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## Tort Law and Distributive Justice

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The judge is intended to be a sort of living embodiment of the just.

The just in distributions must accord with some sort of worth but what they call worth is not the same.

The judge restores equality, as though a line had been cut into unequal parts, and he removed from the larger part the amount by which it exceeds the half of the line, and added this amount to the smaller part. And when the whole has been halved, then they say that each person has what is properly his own, when he has got an equal share.

Aristotle

### I. Introduction

This chapter discusses the place of distributive justice in the normative theory of tort law, although much of the discussion will apply to civil law generally. My goal is not to discuss the distributively just and unjust effects of tort law, but to identify and describe the distributive justice of tort law in particular, that morality of distribution that cannot fail to apply to this area of law, and therefore bear on its justification.<sup>1</sup> But in characterizing tort law's distributive justice, the chapter also characterizes its corrective justice. Indeed, the chapter's central claim is that tort law's distributive justice just is its corrective justice. Thus the chapter argues that tort law's justice is fully distributive as well as fully corrective.

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\* I would like to thank David Enoch, John Goldberg, Greg Keating, and John Oberdiek for their helpful comments during the presentation of an early version of this chapter. Many thanks to my colleagues Ori Aronson, Jacob Nussim and Ziv Bohorer for pressing me to clarify the discussion. For useful questions thanks also to Michal Alberstein, Tsilly Dagan, Yoed Halbersberg, and Arie Reich. My debt to John Gardner should be clear from the discussion.

<sup>1</sup> The problem is similar to the one addressed in John Gardner, "What is Tort Law For? Part 2. The Place of Distributive Justice," Chapter 16 of this volume, and in Peter Cane, "Distributive Justice in Tort Law," 4 *New Zealand L. Rev.* 401 (2001), 413.

In arguing for these claims, the chapter offers an unorthodox account of the Aristotelian distinction between the two forms of justice. The chapter does not reject the very distinction, but it does reject the common assumption that the forms are mutually exclusive. The thought is that corrective justice is a distinct category of distributive justice, and that tort law's justice is a distinctly corrective principle of distributive justice.

The chapter lends some support and shape to the claim that corrective justice enjoys certain interesting priorities over distributive justice in relation to tort law. First is the broadly conceptual claim that tort law's justice can be said to be corrective but not distributive justice as such. More important is the normative-ethical claim that corrective justice enjoys some priority in the justification of tort law, not so much over distributive justice per se as over non-corrective principles of distribution. As an institution whose job it is to do corrective justice, it is hard to see how tort law can escape the demands of corrective justice. It is not clear that the same holds for any particular *non-corrective* principle of distribution. To each according to her needs, abilities, or virtues, for example.

The chapter also raises the problem of reconciling the priority of corrective justice with the platitude that our modern tort law is not simply a corrective justice system but rather a mixed system that involves non-corrective redistributive mechanisms, such as liability insurance. The discussion resists one natural way to achieve such reconciliation, recommends another, and illustrates its possible implications.

The emerging picture is neither as revisionary nor as traditional as it might seem. Much of the claims are old wine, new wineskins. This much is true of the claim that tort law's justice is distinctly corrective. Here the discussion will mostly exploit the familiar insights of others. The emerging picture goes beyond these insights by insisting on and characterizing the genuinely *distributive* nature of tort law's justice. Here my discussion breaks with some interesting claims. Most obviously, it conflicts with the claim that tort law faces no special problems of distribution and has no special principles of distributive justice. But it also conflicts with the weaker claim that tort law's distributive justice is different from, and derivative of, its first and corrective justice, that tort law's special problems or principles of distribution are incidental to, or derivative of, its special problems or principles of correction.

Section II (Background) provides some context for the discussion that follows. Section III (The Aristotelian Distinction) discusses Aristotle's classic account and explains the need for reconstruction. Section IV (An Alternative Account) offers such reconstruction. Section V (Reparative Justice in Tort Law) uses the account to show how tort law's distinct principle of justice is fully distributive as well as fully corrective. Section VI (The Priority of Corrective Justice) says how the discussion can and cannot support the priority of corrective over distributive justice in relation to tort law. Section VII (Similar Views) compares the account with recent views about tort law's distributive justice. Section VIII (The Mixed Tort Law) entertains the possibility of reconciling the priority of corrective justice in torts with non-corrective redistributive mechanisms, such as liability insurance.

## II. Background

Aristotle famously distinguished between distributive and corrective justice. In general, both concern the allocation of goods among people, but while distributive justice requires “geometric” allocation in accord with the relative merits of the parties, corrective justice requires “arithmetic” allocation back relative to some past wrongful interaction. Aristotle presents the two categories (“forms”) of justice as mutually exclusive. A principle that belongs to one category cannot also belong to the other.

Aristotle’s discussion of the forms of justice has become tremendously influential in the history of ethics.<sup>2</sup> That it has proved particularly influential in legal theory is not surprising. Aristotle clearly thought of justice as particularly applicable in the legal context, identifying the judge as its personal representative. More to the point, contemporary theorists use the Aristotelian distinction to make interesting claims about civil law, including claims about the relative place of distributive and corrective justice in the constitution, foundation, or justification of tort law.

It is often argued that corrective justice is the form or foundation of tort law, and that the place of distributive justice is at most subordinate.<sup>3</sup> This view implies the somewhat weaker view that tort law’s first principle of *justice*—in short, tort law’s justice—is corrective rather than distributive. And it is sometimes argued that the priority goes the other way, that tort law’s foundation or foundational justice is distributive rather than corrective.<sup>4</sup>

<sup>2</sup> See, e.g., Izhak England, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford: Oxford University Press, 2009).

<sup>3</sup> See, e.g., Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1996). See e.g. the claim that “[c]orrective justice is the form of the private law relationship” (p. 75); cf. also *Corrective Justice* (Oxford: Oxford University Press, 2012). See e.g. the claim that “[c]orrective justice is the term given to the relational structure of reasoning in private law” (p. 2). See also Martin Stone, “The Significance of Doing and Suffering,” in Gerald Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001), 131–82. See e.g. the claim that corrective justice “can serve to identify the aim of tort law and thus provide a way of grasping its practical unity” (p. 133). Cf. also Jules Coleman, *The Practice of Principle* (Oxford, 2001), e.g. the claim that “tort law is best explained by corrective justice” (p. 9) and Stephen Perry, “On the Relationship Between Corrective and Distributive Justice,” in Jeremy Horder (ed.) *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000), 238–62, e.g. the comment that corrective justice “constitutes the normative foundation of tort law” (p. 262). Cf. also John Goldberg and Benjamin Zipursky, “Tort Law and Responsibility” (Chapter 1 of this volume), who understand tort law’s main moral principle in terms of responsibility rather than corrective justice. It is also reasonable to maintain that the moral responsibility at issue in tort law is responsibility in corrective justice.

<sup>4</sup> See, e.g., Hanoch Dagan, “The Distributive Foundations of Corrective Justice,” 98 *Mich. L. Rev.* 138 (1999); Gregory C. Keating, “Distributive and Corrective Justice in the Tort Law of Accidents,” 74 *S. Cal. L. Rev.* 193 (2000). See also Jeremy Waldron, “Moments of Carelessness and Massive Loss,” in David G. Owen (ed.), *The Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1997), 387–408. Cf. also Tsachi Karen-Paz, “Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?” 4 *Theoretical Inq. L.* 275 (2003), Art. 5, which implicitly rejects the evaluative priority of corrective over distributive justice in tort law.

Proponents of such views seem to share the Aristotelian assumption that corrective and distributive justice are mutually exclusive categories of justice that do not intersect and so that neither category subsumes the other. To the extent that a problem, principle, or justification is corrective, it is not also distributive, and vice versa. Again, a principle of one kind can never apply as a principle of the other as well. This assumption rules out the following possibilities as to the relation between the two categories, as shown in the following three figures:

What really matters for the discussion is that the assumption rules out the possibility depicted in Figure 17.2, in which corrective justice is a special case of distributive.

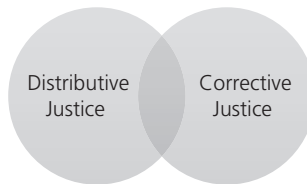


Figure 17.1 Distributive and corrective justice intersect

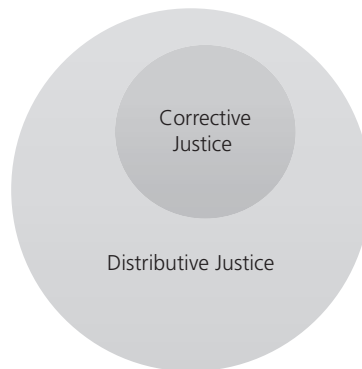


Figure 17.2 Distributive justice subsumes corrective

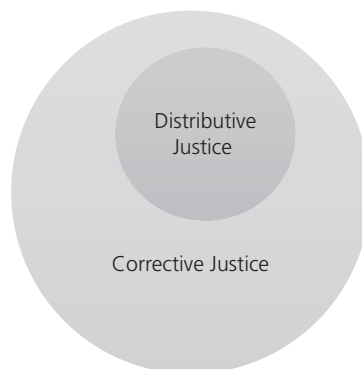


Figure 17.3 Corrective justice subsumes distributive

But for simplicity, we can focus on the stronger assumption that the forms (kinds, categories) of justice are mutually exclusive. This assumption rules out the possibility depicted in Figure 17.1 and therefore those depicted in Figures 17.2–17.3 as well. Taking a leaf from Ernest Weinrib, I will describe it as the assumption about the *categorical* nature of the distinction: the two forms of justice are categorically distinct (mutually exclusive). It follows that neither is a subclass of the other.<sup>5</sup>

Now it is important to keep the assumption about the categorical nature of the distinction between principles of distributive and corrective justice separate from a further view that Weinrib and other friends of the relevant assumption seem to hold, namely the view that a single institution cannot owe its justification to some *combination* of corrective and distributive principles.<sup>6</sup> Clearly, the assumption about the categorical nature of our distinction does not have this questionable implication. On the face of it, principles belonging to mutually exclusive categories of justice can apply to the same institution. And a single institution might well depend for its justification on conformity to such combination of principles.

Contemporary theorists who accept the possibility of such mixed justification of tort law share the assumption about the categorical nature of the relevant distinction. According to Stephen Perry for example “the two principles have different normative functions. One is concerned with the just distributions of resources, while the other is concerned with remedying harmful interactions between persons.”<sup>7</sup> John Gardner similarly claims that, while distributive and corrective norms both regulate the allocation of goods, they do so in distinct ways:

Norms of distributive justice regulate the allocation of goods among people together with the grounds of such allocations (“division”). Norms of corrective justice regulate the allocation of goods back from one person to another together with the grounds of such allocations back (“addition and subtraction”).<sup>8</sup>

Principles of corrective and distributive justice might well bear on the justification of a single institution, but they can only do so in their own distinct corrective or distributive ways. Principles of correction (distribution) cannot apply to or justify anything in the distinctly distributive (corrective) way.

The assumption about the categorical nature of the distinction between the forms of justice has implications for views about their relative place in the justification of tort law. In particular, it has implications for the common view that the form, foundation, or first principle of tort law is corrective justice, as well as for its weaker corollary that tort law’s first principle of *justice*—in short, tort law’s justice—is corrective. Given the

<sup>5</sup> Weinrib, *Private Law* at 72 and *Corrective Justice* at 18–19, 269 (note 3).

<sup>6</sup> Cf. e.g. his comment in *Private Law* that “any given relationship cannot rest on a *combination* of corrective and distributive considerations” at 73.

<sup>7</sup> Perry, “On the Relationship between Corrective and Distributive Justice” at 262.

<sup>8</sup> Gardner, “Corrective Justice” at 17 “What is Tort Law For? The Place of Corrective justice,” *Law and Philosophy* 30 (2011), 1 at 17.

assumption, the common view implies that tort law's first principle or justice *is not* also distributive. The twofold implication that tort law's foundation, or justice, is corrective justice and not distributive justice warrants the claim that, when it comes to tort law, corrective justice enjoys priority over distributive justice.

Peter Cane and John Gardner have recently offered plausible versions of this priority claim, arguing that tort law's own problems of distributive justice are incidental to its more fundamental problems of corrective justice. Taking the categorical nature of the distinction for granted, this claim implies that tort law's most fundamental problem of justice is not also distributive.

This chapter offers an alternative account of the special relation between tort law and distributive justice in *which* its distinctive problem, function, or principle of distribution is not incidental to its distinctive problem, function, or principle of correction. Nor is it more fundamental. Rather, tort law's most fundamental principle of distribution just is its most fundamental principle of correction. Tort law's distributive justice is corrective justice.<sup>9</sup>

The basic thought behind this claim is that corrective justice is a distributive justice. The claim is not offered as a stipulation, but as a largely substantive claim about the kind of corrective justice at issue in civil law in particular; it certainly allows for the possibility of related nondistributive principles of corrective justice. The idea is that the corrective justice principles that can be plausibly said to have special application, or particularly fundamental place, in the working and justification of civil law are principles of distributive justice. The claim is offered under a particularly natural sense of "distributive justice," one that remains agnostic about the relevant principle or criterion of distribution (let alone about intricate controversies in contemporary normative ethics). But this, I think, is how it should be.

### III. The Aristotelian Distinction

What is the Aristotelian distinction between corrective and distributive justice? I share the assumption that Aristotle's original way of drawing the distinction contains much that makes it particularly helpful for discussing civil law. At the same time, I believe that Aristotle's original definitions of distributive and corrective justice are just too narrow for this purpose and require reconstruction. A major difficulty concerns Aristotle's highly specific *comparative* definition of distributive justice. Another difficulty concerns his arithmetic definition of corrective justice. Once the first problem is fixed, it is no longer clear why the corrective justice of civil law should not be thought of as a special case of distributive justice.

<sup>9</sup> The chapter claims that (1) tort law's distributive justice is corrective (or is corrective justice) and that (2) tort law's corrective justice is distributive (or is a distributive justice, or is tort law's distributive justice), but not that (3) tort law's corrective justice is distributive justice or that (4) tort law's justice is distributive justice.

In this section, I present a familiar picture of Aristotelian justice and raise some problems about it. In the next section, I offer a reconstruction. Let me start by clarifying that the Aristotelian justice at issue does not extend to Aristotle's entire province of justice; that province (his "general justice") encompasses interpersonal ethics in its entirety.<sup>10</sup> The Aristotelian justice at issue in this chapter on the other hand is confined to that particular subclass of interpersonal ethics that comprises distributive and corrective justice (Aristotle's "particular justice"). By "Aristotelian justice" I simply mean that justice that includes all and only principles of distributive and corrective justice.

What is it that the forms of Aristotelian justice have in common and that sets them apart from other interpersonal ethical norms? Aristotle does not provide a very clear independent definition of Aristotelian justice,<sup>11</sup> but perhaps we can glean the general idea from his definitions of its two forms. Here then is one natural suggestion: Aristotelian justice is concerned with forced competitive allocations of (positive or negative) person-affecting goods among parties.<sup>12</sup> The allocation is forced in that we cannot avoid making it in some way (if only by omission); at least one party will end up with some of the goods and all the goods will end up with at least some party. It is competitive in that any allocation will favor at least one party over at least some other party relative to some alternative. It does so by benefiting the former party rather than the latter (or burdening the latter party rather than the former) in some way. The "rather than" implies an alternative allocation that would favor the latter over the former relative to the actual allocation.<sup>13</sup>

Now there is no mystery about our special interest in such multiparty allocations, where at least two parties compete over benefits or burdens that could go either way. But perhaps it is not too early to register a worry that will become clearer shortly. On the face of it, defining Aristotelian justice in terms of multiparty allocation excludes principles that apply in single-party problems of allocation. Suppose, however, that the two forms of Aristotelian justice are unified by their concern with multiparty allocation. What is it that sets them apart?

### A. Distributive justice

Aristotle defines distributive justice as "geometric equality" or "equality of ratios." Such equality presupposes the allocation of one or more goods between at least two

<sup>10</sup> Aristotle, who often thought of justice in terms of moral virtues, defined general justice as "complete virtue in relation to another" (NE bk V, Ch 2, §15). In this chapter I think about justice in terms of moral principles. Aristotelian principles of general justice are those that regulate how we treat others.

<sup>11</sup> He defines the relevant ("particular") *injustice* as overreaching, which makes Aristotelian justice a matter of avoiding overreaching.

<sup>12</sup> Cf. also Gardner, "Corrective Justice."

<sup>13</sup> Notice that competition does not imply "winner takes all." A compromise is just one solution to a competitive problem of allocation. Our dinner forces a competitive problem of allocation: Any allocation will favor one of us over the other relative to some alternative. Splitting the bill favors me relative to the alternative in which you foot the entire bill and favors you relative to the converse alternative.

parties. (But there is no need for more than one good or two parties). It also presupposes that each party *merits* a certain quantity of the goods under some principle of distribution. Geometric equality requires that the ratio between the quantity had by, or allocated to, a party and the quantity she merits remain the same for each party.<sup>14</sup> Suppose that what is allocated between A and B is money and that the relevant principle requires distribution in accord with need (A and B have no money). Then the ratio between the amounts of money A and B receive should also be the ratio between the amounts they merit. If A is twice as needy as B, A should get twice the amount that B gets.<sup>15</sup>

Aristotle's geometric definition of distributive justice is in one way very general and in another, very narrow. The view clearly presupposes merit-determining principles of distribution, but it tells us nothing about their content: "The just in distribution must accord with some sort of worth but what they call worth is not the same." What counts as "worth" or makes it the case that the parties merit the quantities they do can vary from one case to another. It can be some character trait (being virtuous), action (murder), or relational property (being the student of Plato).

Notice that the merit-determining principles of distribution geometric equality presupposes are *noncomparative*. They tell us how much of the relevant person-affecting goods one merits by virtue of her own merits, regardless of how much others merit or get. Thus in principle, they apply to single-party allocations. Take the principle that requires distribution of help in accord with need. It would certainly support allocating some help to its only potential recipient, provided she is in need. And on the plausible assumption that the more meriting of some good one is the more good one merits, the principle would support allocating more of the help to her the greater her needs.

The geometric definition of distributive justice is highly specific. It requires the ratio between what we merit and what we get to be the same, *regardless of whether we get what we merit*. Suppose we are equally meriting of some good (benefit or burden). Insofar as geometric equality of ratios is concerned, there is absolutely no difference between the case in which we both get exactly as much as we merit and the case in which we both get twice or half as much. Or suppose that you already got twice as much of the relevant good as you merit, and there is simply nothing we can do about that. Conceived of as geometric equality, Aristotelian distributive justice requires that I also get twice as much as I merit.

Now this is a strikingly peculiar definition of the generic form (concept, ideal, category) of distributive justice. What is most striking about this definition is not that it is controversial or ultimately indefensible, but that it is essentially *comparative* in nature. *Comparative* justice demands that the quantity had by, or allotted to, each party bear a certain relation to the quantity had by, or allotted to, each other party, where the precise relation is itself a function of how meriting they all are. Here is how Shelly Kagan

<sup>14</sup> Simplicity I will assume that each party has the quantity allotted to her.

<sup>15</sup> That is essentially the Aristotelian ratio view Shelly Kagan criticizes in *The Geometry of Desert* (New York: Oxford University Press, 2012), Chapter 7.



illustrates the claim of comparative justice (or desert) when the good is wellbeing and the meriting feature is virtue:

When I am as virtuous as you, then I should be doing as well as you, no matter how well you are doing. If I am not, then there is something to be said in favor of improving my lot to bring me up to where you are—regardless of where you are.<sup>16</sup>

Kagan has recently argued that Aristotle's ratio view is an indefensible principle of comparative justice.<sup>17</sup> Moreover, the very idea of comparative justice is controversial. It is at least arguable that there are simply no such principles, that the morality of distribution is concerned exclusively with how much we merit and get and never with how much we merit or get as compared to one another. Notice that we do not always need to invoke a comparative principle of justice to reach comparative conclusions. Given the plausible assumption that the more meriting you are the more you merit, you should get more than me if you merit more than me. But both the merit-determining principle and the assumption are applicable to the case in which you are the only potential recipient.

Now this already provides a strong reason against taking geometric equality of ratios as a working definition of distributive justice in the present context. Those who discuss the relation between civil law and distributive justice would not typically want to commit themselves to any particular view about the existence or content of comparative justice. However, the main and in my view decisive reason to reject the geometric definition of distributive justice is simply that it fails to include the principles of distribution it presupposes, namely all noncomparative principles that determine the relevant meriting features of the parties. An essentially comparative definition of this sort can hardly be said to capture our general notion ("form") of distributive justice. And I see no special to adopt it in the legal context.

## B. Corrective justice

Aristotle defines corrective justice as "arithmetic equality" (sometimes called "equality of difference.") It presupposes some *directed wrongful interaction* ("transaction") between two parties, namely a morally asymmetric interaction in which one party does some sort of wrong to the other. The interaction effectively takes ("subtracts") some positive or negative good from one party and gives ("adds") it to the other. Arithmetic equality then requires taking the relevant good from the latter and giving it back to the former, thereby restoring the pattern of its original distribution. In short,

<sup>16</sup> Kagan, "Geometry of Desert" (note 15) at 350. Of course, wellbeing is not something we can ever allot directly, but the relevant principle can bear on how we should allot resources that affect the wellbeing of parties.

<sup>17</sup> Kagan shows how this view can lead to unacceptable recommendations. For example, it can urge us to move a more virtuous person below what she merits in response to a less virtuous person being above what he merits. "Geometry of Desert" (note 15) at 357.

arithmetic equality presupposes a bilateral directed wrongful interaction that effectively transfers some good from one of its parties (the original holder) to the other (the original receiver), and requires the bilateral retransfer of that very good back from its receiver to the original holder. This is the point of Aristotle's line example.<sup>18</sup>

The definition of corrective justice as arithmetic equality faces a familiar problem. Arithmetic equality of difference requires retransferring back that which has already been transferred forward, through the underlying wrongful interaction. This only applies to cases in which that interaction involved taking some benefit (e.g. money) or giving some burden (e.g. debt). Here the judge can restore equality by retransferring the relevant good back to its original holder. But such cases are quite special, and do not represent the great majority of cases in which civil law requires correction. On the face of it, arithmetic equality of difference simply has no application in the typical case of reparation in torts. Consider the case in which the wrongdoer (tortfeasor) causes the victim some loss through breaching her duty of care in negligence. The loss in question has never been transferred from the tortfeasor to the victim. Thus it cannot be retransferred back to the wrongdoer. Clearly, transferring the loss to the wrongdoer would not restore its original distribution between the parties (arithmetic equality).

It is tempting to think that the problem is technical. The problem, you might think, is that the option of transferring back is not always available, so maybe we can solve it by adding an "as far as possible" proviso (for example). But the familiar problem with arithmetic equality is symptomatic of a deeper problem. The main difficulty with such equality is not so much that it is frequently impossible but that it is not particularly corrective. Consider a deviant version of Aristotle's line example in which the wrongful interaction has effectively transferred some benefit (say, money) from the wrongdoer to the victim or burden (say, debt) from the victim to the wrongdoer (perhaps it has done both of these things). If what matters in correction is arithmetic equality of difference (restoring the original distribution of the relevant person-affecting consequences), then corrective justice requires retransferring the wrongdoer's loss back to the victim and the victim's gain back to the wrongdoer! Clearly, it does not. Aristotle took this much for granted. But then arithmetic equality isn't what really matters in correction.

### C. The relation between the forms

The Aristotelian definition of his forms of justice in terms of distinct equations clearly suggests that they are mutually exclusive categories of his allocative justice. Principles of both types might happen to apply to a single case, but the principles themselves

<sup>18</sup> Imagine a line A---E--D--C---B where  $AD = DB$  and  $ED = DC$ . Aristotle (Bk V, Ch 4, § 8) writes:

The judge restores equality, as though a line [AB] had been cut into unequal parts [AC and CB], and he removed from the larger part [AC] the amount [DC] by which it exceeds the half [AD] of the line [AB], and added this amount [DC] to the smaller part [CB]. And when the whole [AB] has been halved [into AD and DB], then they say that each person has what is properly his own, when he has got an equal share.

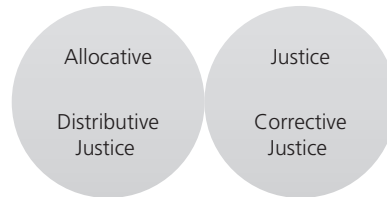


Figure 17.4 Distributive and corrective justice are categorically distinct

belong to mutually exclusive categories. The relation between the Aristotelian forms of allocative justice looks like this:<sup>19</sup>

Why isn't corrective justice or allocation a special principle of distributive justice or allocation under Aristotle's account? One possibility is that although corrective justice is relational principle (it reference to both parties to the underlying interaction), is not a special case of comparative justice. Arguably, retransferring the relevant good back to its original holder would result in geometric equality only if the original distribution of the relevant good was geometrically equal.

Granted but I have already noted that the restriction of distributive justice to comparative principles is unmotivated, at least in the present context. And this raises the possibility that corrective justice can be understood as a special, relational thought noncomparative principle of distribution. I now turn to explore this possibility.

## IV. An Alternative Account

The Aristotelian distinction between the forms of justice has some tremendous advantages in the civil law context. First, like the forms of justice, civil law is often concerned with the allocation of person-affecting goods (benefits and burdens) between multiple parties. Second, civil law is often taken by those who make, administer, or practice it to be a legal institution whose job it is to mete out or pursue justice in the allocation of such benefits ("gains") and burdens ("losses"). Third, it seems that insofar as we think about civil law as a distinct legal institution with its own principle, we think about it as an institution of something like corrective justice. These are all features of the Aristotelian distinction I want to preserve.

But as we have seen in the previous section, the particular equations Aristotle uses to draw the distinction have some disadvantages in the present context. The essentially comparative formula of "equality of ratio" makes for a peculiarly specific conception of justice in distribution. The definition of corrective justice as

<sup>19</sup> This is just the simplest way to understand the relation in the Aristotelian picture. Properly understood, it is compatible with the possibility that a single allocation will happen to achieve both types of equality; what it rules out is the possibility of achieving one type of equality simply by achieving the other. In any event, all that is important for my purposes is that the Aristotelian assumption that geometric and numeric equality are categorically distinct (which makes possible non-geometric numeric equality and non-numeric geometric equality).

“equality of difference” makes it inapplicable when there is nothing to transfer back. And, the assumption about the categorical nature of the distinction between the forms is hard to reconcile with their common concern with allocation. Granted: you can have non-corrective principles of distribution and non-distributive principles of correction. What is less clear is that you can have non-distributive principles of correction *in the allocation of goods*. And arguably, the principle that defines civil law’s function or ethical function is not just any principle of correction; it is principle of correction in the allocation of goods. It is a genuine principle of distributive justice. My goal in this section is to characterize a reconstructed version of the distinction that preserves the main advantages of the more familiar picture and at the same time brings out the genuine distributive nature of civil law and justice.

### A. Distributive justice

To make room for noncomparative principles of distribution we must first give up on the Aristotelian assumption that distributive and corrective justice are confined to multiparty allocations. We can still focus on cases of forced competitive multiparty allocations. We can continue to assume that the relevant *problems* of justice involve forced competitive allocation. What I no longer wish to assume is that the *principles* that bear on the problems make reference to more than one party.

As I wish to understand it, justice in the distribution of goods is not a well-defined principle; nor is it even a distinct form of justice. Rather, it is simply the variable set of principles that bear on the right or desirable way to allocate goods between parties in any given case, whichever they happen to be. These can include noncomparative principles of distribution such as “To each according to her needs” *as well as* comparative principles such as Aristotle’s ratio view. Notice that while there is nothing particularly geometric about this way of understanding distributive justice—it entails neither Aristotelian equality of ratio nor any other principle of comparative justice—it does comport with a broad understanding of Aristotle’s remark that “the just in distributions must accord with some sort of worth.”<sup>20</sup> We can read “(absolute) worth” as “worth or relative worth.” Similarly we can say that distributive justice requires that goods be allocated in accordance with the merits of the parties, where “merits” should be read as “(absolute) merits or relative merits.” The primary notion of a party’s merits remains as noncomparative (“absolute”) as it is in Aristotle’s geometric equality, but the remark uses the term in a broader sense that includes some relation between what the parties get (relation itself defined in terms of what they merit in the primary sense). The resulting conception of distributive justice is completely agnostic about the existence and content of comparative justice.

<sup>20</sup> Bk V, Ch 2, § 7.

The reconstructed definition also retains Aristotle's largely formal conception of merit ("what they call worth is not the same"). This indeed is a familiar feature of our most general use of the terms "distributive justice" in moral and legal discourse. As I understand this notion, a party's "merits" are simply those features that merit (require or otherwise favor) her having or being allotted the relevant good or quantity under some applicable ethical principle. She merits the good or its allocation to the extent that she qualifies for it under such principle. The principles that determine the meriting properties can be teleological or deontological. And the merits are not confined to character traits (let alone virtues). They extend to relational properties such as promissory or filial relations. And they are not confined to present-time features of the situation such as (current) suffering or need. They extend to historical features (past events and relations).

I want to retain the assumption that the goods the allocation of which is in question must be person-affecting, namely good or bad to the recipients, but not the assumption that they must include at least two goods or some divisible good; we can compete over the distribution of a single indivisible good. Again, there is no assumption that the goods in question are being assigned for the first time. The problem of whether and how to redistribute an already assigned good is a problem of distributive justice. Finally, there is nothing particularly political about the relevant goods or parties. The problem of how to divide some good between two private persons is one of distributive justice.

If you complain that this definition of distributive justice is rather indiscriminate, you are probably right. One part of my defense is that this indiscriminate reflects a perfectly familiar sense in which we use the language of distributive justice in moral and legal discourse; the alternative is to use some controversial or rather narrow theory of distributive justice (such as the ratio view). Another part of my defense is that problems of distributive justice are still confined to the allocation of goods (and, we can assume, to forced competitive allocation). Finally, part of my claim will be that perhaps the most central issue about the relative place of distributive and corrective justice in civil law has more to do with the latter than with the former. The contrast that drives competing claims in this area is not so much between corrective and distributive justice as it is between corrective and non-corrective justice.

## B. Corrective justice

The next order of business is to offer an account of corrective justice with an eye to civil law. I believe that the account should retain two major Aristotelian insights. The first is that the corrective justice of civil law (the justice Aristotle imagines the judge to mete out in his line example) regulates the forced competitive allocation of person-affecting goods between multiple (i.e., at least two) parties in the wake of some directed wrongful interaction between two parties. While does not yet make it "geometric"

under the essentially comparative Aristotelian scheme, it certainly does seem to make it distributive in the ordinary sense of the word. As a principle regulating the allocation of goods, corrective justice may well qualify as distributive under the non-geometric account of the previous subsection.

The other Aristotelian insight to retain is that the relevant principle is not just any principle of distribution; it is a distinctly corrective or *backward-looking* one. It presupposes and responds to some past wrongful interaction. At the same time, I leave out the further assumption that backward-looking or corrective distribution requires retransferring consequences of the underlying interaction back to their original holders.

Since I take the idea of correction to be more or less basic, my basic characterization of corrective justice is going to be circular. Corrective justice requires corrective backward-looking redistributive action or operation in the wake of directed wrongful interactions. The operation is *redistributive* in that it requires an active interference with the existing distribution of goods, namely the person-affecting consequences the underlying interaction has had for its parties. The requisite redistribution is *backward-looking* in being a direct response to the underlying wrongful interaction. Corrective justice takes the wrongful interaction itself as a reason or justification for intervention (or as a duty to intervene). Elizabeth Anscombe captures the idea when she writes: “something that has happened... is given as the grounds of an action or abstention that is good or bad for the person at whom it is directed.”<sup>21</sup> The idea of backward-looking reasons, justification, or duties is not essentially distributive; if I offend your feelings, I have a backward-looking reason to apologize, but there is no question of any particular good changing hands. Yet there is nothing odd about backward-looking reasons for redistribution. My claim is that corrective justice is a backward-looking principle of redistribution in the Anscombian sense.

Not all backward-looking action or operation is corrective, however. Praising someone is backward-looking, taking one’s past action as a reason to praise, but a praiseworthy action gives us nothing to correct. When we take corrective action, we do not simply take the past event as our reason for acting; we also see our present action as something that counteracts the wrongfulness of that event (“right the wrong”). Corrective redistribution is one that can be properly said to make the underlying wrongful interaction, or its wrongful consequences, right again.<sup>22</sup>

What sort of redistribution do we have backward-looking reason or duty to undertake under corrective justice? What sort of backward-looking redistribution can be said to make the aftermath of the wrongful interaction right again? In this subsection I characterize the underlying interaction corrective justice presupposes and

<sup>21</sup> Elizabeth Anscombe, *Intention* (Cambridge, MA: Harvard University Press, 1963) § 20. Anscombe wrote about “backward-looking motives.”

<sup>22</sup> Part of the idea might be that the reasons for the corrective action reflect the reasons against the wrongful interaction that gave rise to it. See Gardner’s continuity thesis in his “Corrective Justice.”

the problem of distribution to which it gives rise. In the next subsection I characterize the distinctly corrective solution.

Corrective justice presupposes a directed wrongful interaction in which one party (the wrongdoing moral agent A) wrongs another party (the wronged moral patient P). It concerns the distribution of the good or bad person-affecting consequences of that interaction for its parties (A and P). Thus it is confined to the *transferrable* person-affecting interparty consequences of the underlying interaction. What counts as a consequence of the wrongful interaction is party given by the problem and party determined by the solution (corrective justice).

So the wrongful interaction that gives rise to a problem of corrective justice also gives rise to a problem of *distributive* justice: How to distribute the interparty transferrable consequence of the underlying interaction between their potential bearers? The potential bearers are all and only those to whom the relevant consequences are transferrable. Thus the parties to the problem depends on our options. Suppose that the interaction produces some gain or loss to one of the parties to the original interaction. I am assuming that we always have the option of doing nothing, thereby allocating the gain/loss to the party who already enjoys/suffers it by omission (A or P). I'm also assuming that we can transfer the loss/gain onto the other party. Given these assumptions, the underlying interaction cannot fail to give rise to a problem of multiparty distribution of goods: it always requires some forced competitive allocation of some good (gain/loss) between at least two parties (A and P).

However, the bilateral nature of the underlying interaction of corrective justice (the sheer fact that it involves exactly two parties) does not guarantee the bilateral nature of distribution problem. A gain/loss that is transferrable to the other party (the one who does not already enjoys/suffers it) might well be transferrable to some third party (C). Suppose that we also have the option of transferring the gain/loss to C. Then we have a three-party problem of distribution.

### C. Redistribution in the right-making direction

Corrective justice presupposes some wrongful interaction between A and P with transferrable person-affecting consequences for at least one of them. Corrective justice tells us how to distributive these consequences between multiple parties, which include at least A and P, but can include others. Corrective justice is a distinctly backward-looking solution to this problem, for it takes the wrongful interaction as itself the reason for the solution. It requires a distribution that can appropriately be said to make the post-interactive situation right again (in some sense I'm taking as unanalyzed). What sort of distribution would fit the description? In general, one that is directly sensitive to the nature of the wrongful underlying interaction in the right sort of way. But what sort of distributive solution would reflect such sensitivity?

A partial answer is that to reflect the bilateral nature of the underlying interaction, corrective allocation must itself be *bilateral*: it requires allocating the relevant goods between the parties to the underlying interaction and them alone, namely between A and P. Thus allocating the relevant goods to third parties cannot satisfy the demands of corrective justice. Another part of the answer is that to respond directly to the wrongful interaction, corrective allocation must be *redistributive*: it requires an active intervention with the existing distribution of the relevant goods. The wrongful interaction has produced a distribution that is itself wrongful in some way, simply on account of having been produced by that interaction. You cannot correct a distribution without redistribution.

Redistributing the relevant consequences between the parties is not yet corrective, however. Suppose that the relevant interaction has produced some gain for P or loss for A. Surely there is nothing corrective about redistributing it to the other party. Far from making things right again, such redistribution would make things even worse. And as we have seen, the arithmetic principle that the relevant gain/loss be retransferred back to its original holder (thereby restoring the original pattern of their interparty distribution) does not solve that problem. What seems to be needed is some other principle that bridges the gap between correction and distribution.

[AQ2]

The requisite principle must relate the “directions” of the corrective redistribution and underlying wrongful interaction. To formulate the principle with clarity we need to introduce three theoretical terms. Let us say that a directed wrongful interaction between X and Y has the X to Y *direction of wrongdoing* when it involves X wronging or doing wrong to Y. We now distinguish between two senses in which a redistribution of some good can be said to take a particular direction. Let us say that a directed redistribution of some person-affecting good/benefit/burden between X and Y has the X to Y *direction of good/benefit/burden-moving* when it redistributes the good/benefit/burden from X to Y. Finally, let us say that a directed redistribution of such good between X and Y has the X to Y *direction of burdening-by-benefiting* when it burdens Y by benefiting X to the same extent (equivalently: when it benefits X by burdening Y to the same extent).

Notice that while a redistribution with the X to Y direction of *benefit-moving* has the Y to X direction of *burdening-by-benefiting* (it burdens X by benefiting Y to the extent of the benefit), a redistribution with the X to Y direction of *burden-moving* has the opposite, X to Y direction of *burdening-by-benefiting* (it burdens Y by benefiting X to the extent of the burden). The principle we need says that corrective redistribution reverses the underlying interaction’s direction of wrongdoing with its direction of *burdening-by-benefiting*. Corrective redistribution in the aftermath of an interaction with the X to Y direction of wrongdoing takes the Y to X direction of *burdening-by-benefiting*.

Using “A” and “P” schematically for the wrongdoing agent and wronged patient affords a simple statement of the relevant principle. Since directed wrongful interactions have the A to P direction of wrongdoing, the principle says that *corrective redistribution takes the P to A direction of burdening-by-benefiting*. Securing that



direction of burdening requires redistributing the good and bad interparty consequences of the underlying interaction (gains and losses) in opposite directions. Gains should be redistributed from A to P (with the A to P direction of good-moving); losses, from P to A (with the P to A direction of good-moving). To mark the fact that redistribution in this direction of burdening tends to warrant the imagery of righting the wrongful interaction or its consequences, I will sometimes call it the *right-making* direction.

Recall the case in which the wrongful interaction transfers some gain from A to P and loss from P to A. Unlike arithmetic equality of difference, the principle on offer avoids the implication that corrective justice requires retransferring the said consequences to the other party: such retransfer would have the wrong, A to P direction of burdening-by-benefiting. It would fail to put things right again because it would fail to reverse the interaction's direction of wrongdoing with its direction of burdening. Now someone might object that the principle still yields the wrong result. Redistribution with the P to A direction of burdening would require transferring the relevant consequences to the parties who already have them, which is impossible.

It is however possible to reply that the principle is *undefined* for such cases (as for cases in which the wrongful interaction has no interparty person-affecting consequences at all). Not all person-affecting consequences that wrongful interactions have for their parties require correction, only those that benefit A or burden P. Let us say that when a directed wrongful interaction between X and Y produces some person-affecting consequence for one of them, that consequence has the X over Y *direction of favoring* when it benefits X or burdens Y. Then we can say that the relevant principle is only defined for consequences with the A over P direction of favoring.

We can think of various principles of corrective justice. Some principles require A to take corrective responsibility for the relevant consequences of her wrongful agency by effecting or facilitating the requisite redistribution. Others require the judge to hold A correctively responsible and enforce the said redistribution. Still others require the law to pursue corrective justice. Principles of the first two kinds are most naturally thought of as deontic (imposing a requirement). Principles of the third kind might well be telic (generating reasons).

## E. Reconciling correction and redistribution

The reconstructed account does away with the assumption that the forms of justice are categorically distinct and describes a kind of corrective justice that is fully distributive as well as fully corrective. The most basic idea of corrective action in normative ethics is that of *backward-looking* principles that identify past wrongdoing as a reason for doing something about it now, something that can be properly said to correct or make things right again. This idea is not particularly distributive. Reasons to express certain reactive attitudes such as regret or blame are backward-looking and broadly corrective. Reasons to apologize are clearly corrective. Such actions do not necessarily allocate person-affecting goods. There is however nothing about the basic idea to exclude

genuinely corrective principles of distributive justice. The idea of backward-looking or “historical” principles or theories of distributive justice is not unfamiliar. One example is the familiar view that takes the fact that some good has been acquired through voluntary exchange to justify or favor its existing distribution. Another example is the familiar argument that we should transfer opportunities from one group to another as compensation for past wrongdoing. The theory of distributive justice behind the argument is historical and corrective. It requires redistribution with the P to A direction of burdening by virtue of some past interaction with the A to P direction of wrongdoing.

The corrective justice that preoccupied Aristotle and continues to exercise contemporary civil law theorists is concerned with the allocation of person-affecting goods in accord with merit (“some sort of worth”). The merits of the parties are relational and interdependent; they are determined by the roles they played or didn’t play in the same wrongful interaction and cannot be described independent of one another: A plays the role of the agent who wrongs P; P plays the role of the patient who is wronged by A. Relational principles or theories of distribution are not unfamiliar. To use an example from the previous paragraph, the process through which a good is acquired is a relational fact. All criteria of distribution that depend on social facts are implicitly relational, to some extent.

So corrective justice is not just any principle of distribution. Unlike principles that require distribution in accordance with need, suffering, or talent, it takes the wrongful interaction itself to require doing something about its interparty transferrable consequences, something that can be properly said to put things right. Unlike these other principles, it requires that these consequences remain between A and P. And unlike these other principles, it requires the redistribution to have the P to A direction of burdening.

The proposed account of the distinction does not baffle competing claims about the relative priority of corrective and distributive justice in relation to civil law. Rather, it requires their reinterpretation as claims about the relative priority of corrective and *non-corrective* principles of distribution or justice. In the next section, I apply the distributive account of corrective justice to tort law.

## V. Reparative Justice in Tort Law

My distributive account of corrective justice was characterized with an eye to civil law, that area of law that includes the law of torts, contracts, and restitution. It is often argued that civil law’s first principle or principle of justice is corrective. The claim is plausible. Civil law requires corrective action in the aftermath of civil law wrongs (torts, breach of contract, unjust enrichment). This preoccupation also seems to define civil law as a distinct area of law. What could possibly unify the paradigmatic institutions of civil law if not some sort of backward-looking concern with correction? There is nothing sacred about conceiving of the institutional subject in this way, but as soon as you conceive of it in some other way you

begin to change the subject.<sup>23</sup> Under the assumption about the categorical nature of the key distinction, this corrective view implies that civil law's justice is not distributive. The implication is not simply that civil law's justice is not identical with distributive justice as such. No one thinks that corrective justice exhausts distributive justice, and the claim that civil law's distinct function is distributive justice as such rings neither true nor helpful; clearly concern with distributive justice can hardly set civil law apart from most other areas of law. Indeed the categorical nature of the distinction forces the stronger implication that civil law's justice, which is corrective, is not *also* distributive.

If it turns out that civil law's first principle of justice is basically the reconstructed Aristotelian corrective justice I have been characterizing, then we are entitled to reject this implication. For in that case the denial of the distributive nature of civil law's justice would fail to be true and, in any event, would fail to register an important truth about the normative foundation of civil law, namely that it is an essentially distributive institution whose function it is to solve special problems of distribution by way of special redistributive action. In this section I will try to support this claim in relation to the law of torts, which I take to be a paradigm case of civil law, along with the laws of contracts and restitution. I will try to support the claim that tort law's first principle of justice is a special case of the distinctly distributive principle of corrective justice I have described in the previous section. I will use the account to show how tort law's justice is both corrective and distributive.

Now on the one hand, it is the distributive nature of tort law's justice that stands in greater need of vindication. So for the most part, my discussion of the distinctly corrective nature of tort law's justice will rely on familiar arguments (and hence depend on their cogency). On the other hand, I am also concerned to show how the distributive nature of tort law's justice is compatible with a certain priority of corrective justice. Thus corrective and distributive aspects of tort law's justice will be mixed in the discussion that follows. This will reflect one of this chapter's themes, that when it comes to tort law, corrective and distributive justice are inseparable; tort law's justice is corrective-and-distributive throughout. Before discussing tort law, I briefly comment about civil law generally.

### A. Civil law justice

Remedial civil law rules require corrective redistribution in the wake of directed wrongful civil law interactions. They seem to define duties, rights, and powers (in short, relations) of corrective justice in the reconstructed Aristotelian sense. A civil law wrong is a bilateral interaction with the A to P direction of wrongdoing (a tort, breach of contract, unjust enrichment). But not every such interaction is actionable. To

<sup>23</sup> Cf. Martin Stone's remark that in conceiving of tort law as "the legal response to the problem of accidents," one never gets "tort law into view at all." *Doing and Suffering*, p. 151.

amount to an actionable or complete civil law wrong, the interaction must have *transferrable* person-affecting consequences for its parties. Remedial civil law rules require the redistribution of these consequences between the parties in the opposite, P to A direction of burdening-by-benefiting. What is distinctive about civil law liability rules as such (if anything) is that they require this redistributive operation simply as the appropriate response to the underlying wrongful interaction, quite regardless of other reasons for or against it. When the interaction produces a gain for A, loss for P, or both, the sanctioned civil law response is transfer with the A to P direction of good-moving (“restitution”), transfer with the P to A direction of good-moving (“reparation”), or both.

It may be objected that my account cannot explain restitution. It is commonly argued that the law of restitution imposes duties to relinquish gains that are not wrongful (as when I find that you have mistakenly transferred some money into my account). But if these are duties of corrective justice at all, they are highly nonparadigmatic ones. The typical argument for treating such duties as corrective is that they presuppose an interaction what *would* be wrongful unless they are discharged. But if an argument of this sort is cogent, the duty to keep promises or perform contracts is a duty of corrective justice. I find this result counterintuitive. There is simply nothing for promisors or contractors to correct by keeping their promises or contracts. Things change as soon as the potentially wrongful interaction becomes wrongful in actual fact owing to a failure to discharge the duty (relinquish the gain, keep the contract). Potentially wrongful interaction can only give rise to potentially corrective duties. Notice that the objection effectively collapses the corrective nature of the relevant duties to their backward-looking or historical nature. The duties to relinquish unmerited gains or keep contracts are backward-looking in the Anscombian sense of identifying some historical fact (mistaken transfer, contract) as itself a reason or duty to do something. But they are not fully corrective, because the agent has not done anything she can correct or fail to correct.

## B. What is harm reparation?

Some philosophers define corrective justice as the requirement to repair harm.<sup>24</sup> And in tort law, correction does seem reparative. But what is this requirement? A familiar answer says that to repair P’s harm is to bring P to the position in which P was before (or would have been apart from) the tort. But such restoration is often impossible because the harm to P is irreversible. Suppose that A causes his neighbor P permanent physical injury through his careless conduct. Suppose also that the harm leads to financial losses that are associated with P’s condition (e.g. medical expenses). Bringing P back to his original position is impossible. All that can be done is bringing P back to his original position with respect to the collateral losses (as we might call them). To

<sup>24</sup> See e.g. Perry “Corrective and Distributive Justice.”

accommodate this familiar point, we can retreat to the claim that tort law requires bringing P to his original position “as far as possible.” But this still sounds too strong. Tort law does not require restoring P’s position in every possible way. It does not require A to apologize, work for P, or make some third party cover P’s expenses.

An account that acknowledges the essentially distributive nature of corrective justice offers a more informative yet simpler definition of reparation. Reparation of harm in torts is essentially *redistributive* and can only take the form of transfer. Physical injury is not transferrable. Therefore, it is not repairable. The collateral loss of mitigating and coping with the injury on the other hand is financial and can be transferred to A as debt. Harm reparation in tort requires the transfer of P’s collateral (i.e., transferrable) tort-generated losses onto A.

### C. Redistribution in the right-making direction

Tort law reparation also provides an occasion to compare the redistributive account of corrective justice with arithmetic equality accounts. The redistributive account of reparation retains two attractive features of the Aristotelian arithmetic account of corrective justice: The assumption that (1) corrective justice operates on material, person-affecting goods, gains and losses the parties to some wrongful interaction enjoy or suffer in its wake; and the assumption that (2) doing or achieving corrective justice is a matter of transferring these goods between these parties. The first assumption explains why the interaction creates a problem of forced competitive distribution of goods. The good is here to be enjoyed or suffered by at least some party, but there is some alternative allocation under which it is enjoyed or suffered by someone else. The second assumption begins to explain how the corrective solution differs from others: it requires the relevant good to remain between the parties. And it requires *redistribution* of the relevant good, an intervention in its existing distribution. But these assumptions are not sufficient to explain the distinctly backward-looking or corrective nature of reparation. Changing the interparty distribution of the relevant good does not yet restore or correct anything. What explains the backward-looking or corrective nature of corrective justice in the Aristotelian picture is the idea of arithmetic equality, the assumption that (3) corrective redistribution transfers back some positive or negative good that has been transferred through the underlying interaction (in much the same way a refund does), thereby restoring the original pattern of its distribution.

As I have noted, arithmetic equality view renders corrective justice all but inapplicable to reparation in torts. A in our previous example would be liable to repair P’s collateral losses. Such reparation would require transferring P’s loss to A. But the loss has never been transferred from A to P in the first place. A could not have had that loss before the tortious encounter that created it. And the loss has remained in P’s

possession ever since (otherwise transferring it to A would not be an option now). Therefore, transferring P's loss to A would not transfer that loss back.

The Aristotelian conception of corrective justice as arithmetic equality is still influential. However, the impetus to reconcile it with tort reparation exerts pressure to adopt some "normative" interpretation of the relevant goods, thereby giving up on the attractive Aristotelian assumption (1). Gardner's account of corrective justice provides a recent illustration. The question of corrective justice on this account is whether or how something that "has already shifted between the parties" to a transaction "should now be allocated *back* from one party to the other, reversing the transaction that took place between them."<sup>25</sup> How should we understand this claim in the context of reparation in torts? I assume that what reparation allocates from P to A is some loss associated with the tort. But in what sense does it allocate the loss *back* to A?

The claim seems to imply that P's loss had been A's prior to the tort: the tort has shifted it from A to P, and should now be shifted back. But this is impossible, as it was the tort that created the loss in the first place. Gardner's idea might be that P's loss should be returned to A, who has been its rightful owner since its creation through the tort. But since the material, person-affecting suffered loss the tort has produced lies with P, the ownership in question must be a kind of normative (moral or legal) ownership or liability. Thus the explanation of the sense in which reparation is corrective presupposes something like the Pottery Barn principle: "You break it, You own it." Alas this principle does not require the returning or otherwise transferring anything back from P back to A. We reach a dilemma. If the loss is material, then A has never had or suffered it, and it cannot be allocated back to A. And if the loss is normative (duty), then P has never had it, and it cannot be allocated from P. The Pottery Barn principle simply reformulates the duty of reparation in terms of ownership. It cannot explain reparation's (i.e., its own) corrective or backward-looking nature.

The account of the previous section provides the beginning of an explanation. Reparative justice is backward-looking simply in that it takes the past tortious interaction as itself a reason/duty to interfere with the existing distribution of the loss. The corrective nature of reparation is hard to explain in non-circular terms. Still reparation can be brought under a more general principle that requires us to redistribute the person-affecting consequences of wrongful interactions in the P to A direction of burdening-by-benefiting, namely in whichever direction of good-moving would work to the detriment of A by working to the benefit of P. Why? Because that would warrant the claim that the redistribution makes things right again. Why? Because it was A who wronged P and not the other way round.

<sup>25</sup> Gardner, "Corrective Justice" at 11.

#### D. Corrective defenses

Tort law provides defenses that limit the scope of the tortfeasor's (A's) liability to repair the victim's (P's) harm, including "proximate cause," "contributory negligence," and "mitigation of damages." Such doctrines are sensitive to the relative contribution of the parties to the production of the wrongful interaction or its consequences. Suppose for example that both parties are "at fault" or otherwise responsible for the tortious interaction or P's loss. Suppose that the tortfeasor A can be said to have been responsible for seventy-five per cent of the loss while the victim P can be said to have been responsible for the rest. Then the law may well take this as a reason to limit the scope of A's duty to repair to seventy-five per cent of the loss. Such doctrines seem essentially distributive. They concern the question: How should we divide the loss between the parties? (Notice that the rule in my own example *seems* essentially comparative, reflecting something like the ratio view; but I have already noted that this interpretation is optional.)<sup>26</sup> If tort law's first principle of justice (i.e., reparative justice) is not distributive, these doctrines cannot be said to form part of tort law's first principle; they must be relegated to tort law's second principle. But intuitively, these doctrines are integral to tort law's first and reparative principle of liability. The distributive account of corrective justice comports with this intuition. It treats tort law's sensitivity to the respective contributions of the parties to the tortious interaction or loss as internal to its corrective–reparative justice.

Reparative justice is a distinctly corrective, backward-looking and relational principle of distribution. It takes the past tortious encounter between A and P as itself a reason to redistribute its interparty consequences in the right-making direction. This can at least begin to explain the sensitivity of liability rules to the respective contributions of the parties without relying on *non-corrective* principles of distribution. It can do so in one of two ways, depending on the kind of case.

(1) *Bi-directional wrongdoing*. In one sort of case, the underlying interaction comprises two sub-interactions with opposite directions of wrongdoing, calling for two reparative transfers with opposite directions of burdening. The overall correctively just response will require setting these transfers off with or without remainder. No additional principle of distribution is required.

(2) *Joint contribution to one-directional wrongdoing*. In the more interesting sort of case the underlying interaction has just one direction of wrongdoing, but the wronged moral patient P nevertheless plays some morally significant agential role in the production of the interaction or her own loss. For example, P can be partly responsible or "at fault" for the loss by virtue of failing to take reasonable measures to protect herself without doing some wrong to A. While P's imprudent agential contribution is not wrongful, it is still very much a feature of the underlying wrongful interaction, and

<sup>26</sup> For example, the rule can also be said to reflect the twin noncomparative principles: (1) one's being at fault for some loss merits one's suffering it and (2) one's being more at fault merits one's getting more of it.

so can be taken to generate a backward-looking and relational normative factor: a reason *against* redistributing twenty-five per cent of the loss in the right-making direction (i.e., to A) or perhaps a *permission* not to repair that part (or *immunity* to liability to repair it). The lesson is that corrective justice does not always take the form of duties to correct; it sometimes takes the form of rights not to correct. Corrective defenses delimit the consequences that are subject to positive duties of corrective redistribution with the right-making direction.

It may now be objected that the said defenses and other tort law doctrines are sensitive not simply to the respective contributions of the parties to their past encounter but also to their respective needs, abilities, and other non-corrective features. This tends to show that they reflect *non-corrective* principles of distributive justice.<sup>27</sup> Therefore, so goes the thought, they cannot be subsumed under a distinctly distributive principle of corrective justice. Granted, there is more to tort liability than corrective redistribution, including sensitivity to non-corrective principles of distribution. The thought is that reparative–corrective redistribution is still tort law’s first principle of justice.

The institution I have discussed in this section is a rather idealized tort law, tort law as it is traditionally conceived. Later I will relate the discussion to a more realistic tort law, our mixed tort system. But first I want to say a word about the lessons of the discussion so far for the priority of corrective justice.

## VI. The Priority of Corrective Justice

If the foregoing discussion is basically right, tort law’s distributive justice is nothing other than its corrective justice. What are the implications of this view for apparently conflicting claims about the relative place of corrective and distributive justice in the explanation or justification of tort law? It depends on how we understand the debate. Insofar as these priority claims are taken to assume the categorical nature of the relevant distinction, the account rejects them all, regardless of side; it rejects the *debate*. However, the account lends some support to a priority of corrective justice that does not assume its non-distributive nature.

One lesson of the discussion is the asymmetry between our most general conceptions of distributive and corrective justice. As we typically use this term in normative discourse, “distributive justice” does not identify any well-defined principle of distribution, but simply the principles that make some distribution just (whichever they happen to be). Of course, we often use the expression in some narrower sense, focusing on some particular subclass of such principles (e.g. political, deontological, comparative), and the context of civil law is no exception. But at least when we ignore the Aristotelian contrast with corrective justice, that context suggests no obvious or obviously useful

<sup>27</sup> See e.g. Cane, “Distributive Justice” and Karen-Paz, “Egalitarianism as Justification.”



such restriction. The language of “corrective justice” on the other hand does seem to identify a minimally well-defined principle or family of principles. On any plausible definition, principles of corrective justice are “backward-looking” in some interesting sense that excludes most principles of justice or distribution.

The thought suggests that perhaps the issue is not priority as between corrective and distributive justice, but as between corrective and *non-corrective* distributive justice. Put another way, the pertinent contextual definition of distributive justice is not independent of the concept of corrective justice. “Distributive justice” in this context simply designates non-corrective principles of distribution (in the ordinary flexible sense).

Notice that on this way of thinking, the relevant contrast is not between two well-defined forms of justice, but between the well-defined form of corrective justice and its anti-form, a residual category of principles of distribution as distinct from each other as they are from principles of corrective justice. Still the redistributive account of tort law’s justice vindicates the priority of corrective justice over the relevant set of principles. For while tort law’s first principle of justice is distributive (as these other principles are), it is a distinctly corrective such principle (as they are not). Tort law has all manner of distributive effects that open it up to evaluation in light of various principles of distributive justice (need, virtue, equality of opportunity). But this much seems true of most every other legal institution, from criminal to tax to information law. What does seem true of civil law, but not of most other institutions, is the requirement of distinctly backward-looking, relational, and corrective redistribution, one that is justified by some past directed wrongful interaction and is properly sensitive to its morally relevant features (but not to *other* morally relevant features of the case).

This represents an institution–internal justificatory priority of corrective justice. Whether it can support a stronger justificatory priority is a difficult question that is not special tort law. At a minimum, it is plausible to think that when an institution’s first principle of justice is X and not Y, X will be more frequently applicable to the institution’s operation, and therefore more relevant to the justification of the institution itself, than Y. It is also plausible to believe—but much harder to defend—that institutions with their own “ethical function” (roughly, ethically acceptable or valuable function) enjoy a certain justificatory autonomy. The basic idea is that of division of ethical labor. The general thought can be broken into sufficiency and necessity claims. First (sufficiency), an institution that performs its defining ethical function sufficiently well is justified, even if this comes at some moral price, unless that price is too large. Second (necessity), an institution that fails to perform its defining ethical function sufficiently well is unjustified, unless the ethical price of its abolition is too large.

Suppose that tort law’s ethical function is corrective justice. Then justificatory autonomy makes it more significant to the justification of tort law than any other

principle of distribution. Up to a point, if tort law is sufficiently good at doing or achieving corrective justice, then it is justified (sufficiency). And up to a point, if tort law is not sufficiently good at doing or achieving corrective justice, then it is unjustified (necessity). No other principle of distributive justice can be said to enjoy such justificatory priority.

## VII. Similar Views

A distributive account of tort law's corrective justice offers one way to reconcile tort law's corrective and distributive functions or principles. Recent accounts of tort law's distributive justice suggest another route to reconciliation.

Peter Cane and John Gardner claim that tort liability rules effectively distribute bundles of reparative legal rights and responsibilities or relations—enforceable duties, powers, and immunities—among members of different groups (e.g., doctors and patients, landowners and tenants, employers and employees). Since the allocation of such legal relations is always beneficial or burdensome to members of some groups (and different allocations benefit/burden members of different groups), it is clearly answerable to principles of justice, including non-corrective ones, such as allocation in accord with suffering, need, or ability. However, since these relations are themselves distinctly corrective, the problem/function of distributing them is incidental to that of correcting tortious interactions or losses. Thus corrective justice enjoys a certain explanatory priority over non-corrective distributive justice in tort law.<sup>28</sup>

A related view says that the way in which tort law or the courts allocate the loss between the parties to the tort litigation is sensitive to principles of distribution, including non-corrective such principles. However, what creates the problem and restricts it to the parties is tort law's duty of reparation. Here too tort law's distributive function is merely incidental to its corrective function.<sup>29</sup>

These claims seem true as far as they go. Tort law cannot fail to create and face certain problems of distribution between members of different interest groups, between the litigating parties, and, I would add, between the parties and others simply by virtue of implementing its first and corrective principle of justice. So to the extent that tort law's response to such problems takes account of non-corrective principles, it

<sup>28</sup> Cane writes that, while liability rules affect the distribution of benefits and burdens, the goods being distributed are not "material goods" but reparative rights and responsibilities. He takes this to show that, in tort law, corrective justice is logically prior to distributive. "Corrective justice provides the structure of tort law within which distributive justice operates." "Distributive Justice", 412–13, 416. Gardner writes that what tort law allocates "is access to a special apparatus for the doing of justice in another form, viz. corrective justice." "Distributive Justice", § 2.

<sup>29</sup> This view is adapted from Gardner, "Distributive Justice," §: reasons of corrective justice explain "why we might be confronted with questions of distributive justice that are already pre-localized and already assume the context of a bilateral zero-sum conflict . . . Once again, it is corrective justice that has the explanatory priority."

is incidental to tort law's corrective response. But this admittedly accurate claim makes no mention of a tort law *principle* of distributive justice and leaves out the genuinely distributive nature of its first and corrective principle.

In the previous sections, I have tried to characterize tort law's *first* principle of distributive justice. Tort law's distributive justice on this view is not a by-product of its first and corrective principle of justice; it just is that principle.

## VIII. The Mixed Tort Law

My characterization of tort law's justice assumed a highly idealized conception of the subject matter. This idealization is a standard criticism of the view that tort law's first principle of justice is corrective. It is now a platitude that our tort law is a "mixed system." For our purposes, the key observation is that major tort law mechanisms are now governed by *non-corrective* principles of distribution. The question is whether my claim about the distinctly corrective nature of tort law's justice and tentative remarks in favor of the priority of corrective justice are compatible with this observation. I raise the problem by retelling a brief story. I then examine a possible response. I close by making a tentative proposal.

### A. The story of tort law

Part 1. At the beginning there was a tort law system that pursues corrective justice (i.e., corrective redistribution) single-mindedly (the *pure* tort system). It is not surprising that such single-minded pursuit has some unhappy distributive effects. After all, what makes corrective justice a distinct principle of distribution also makes it indifferent to many ethically relevant features of the distribution problem, features that bear on the justice of our response. Features that are not directly related to the underlying wrongful interaction itself, including suffering to be alleviated, needs to be satisfied, and harm to be prevented are simply irrelevant. The single-minded and quite successful achievement of corrective justice, so the story goes, comes at a real price in the currency of distributive justice. It is possible to maintain that implementing corrective justice can lead to major distributive *injustice*. Suppose that A's momentary tortious carelessness results in P's massive transferrable loss. It is possible to maintain that corrective justice would require shifting that loss to A. That would typically be a major distributive injustice. As Jeremy Waldron complains: "It is hard to explain why this is a fair price of a moment's carelessness."<sup>30</sup> But often the price of our system's pursuit of corrective justice lies simply in the failure to satisfy important

<sup>30</sup> Waldron, "Moments of Carelessness," p. 388.

non-corrective principles of distribution. The crucial point is that the purely corrective system has major distributive side effects.

Part 2. In the second part of the story, mass-redistributive mechanisms develop in response to the said side effects. Their main function (as we might say) is to ameliorate the distributive side effects of doing corrective justice. We can focus on one notable such mechanism, liability insurance.<sup>31</sup> When the tortfeasor A is insured against liability in tort, the tort victim's (P's) loss is transferred not to P but to his insurance company C, which spreads it in small portions across its policyholders D. The upshot of the insurance turn is a mixed modern tort law system that comprises the corrective justice system of old plus the non-corrective redistributive insurance mechanism. The end.

The story raises a challenge for the proposed account of tort law's first principle of justice and for any priority of corrective justice that it can be said to support. For a large number of cases, insurance has replaced corrective redistribution of P's loss to A with non-corrective redistribution of that loss to third parties C and fourth parties D. Such redistribution is not bilateral (the loss is not redistributed between A and P). In particular, it does not have the P to A direction of burdening. So it is no longer distinctly corrective under the proposed account.

## B. Implementing corrective justice?

It is natural to reply that insurance simply implements corrective justice. Since C is a contractually authorized agent of the tortfeasor A, C can discharge A's corrective justice liability on his behalf.<sup>32</sup> The response underestimate the distance between the complex multilateral insurance operation (the transfer of P's loss to C and then to D) and the bilateral corrective transfer it replaces. One difficulty is that the transfer of P's loss to C is twice removed from its transfer from to A. First, C is no longer a party to the interaction with P. And second, it isn't a moral agent in the primary sense.

<sup>31</sup> Tort experts claim that we cannot understand tort law without understanding insurance. Abraham (*The Liability Century*, p. 1) provides a recent statement:

The tort liability and insurance systems are very much like the two suns in a binary star, dependent on each other for their position in our legal system. For more than a century these two systems have influenced each other's course of development. Neither would be anything like what it is today if the other had not existed and developed along with it. Today the two systems constantly interact, and almost no effort to understand or reform one of them can take place without understanding the role played by the other.

Kenneth Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, MA: Harvard University Press, 2008), 1.

<sup>32</sup> Cf. Gardner, "Corrective Justice."

But the main difficulty with the response is that C is not the ultimate bearer of the loss. In effect, C is a mechanism for transferring the loss onto the many policyholders D, who were neither involved in the wrongful interaction with P nor authorized agents of A. By this point, the imagery of bilateral redistribution between P and A so as to make the situation right again no longer seems apt.

### C. Priority in a mixed system

An alternative way to reconcile the distinctly corrective nature of tort law's first justice with insurance against tort liability starts by openly acknowledging that mass redistribution through insurance displaces rather than implements corrective justice. Still, the non-corrective redistributive institution of liability insurance presupposes liability to insure against. That is the liability the tortfeasor would have if he were not insured. It is not essentially different from the liability she *would* have under the pure tort law of old. That basic liability is still essentially corrective. Therefore, the non-corrective redistributive part of the mixed system—and hence the mixed system as a whole—presupposes its corrective part.<sup>33</sup>

These observations raise a more interesting priority claim, one that concerns the justification of the system.<sup>34</sup> The basic claim is that our mixed tort system—understood as our substantive tort law together with the redistributive mechanisms that presuppose that law—is justified only if our mixed system would be justified even apart from the mechanisms. Put another way, the justification of the substantive subsystem (i.e., its being independently justified) is a condition on that of the mixed system (i.e., on the combined system's being justified).

Since we are assuming that our substantive tort law is corrective and the mechanisms are not, we can claim that corrective justice enjoys the following priority in the justification of our mixed tort law: The justification of the corrective tort subsystem is a condition on that of the mixed system as a whole—the mixed system is not justified unless it would be justified even apart from its non-corrective redistributive subsystem. For completion, we should add that the converse does not hold: It is not the case that the justification of our non-corrective redistributive subsystem is a condition on that of the mixed system as a whole. (That is simply because you cannot have the redistributive subsystem without the corrective one; the former presupposes the latter.)

The entertained priority claim is not obviously correct, and I find it hard to provide it with some deeper rationale.<sup>35</sup> But suppose it is correct. Then it can have non-trivial

<sup>33</sup> The converse claim cannot be made without threatening regress.

<sup>34</sup> I am indebted to David Enoch for the suggestion.

<sup>35</sup> An analogy might help. Our mixed criminal law system includes the substantive criminal law as well as subsystems that presuppose it, for instance the institution of plea-bargaining. It is plausible to maintain that

normative implications for our mixed tort law system. The key question is whether the corrective justice component of our mixed tort law (the “substantive” law of torts) is justified, apart from the non-corrective redistributive mechanism that supplement it. Would our tort law still be justified if we did not have liability insurance? This is similar to asking whether the pure corrective system of our story is justified. The story assumes that insurance ameliorates some significant distributive side effects of doing corrective justice. If these side effects are so serious that our tort system would not be justified without their amelioration, then it is not justified with that amelioration, either.

## IX. Conclusion

In this chapter I have offered an account of the distinction between corrective and distributive justice with an eye to civil law. The account does away with the assumption that they are mutually exclusive categories. Corrective justice in this account is a principle of distributive justice.

Corrective justice concerns the distribution of the person-affecting consequences of some directed wrongful interactions. What distinguishes corrective justice from other principles of distribution is its backward-looking sensitivity to the nature of the underlying interaction. Proper such sensitivity requires redistribution of the relevant consequences the interaction had for its two parties between them alone in the direction that would burden the wrongdoing agent by burdening the wronged patient (warranting the wrong-righting imagery). It does not require retransferring any of the relevant consequences back to its original holder or restoring the original pattern of its distribution (“arithmetic equality”).

This account explains how tort law reparation is fully distributive as well as fully corrective. The wrongful interactions of tort law are harmful. Corrective justice requires redistributing the victim’s transferrable losses to the tortfeasor and limits the scope of the requisite redistribution by reference to the victim’s agential contribution to the tortious interaction or loss.

The account suggests that some of the more interesting claims about the relative place of corrective and distributive justice in tort law can be understood as claims about corrective and non-corrective principles of distribution. Corrective justice is the only principle of distribution that can be said to be tort law’s first principle of justice.

Finally, the chapter entertains the possibility of reconciling the priority of corrective justice with the non-corrective redistributive mechanisms of our mixed tort system, such as liability insurance. It claims that while liability

our mixed criminal law is unjustified unless our substantive criminal law is independently justified, that is to say unless our system would be justified even apart from the plea bargaining subsystem.

insurance displaces corrective liability in many cases, it presupposes such liability. And it raises the possibility that the justification of the corrective component of our tort system system is a condition on that of our mixed system as a whole such that if our tort system would not be justified without insurance, then it is not justified with it, either.

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