regard, all citizens are equally free in an arithmetical sense, because each is equally "for himself." An individual suffers wrong when an injury is inflicted upon him contrary to the law of the community, which regulates the good of its members and directs their conduct for the common advantage.[87] To injure another individual violates his freedom, and hence equality, by treating him as though he existed for my sake rather than for his own.[88] Such conduct promotes my private good by unjustly depriving him of his own separate good, thereby giving rise to a gain which is the same time another's loss. This is the realm of corrective justice, which is characterized by arithmetical equality.

In sum, Aristotle's doctrine of juridical equality reasonably can be understood to be based on a conception of freedom. According to this interpretation, derived largely from the *Politics*, the answer to the question, "With respect to what quality are individuals arithmetically equal for purposes of corrective justice?" is that they are equally free. Aristotle's conception of freedom is not apolitical, however, but is rooted in community. The ultimate basis of juridical equality is the equality of citizenship.

If we return to book V of the *Ethics*, we can see that Aristotle expresses a view much like this. After discussing the two forms of justice, he remarks, "But we must not forget that what we are investigating is both justice without qualification and political justice."[89] This, he explains,

> is found among men who share their life with a view to self-sufficiency, men who are free and either proportionally or arithmetically equal, so that between those who do not fulfill this condition there is no political justice but justice in a special sense and by analogy. For justice (*dikaion*) exists only between men whose mutual relations are governed by law (*nomos*); and law exists for men between whom there is injustice; for legal justice (*dikê*) is judgment as to what is just and unjust. . . .
>
> The justice of a master and that of a father are not the same as this, though they are like it; for there can be no injustice in the

87. *See* supra text accompanying notes 38-43.

88. *Cf.* Ethics, supra note 6, V.5, at 1132b34-1133a1 (stating to be subject to harm without being able to inflict harm in return seems to be slavery).

89. Id. V.6, at 1134a24-26 (*kai to haplôs dikaion kai to politikon dikaion*) (author's translation). This ambiguous phrase is sometimes taken to draw a contrast between justice in an unqualified sense (*to haplôs dikaion*) and political justice (*to politikon dikaion*). Ross and Urmson, for example, translate, "not only what is just without qualification but also political justice." Id. The context, however (which I quote at some length in the text immediately following), indicates that Aristotle's point is to distinguish between justice in the full sense, which he identifies with political justice, and other relations which partake of justice only "in a special sense and by analogy." Id. V.6, at 1134a28-29. At one point, for instance, he observes that "there can be no injustice in the unqualified sense (*haplôs*) toward things that are one's own," and concludes that such relations therefore do not manifest "political justice or injustice." Id. V.6, at 1134b9-17 (author's translation). Moreover, Aristotle gives no other account of what he means by "justice without qualification." It seems more plausible, then, to read the phrase in question as equating justice in the unqualified sense with political justice, in contrast to the other, imperfect senses of justice which he proceeds to discuss.

> unqualified sense towards things that are one's own . . . . Therefore political justice or injustice are not manifested in these relations; for it was as we saw according to law, and between people naturally subject to law, and these as we saw are people who have an equal share in ruling and being ruled.[90]

Thus, Aristotle holds that political justice (or justice in the full sense) exists among those who are free and equal, a status which he identifies with that of citizens—individuals who have an "equal share in ruling and being ruled." In the context of ruling, freedom and equality consist in the right of a citizen to share in political authority in proportion to merit. Insofar as he is ruled, on the other hand, every citizen has a claim to be recognized as a free man who exists "for himself," and who therefore cannot be injured without injustice. In this respect all citizens are arithmetically equal. Relations among citizens are naturally subject to law—the law made by the citizenry itself to establish justice within the *polis*.[91] This is the law of corrective justice, which is governed by principles of arithmetical equality.

In short, Aristotle provides an implicit account of the equality that characterizes corrective justice, an account based on equal citizenship in the political community. It is unnecessary, therefore, to supplement his account with one derived from the natural right theories of Kant and Hegel, who base juridical equality on the abstract equality of private individuals.

IV. Conclusion

A cornerstone of Weinrib's effort to construct a theory of legal formalism is his interpretation of Aristotle's account of corrective justice. I this Essay, I have argued that Aristotle does not support the formalist project. Far from providing a completely nonpolitical theory of private law, Aristotle holds that corrective justice is rooted in community and is directed toward the common good. In this sense, for Aristotle justice belongs to the *polis*.

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90. Id. V.6, at 1134a26-b15 (translation modified).

91. *See also* Politics, supra note 1, III.13, at 1284a11-13 (legislation has to do with those who are equal).