THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY

SECOND SERIES

TORT LAW

Ernest J. Weinrib

Tort Law

Edited by

Ernest J. Weinrib

University of Toronto, Canada

ASHGATE
DARTMOUTH

Published by
Dartmouth Publishing Company
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company
131 Main Street
Burlington, VT 05401-5600 USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Tort law. – (International library of essays in law and legal theory. Second series)
1. Torts
I. Weinrib, Ernest Joseph
346'.03

Library of Congress Control Number: 2001099676

ISBN 0 7546 2142 1

Printed in Great Britain by The Cromwell Press, Trowbridge, Wiltshire

The International Library of Essays in Law and Legal Theory

Second Series

Series Editor: Tom D. Campbell

Titles in the Series:

Freedom of Speech, Volumes I and II
Larry Alexander

Privacy
Eric Barendt

Comparative Legal Cultures
John Bell

Contract Law, Volumes I and II
Brian Bix

Corporate Law
William W. Bratton

Law and Democracy
Tom D. Campbell and Adrienne Stone

Legal Positivism
Tom D. Campbell

Administrative Law
Peter Cane

International Trade Law
Ronald A. Cass and Michael S. Knoll

Sociological Perspectives on Law, Volumes I and II
Roger Cotterrell

Intellectual Property
Peter Drahos

Family, State and Law, Volumes I and II
Michael D. Freeman

Natural Law
Robert P. George

The Creation and Interpretation of Commercial Law
Clayton P. Gillette

Competition Law
Rosa Greaves

Chinese Law and Legal Theory
Perry Keller

Constitutional Law
Ian D. Loveland

Law and Legal Interpretation
D. Neil MacCormick and Fernando Atria

Human Rights
Robert McCorquodale

Anti-Discrimination Law
Christopher McCrudden

Medical Law and Ethics
Sheila McLean

Mediation
Carrie Menkel-Meadow

Environmental Law
Peter S. Menell

Criminal Law
Thomas Morawetz

Law and Language
Thomas Morawetz

Law and Anthropology
Martha Mundy

Gender and Justice
Ngaire Naffine

Law and Economics
Eric A. Posner

Japanese Law
J. Mark Ramseyer

Justice
Wojciech Sadurski

The Rule of Law
Frederick Schauer

Regulation
Colin Scott

War Crimes
Gerry Simpson

Restitution
Lionel D. Smith

Freedom of Information
Robert G. Vaughn

Tort Law
Ernest J. Weinrib

Rights
Robin West

Welfare Law
Lucy A. Williams

Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

Arizona Law Review for the essay: Jules L. Coleman (1995), 'The Practice of Corrective Justice', *Arizona Law Review*, **37**, pp. 15–31. Copyright © 1995 by the Arizona Board of Regents. Reprinted by permission.

Cambridge University Press for the essay: Benjamin C. Zipursky (2000), 'Pragmatic Conceptualism', *Legal Theory*, **6**, pp. 457–85. Copyright © 2000 Cambridge University Press.

Duke Law for the essay: Ernest J. Weinrib (1994), 'The Gains and Losses of Corrective Justice', *Duke Law Journal*, **44**, pp. 277–97. Copyright © Duke Law Journal.

McGill Law Journal for the essay: Jules Coleman and Arthur Ripstein (1995), 'Mischief and Misfortune', *McGill Law Journal*, **41**, pp. 91–130. Copyright © 1995 McGill Law Journal.

Quinnipiac Law Review Association for the essay: Stephen R. Perry (1996), 'The Distributive Turn: Mischief, Misfortune and Tort Law', *Quinnipiac Law Review*, **16**, pp. 315–38.

Martin Stone (1996), 'On the Idea of Private Law', *Canadian Journal of Law and Jurisprudence*, **9**, pp. 235–77. Copyright © 1996 Martin Stone.

Theoretical Inquiries in Law Journal for the essays: Ernest J. Weinrib (2000), 'Restitutionary Damages as Corrective Justice', *Theoretical Inquiries in Law*, **1**, pp. 1–37; Ernest J. Weinrib (2001), 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice', *Theoretical Inquiries in Law*, **2**, pp. 107–59.

The University of Iowa for the essays: Ernest J. Weinrib (1992), 'Corrective Justice', *Iowa Law Review*, **77**, pp. 403–25; Jules L. Coleman (1992), 'The Mixed Conception of Corrective Justice', *Iowa Law Review*, **77**, pp. 427–44; Stephen R. Perry (1992), 'The Moral Foundations of Tort Law', *Iowa Law Review*, **77**, pp. 449–514. Copyright © 1992 Stephen R. Perry; Richard W. Wright (1992), 'Substantive Corrective Justice', *Iowa Law Review*, **77**, pp. 625–711. Copyright © 1991–1992 The University of Iowa (Iowa Law Review). Reprinted with permission.

Vanderbilt University for the essay: Benjamin C. Zipursky (1998), 'Rights, Wrongs, and Recourse in the Law of Torts', *Vanderbilt Law Review*, **51**, pp. 1–100.

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

Preface to the Second Series

The first series of the International Library of Essays in Law and Legal Theory has established itself as a major research resource with fifty-eight volumes of the most significant theoretical essays in contemporary legal studies. Each volume contains essays of central theoretical importance in its subject area and the series as a whole makes available an extensive range of valuable material of considerable interest to those involved in research, teaching and the study of law.

The rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given. It also affords the opportunity to extend the areas of law covered in the first series.

The new series follows the successful pattern of reproducing entire essays with the original page numbers as an aid to comprehensive research and accurate referencing. Editors have selected not only the most influential essays but also those which they consider to be of greatest continuing importance. The objective of the second series is to enlarge the scope of the library, include significant recent work and reflect a variety of editorial perspectives.

Each volume is edited by an expert in the specific area who makes the selection on the basis of the quality, influence and significance of the essays, taking care to include essays which are not readily available. Each volume contains a substantial introduction explaining the context and significance of the essays selected.

I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
Series Editor
Centre for Applied Philosophy and Public Ethics
Charles Sturt University

Introduction

This volume contains essays on tort theory published in law journals over the last decade. All the essays explore the notions of justice that inform the doctrines and institutions of tort law. Many of them explicitly invoke the idea of corrective justice; others explore ideas of responsibility and fairness. Although the authors of these essays are frequently in disagreement with one another, they share a common interest in treating law as a normative phenomenon that is to be understood in moral terms.

In this respect the collection differs from the predecessor volume on tort law in this series. That volume, published in 1991, included material that reflected the division between the 'economists', with their emphasis on incentives, and the 'moralists', with their focus on normative argument. While tort scholars working within the economic approach continue to refine and extend the insights of the great pioneers of the previous generation, no wide-ranging or fundamental reformulations of the economic approach to tort law have appeared. In contrast, the last decade has witnessed an explosion of tort scholarship in a normative vein. This volume presents some of the leading essays from that corpus of scholarship.

If anything, this collection of journal essays understates the intensity of normative tort scholarship in the period between this volume and its predecessor. Some of the principal expositions of tort theory have been published as books rather than as essays. Indeed, the 1990s has been called 'the decade of the books' for tort theory (Owen, 1995, p. 4). At the beginning of the decade, no monograph existed that set out a justice-oriented understanding of tort law whereas, nowadays, one can point to a number of such works offering accounts from different perspectives. Jules Coleman's *Risks and Wrongs* (1992) argued that the core of tort law consists in a corrective justice practice under which wrongdoers are obligated to repair the wrongful losses for which they are responsible. Izhak Englard's *The Philosophy of Tort Law* (1993) provided a detailed examination both of the theoretical literature and of the principal tort issues to support his view that tort law embodies a pluralism in which corrective justice coexists with other theoretical ideas. Ernest Weinrib's *The Idea of Private Law* (1995) treated tort law as the chief illustration of a conception of private law that synthesized the ideas of coherent formal ordering, corrective justice, and Kantian right. Alan Brudner's *The Unity of the Common Law* (1995) viewed tort law, as well as the other main institutions of the common law, as the juridical exemplars of a Hegelian dialogue that, through a process of internal development, reconciles, preserves and unifies the notions of freedom and welfare. Arthur Ripstein's *Equality, Responsibility, and the Law* (1999) treated tort law as illustrative of the notion that equality and responsibility are to be understood in the light of an idea of reciprocity that sets the fair terms of interaction in a way that precludes favouring the interests of either party. In addition to these books, a number of important collections of essays were published, in which discussions of tort law from the standpoint of justice predominated (see Cooper-Stephenson and Gibson, 1993; Owen, 1995).

The significance of corrective justice is a recurring theme in this body of work. Broadly understood, corrective justice refers to an idea of justice that centres not on the overall welfare

of the community but on the normative nature of the interaction between the plaintiff and the defendant. Taking up this theme, all the essays in this collection, in their different ways, address the following question: how can the tort liability be understood as a normatively intelligible response to what the defendant did to the plaintiff?

Aristotle's original exposition of corrective justice in Book Five of the Nicomachean *Ethics* continues to exert its influence on contemporary responses to this question. Accordingly, in this Introduction, I want to outline some of the issues that arise out of Aristotle's account and to situate the material in this collection in relation to those issues.

Aristotle's classic account portrays corrective justice as restoring the notional equality that consists in the parties' having what lawfully belongs to them. Injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss. The law corrects this injustice when it re-establishes the initial equality by depriving one party of the gain and restoring it to the other party. Aristotle likens the parties' initial positions to two equal lines. The injustice upsets that equality by adding to one line a segment detached from the other. The correction removes that segment from the lengthened line and returns it to the shortened one. The result is a restoration of the original equality of the two lines.

This account features a number of interrelated motifs. First, liability corrects the injustice that the defendant has inflicted on the plaintiff; applied to tort law, corrective justice asserts a connection between the remedy and the wrong. The court does not treat the situation it is adjudicating as a morally neutral given and then ask what is the best course for the future all things considered. Rather, because the court's function is to correct an injustice done by one party to the other, the remedy necessarily mirrors the wrong and endeavours, so far as possible, to undo it.

Second, the relationship between the parties is a bipolar one in which the plaintiff and the defendant are correlatively situated. Liability connects two parties as obligor and obligee. At the remedial stage this correlativity is evidenced by damages that move, like the misplaced segment in Aristotle's line, from the defendant to the plaintiff. Because the remedy responds to and mirrors the wrong, the latter has the same bipolar and correlative structure as the former. The wrong is thus an event whose normative significance applies to both the defendant as the doer and the defendant as the sufferer of the injustice in question.

Third, corrective justice stands in contrast to distributive justice. The kind of justice that deals with the doing and suffering of injustice is categorically different from the kind of justice that distributes benefits or burdens. The doing and suffering of an injustice joins two parties who are correlatively situated. In contrast, the distribution of benefits or burdens is not restricted to two parties and is not correlatively structured. Rather, it assigns shares to any number of recipients in accordance with their proportional merit under some criterion of distribution. Thus, the extent to which tort law is understood as corrective justice is also the extent to which it cannot be understood as distributive justice.

To these motifs in Aristotle's account some tort theorists have controversially suggested that one can add another: the continuity of corrective justice with the tradition of natural right as it appears in the work of Kant and Hegel. Several considerations have been adduced to support this suggestion. Corrective justice, with its emphasis on the sheer correlativity of the parties' positions, provides the framework for a non-instrumental understanding of tort law; it presumably has a strong connection with the more detailed non-instrumental explications of private law in the natural rights literature. Moreover, the obvious normative categories expressive of corrective

justice's correlativity are rights and their correlative duties; the natural rights tradition contains the most penetrating expositions of the philosophical significance of such rights. Finally, Aristotle himself refers to – but does not explain – the notional equality that, despite the actual differences between the plaintiff and the defendant, forms the baseline for corrective justice; the equal moral status of persons, as postulated in the natural right tradition, seems nicely to fit corrective justice as Aristotle describes it.

Of course, there is a considerable difference between Aristotle's brief presentation of the abstract framework of liability and the theoretical explication of tort law as an elaborate, sophisticated and ongoing normative practice. The essays in this collection all concern themselves with issues that flow from the consideration of Aristotle's account: the relationship between right and remedy, the nature of the link between plaintiff and defendant, the contrast with distributive justice, and significance of the natural right tradition. But the authors of these essays naturally see the relationship between these issues in different ways, have different estimations of their relative importance, and have different conceptions of how these issues are to be worked out in connection with tort law. Moreover, some explicitly invoke the classic philosophical texts on corrective justice and natural right, while others construct arguments formulated completely within the bounds of contemporary scholarship.

Over the last two decades Ernest Weinrib has consistently championed the ongoing relevance of Aristotle's account of corrective justice and its continuity with notions of natural right. For Weinrib, Aristotle's description of a bipolar relationship in which the parties have equal moral standing through the correlativity of their positions as the doer and the sufferer of an injustice is an account of the structure of justification implicit in private law as a familiar normative practice. In Weinrib's view, legal reasoning in tort law (and in other branches of the law of obligations) is coherent to the extent that it partakes of the structure of Aristotle's corrective justice. This approach to private law through the structure of the plaintiff–defendant relationship Weinrib terms 'formalism'. The first three essays in this collection illustrate this approach. 'Corrective Justice' (Chapter 1) provides an interpretation of Aristotle's text that highlights and defends its formalistic nature. The essay also argues that Aristotle's corrective justice presupposes the abstract equality of free purposive beings and is therefore congruent with the Kantian and Hegelian notions of right in private law. Weinrib's second essay, 'The Gains and Losses of Corrective Justice' (Chapter 2), counters an important misunderstanding of Aristotle. It is sometimes assumed that Aristotle's conception of corrective justice applies only when one party realizes a material gain that is equal to the other's material loss. On this assumption, corrective justice is limited to wrongs such as takings. Weinrib, in contrast, contends that corrective justice, as Aristotle describes it, provides the structure of liability generally. In Weinrib's view, the gain and loss to which Aristotle refers (like the baseline of equality against which they operate) are normative notions representing the injustice that liability rectifies. Gain and loss refer not to the difference between what the parties have after and before the injustice, but to the difference between what the parties have and what they should have under the correlatively structured norm that governs their interaction. Thus, gain and loss are fully satisfied even in cases of negligence (where the plaintiff has lost but the defendant realizes no material gain) and restitutionary damages (where the defendant has gained but the plaintiff may have suffered no material loss). The next essay, 'Restitutionary Damages as Corrective Justice' (Chapter 3), elaborates this last possibility. The question of when the damages against a wrongdoer may be based on the defendant's gain rather than the plaintiff's loss has been

much debated, especially among Restitution scholars. Weinrib uses this controversy as an example of how his understanding of corrective justice illuminates a controversial and problematic set of legal doctrines.

Martin Stone's elegant essay 'On the Idea of Private Law' (Chapter 4) provides an extended critical commentary on the main themes of Weinrib's work. Stone's purpose is to elucidate the mode of thinking within which Aristotle's idea of corrective justice makes sense. Like Weinrib, Stone rejects functionalism – the effort to understand tort law in terms of goals such as deterrence and compensation – as being incompatible with the transactional limits of tort law. But he also rejects Weinrib's formalism, especially the link that Weinrib postulates between corrective justice and Kantian right. Both the functionalist and the formalist, Stone argues, make the mistake of supposing that that corrective justice must be validated by some set of theoretical considerations that certify its correctness, although they have radically different versions of what those considerations might be. Accordingly, Stone criticizes Weinrib for thinking that Aristotle's account contains a gap that must be filled by Kant's idea of rational agency. In his view, Aristotle's account of corrective justice merely exhibits the kind of reason already present in tort law as an ongoing activity of argument and judgment, and grounding corrective justice in Kant is unnecessary because corrective justice presupposes the perspective of someone who already accepts that tort law expresses genuine reasons.

Jules Coleman's essay, 'The Mixed Conception of Corrective Justice' (Chapter 5) announces a new departure in the work of this prominent tort theorist. Coleman's previous conception of corrective justice postulated the annulment of wrongful gains and wrongful losses (see especially Coleman, 1982). Because negligence involved a wrongful loss by the plaintiff that was unaccompanied by a wrongful gain on the part of the defendant, Coleman claimed that gains of one party were morally and analytically independent of the losses of the other. The wrongful status of the loss in a tort action was therefore unrelated, as a matter of corrective justice, to the wrongful status of what the defendant had done. This in turn entailed that the grounds for compensating a wrongful loss might be different from the grounds for holding the defendant liable. By fracturing the relationship both between plaintiff and defendant and between the right and remedy, Coleman's original view was at odds with – and indeed was part of a critique of – tort law as a moral practice. The present essay repudiates the annulment thesis in favour of the view that corrective justice imposes a duty to repair the wrongful losses that are the result of one's agency. This revised conception approaches the Aristotelian view by emphasizing the relationship between the doer and the sufferer of the wrongful loss. It also restates the difference between distributive and corrective justice as a difference between duties that are agent-general (incumbent on everyone without singling out anyone in particular) and duties that are agent-specific. The consequence of his revised view is that the core of tort law can be seen as an instance of a practice of corrective justice. Coleman outlines the theoretical implications of this in his second essay in this collection, 'The Practice of Corrective Justice' (Chapter 6).

Stephen Perry's essay, 'The Moral Foundations of Tort Law' (Chapter 7), surveys the most important theoretical attempts to justify correlative rights and obligations of reparation; he then constructs out of the elements of these prior attempts an alternative view that he thinks avoids their deficiencies. He views Aristotle's conception of corrective justice as insufficiently comprehensive, because it does not apply where wrongful gain does not equal wrongful loss. Setting aside Aristotle, Perry presents a taxonomy that divides contemporary arguments into the locally distributive and the volitionist. Locally distributive arguments take the form that as

between victim and injurer, the injurer should bear the loss; volitionist arguments see reparation as closely linked to the concept of voluntary action. Each of these kinds of argument, in turn, has a strict-liability and fault-based version. Perry contends that both the locally distributive and the volitionist arguments have vices that correspond to their virtues. Local distributive justice has the virtue of focusing on the victim's loss, but offers no reason for normatively connecting that loss to the injurer. The volitionist approach has the virtue of focusing on the injurer's action, but is less successful in justifying an obligation to repair the loss. Perry argues that, since these defects are complementary, the solution consists in combining the strict liability version of the volitionist argument (what he calls 'outcome responsibility') with the fault version of the locally distributive argument.

Richard W. Wright's essay, 'Substantive Corrective Justice' (Chapter 8) offers yet a different conception of corrective justice. Like Weinrib, Wright sees Aristotle's account of corrective justice as fundamental to a non-instrumental understanding of tort law. However, he views the theories of both Weinrib and the earlier Coleman as pitched at an excessive level of abstraction, and therefore as incapable of accounting for our actual legal practices or for the normative principles that underlie them. In contrast to Weinrib's explicit formalism and what he regards as Coleman's de facto formalism, Wright presents a substantive version of corrective justice that he claims is both descriptively plausible and normatively attractive. He relates Aristotle's concept of justice to the good that consists in living rationally in accord with complete virtue. Embodied in this idea of the good is the Kantian premise of the absolute moral worth of each human being as a free and equal member of the community.

The next two essays feature an exchange between Jules Coleman and Arthur Ripstein on the one side and Stephen Perry on the other. In 'Mischief and Misfortune' (Chapter 9) Coleman and Ripstein are concerned with the question of who owns life's misfortunes. They argue that the treatment of misfortune cannot be based on neutral concepts of choice, control or human agency, but involve an appeal to substantive conceptions of what is important to life in a liberal political culture. Starting with the principle of fairness that one should bear the cost of one's activities, they claim that both the libertarian and the liberal egalitarian identify the costs of an activity with its causal upshots. For the libertarian this means that, in the absence of causal responsibility, the costs of the misfortune should lie where they fall, whereas for the liberal egalitarian the costs of misfortune should be held in common unless they are someone's causal responsibility. Coleman and Ripstein argue that this conception of costs is indeterminate. Instead, invoking Rawls's notion of primary goods as goods that rational persons want whatever else they want (Rawls, 1971, p. 92), they contend that costs presuppose notions of what is important for living one's life. Applied to tort law, this conception of costs allows standards of liability to be understood as the fair balancing of the value of the parties' liberty and security. Moreover, the necessity of making judgements about what is important for living one's life connects corrective and distributive justice in the efforts of a liberal society fairly to allocate the burdens of misfortune. Thus, Coleman and Ripstein view their approach as elucidating how the treatment of misfortune expresses a liberal theory of political morality.

In reply, Stephen Perry's essay 'The Distributive Turn: Mischief, Misfortune and Tort Law' (Chapter 10) draws attention to what he considers to be gaps and ambiguities in the Coleman–Ripstein essay. The Coleman–Ripstein idea of 'owning' misfortunes can refer either to individual moral responsibility for the harmful consequences of one's activity or to the collective allocation of the costs of misfortune. The former pertains to a pre-political notion of corrective justice,

the latter to a political notion of distributive justice. Only the former, Perry asserts, can commit us to the treatment of misfortune through the correlative rights and duties that characterize tort law. Coleman and Ripstein, in contrast, offer no reason to think that one is under a moral obligation of compensating one's particular victim or to adopt an institution that gives legal recognition to that obligation. Perry argues that responsibility premised on control – especially on the capacity to avoid the harm – creates the normative connection between actor and outcome that underlies tort law's treatment of unintentional harm.

In 'Rights, Wrongs, and Recourse in the Law of Torts' (Chapter 11) Benjamin Zipursky uses the famous *Palsgraf* case as the basis of a discursive critique both of instrumentalist and corrective justice theories. Zipursky treats *Palsgraf* as paradigmatic of what he calls the substantive standing rule, which conditions a right of action on the defendant's having infringed the plaintiff's own right. Instrumentalist theories, including economic analysis of tort law, fail to account for this rule because they reduce to remedial rights the primary rights to which this rule refers. And although Zipursky is sympathetic to corrective justice theories, he thinks that their present formulations also fail because they focus not on the plaintiff's rights, but on the foreseeable connection between the defendant's fault and the plaintiff's injury. The explanation for the substantive standing rule is that civil recourse (that is, the law's recognition of the power to proceed against others through the authority of the state) is available only to the person whose right has been invaded by another. For Zipursky, rights, wrongs and recourse form the conceptual core of the law of torts.

In 'Pragmatic Conceptualism' (Chapter 12) Zipursky returns to the contrast between economic analysis and corrective justice. His goal in this essay is to elaborate the philosophical implications of the claim by corrective justice theorists, such as Weinrib and Coleman, that the economic approach does not adequately explain the bipolar structure of tort law. For economic analysts to take this claim as an invitation to produce functionalist explanations of tort law's bipolar structure is, he notes, to miss the point of the criticism. The basis of the corrective challenge is not that functionalist explanations are unavailable but rather that they are inapposite: they fail to provide an account of the concepts embedded within tort law. Thus the disagreement between economic analysis and corrective justice depends upon a deeper disagreement about what constitutes a satisfactory account of tort law – that is, about what Zipursky calls 'the methodology of legal theory'. He proposes that the appropriate methodology for dealing with the concepts embedded in tort law is a conceptualism that is pragmatic in the sense that it is based on tort law as an institutional practice and it allows for the law's application and revision on practical grounds.

The final essay in this collection, Ernest Weinrib's 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (Chapter 13), summarizes and evaluates the state of tort scholarship about corrective justice. In Weinrib's view corrective justice involves two complementary ideas: correlativity (the idea that liability treats the parties as doer and sufferer of the same injustice) and personality (the idea that purposiveness without regard to particular purposes is implicit in the rights and duties of private law). The former idea exhibits the structure of the justifications that pertain to liability, whereas the latter articulates the presupposition that informs the content of those justifications. Surveying the work of many of the contributors to this collection (Coleman, Perry, Ripstein, and Stone), Weinrib concludes that correlativity, which was regarded as an eccentric notion when first introduced to contemporary tort theory, is now the leitmotif of an emerging consensus about corrective justice. Personality has gained

less support because of the apprehension that it implies that rational agency as elaborated within the natural rights tradition is a philosophical truth. Weinrib points out that this apprehension is irrelevant to tort theory. Personality owes its status within corrective justice to its being implicit in private law as a normative practice. In this respect, its status is no different from that of correlativity. And if the two ideas are, as Weinrib contends, indeed complementary, one may expect that the consensus about correlativity will lead to an appreciation of the pertinence of personality to a theoretical account of the content of corrective justice norms.

Weinrib's essay ends with some general observations about the future of corrective justice theory. First, correlativity is so highly structured a notion that the emergence of a consensus about its significance indicates that the main lines of the corrective justice approach to tort law are now firmly established. Although refinements inevitably remain to be made, further work on the theoretical nature of corrective justice is unlikely to lead to large gains. Moreover, the identification of corrective justice with tort law may be impeding our appreciation of both. Other grounds of obligation besides tort law have their modes of correlatively structured injustice, and a true understanding of tort law involves understanding its place in private law generally. Future work about corrective justice will most profitably be devoted to exploring issues beyond the narrow set that has become canonical for corrective justice theorists of tort law. If this happens, then one can anticipate that, perhaps a decade from now, a volume in the third series of the International Library of Essays in Law and Legal Theory will be devoted to corrective justice and the theory of private law.

References

Brudner, Alan (1995), *The Unity of the Common Law*, Berkeley and Los Angeles: University of California Press.
Coleman, Jules L. (1982), 'Corrective Justice and Wrongful Gain', *Journal of Legal Studies*, **11**.
Coleman, Jules L. (1992), *Risks and Wrongs*, New York: Cambridge University Press.
Cooper-Stephenson, Ken and Gibson, Elaine (1993), *Tort Theory*, North York, Ontario: Captus University Publications.
Englard, Izhak (1993), *The Philosophy of Tort Law*, Aldershot: Dartmouth.
Owen, David (1995), *Philosophical Foundations of Tort Law*, Oxford: Clarendon Press.
Postema, Gerald J. (2001), *Philosophy and the Law of Torts*, Cambridge: Cambridge University Press.
Rawls, John (1971), *A Theory of Justice*, Cambridge, MA: Belknap Press.
Ripstein, Arthur (1999), *Equality, Responsibility, and the Law*, New York: Cambridge University Press.
Weinrib, Ernest J. (1995), *The Idea of Private Law*, Cambridge, MA: Harvard University Press.

Contents

[1]

Corrective Justice

*Ernest J. Weinrib**

Introduction

At private law the sufferers of wrongful harm can recover compensation from those who have wronged them. Such litigation reflects deeply embedded intuitions about justice and personal responsibility. Yet among legal scholars, the nature of private law remains controversial. Some see private law as a mode of public regulation, others as the embodiment of economic efficiency, others as an opportunity for distributive justice, others as a way of attaining justice between the parties, and still others as the repository of our most persistent illusions about the autonomy of law from politics.

The earliest elucidation of private law is Aristotle's treatment of what he called "corrective justice."[1] By Aristotle's day, the rectification of injury through the recognition and enforcement of one party's claim against the other was a familiar phenomenon. Aristotle, however, was the first to point to the distinctive features of this process: its bipolar structure, its constrained standards of relevance, and its relationship to adjudication. In the history of legal philosophy, private law was Aristotle's discovery.

The term "corrective justice" still figures prominently in the modern legal literature, especially (though not exclusively) as a counterweight to instrumental conceptions of private law.[2] However, academic lawyers have paid scant attention to the specific nature and implications of Aristotle's

---

*Faculty of Law and Department of Classics, University of Toronto.

1. Aristotle, Nicomachean Ethics 120-23, ll.1131b25-1132b20 (Martin Ostwald trans., 1962).

Editor's note: Although Professor Weinrib cites to Martin Ostwald's translation of Aristotle's Nicomachean Ethics, he often translates the Nicomachean Ethics himself from the original Greek. Thus, the line numbers that Professor Weinrib cites will correspond with Ostwald's translation, but the wording may be slightly different.

2. *See* Larry A. Alexander, Causation and Corrective Justice: Does Tort Law Make Sense?, 6 Law & Phil. 1 (1987); Jules L. Coleman, Corrective Justice and Wrongful Gain, 11 J. Legal Stud. 421 (1982); Richard Epstein, Nuisance Law: Corrective Justice and its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979); Richard Epstein, Causation and Corrective Justice: A Reply, 8 J. Legal Stud. 477 (1979); George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972); James Gordley, Equality in Exchange, 69 Cal. L. Rev. 1587 (1981); Kathryn R. Heidt, Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?, 47 Wash. & Lee L. Rev. 347 (1990); Richard A. Posner, The Concept of Corrective Justice, 10 J. Legal Stud. 187 (1981); Christopher H. Schroeder, Corrective Justice and Liability for Increasing Risks, 37 UCLA L. Rev. 439 (1990); Christopher H. Schroeder, Corrective Justice Liability for Risks and Tort Law, 38 UCLA L. Rev. 143 (1990); Kenneth W. Simons, Corrective Justice and Liability for Risk Creation: A Comment, 38 UCLA L. Rev. 113 (1990); Catharine Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich. L. Rev. 2348 (1990); Richard W. Wright, Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts, 73 Iowa L. Rev. 1001 (1988).

account. This is unfortunate. Even after more than two millennia, Aristotle provides the clearest exposition of the distinctive structure of private law relationships.

This Article deals with what is both significant and problematic in Aristotle's presentation. I begin by recapitulating Aristotle's position in a way that makes its formalism salient. In response to modern criticism of Aristotle, I argue that Aristotle's formalism is by no means empty, despite its abstraction from particular prescriptions. Because Aristotle's attention to structure enables us to appreciate the distinctive coherence of private law relationships, his account constitutes a decisive contribution to the theory of private law.

Despite his achievement, however, Aristotle's exposition, like all great pioneer efforts, is seriously incomplete. Aristotle presents corrective justice as a transactional equality, but he does not tell us what the equality is an equality of. This omission is crucial, even if understandable. It is crucial because corrective justice remains opaque to the extent that the equality that lies at its heart is unexplained. The omission is understandable, however, since the very formalism of corrective justice presupposes a formal equality that has become the object of serious reflection only in the last few centuries. Indeed, the measure of Aristotle's achievement is that his relentless striving to make sense of legal relationships led him to a correct understanding of private law that defied explication in terms of his own ethics.

One purpose of this Article is to fill the lacuna in Aristotle's account by connecting corrective justice to the legal philosophies of Kant and Hegel. If my argument is correct, the equality of corrective justice is the abstract equality of free purposive beings under the Kantian and Hegelian concepts of right. On this interpretation, the bipolar structure of corrective justice represents a regime of correlative right and duty, with the disturbance of equality in Aristotle's account being the defendant's wrongful infringement of the plaintiff's rights. Aristotle's account of corrective justice thus coalesces with the great modern philosophies of natural right in a single approach to the understanding of private law.

I. Aristotle's Account of Justice

A. *Justice as Mean*

To a modern reader, the most remarkable feature of Aristotle's account is that he presents corrective and distributive justice as different mathematical operations. Justice, both corrective and distributive, involves the achievement of *to ison*, which in Greek signifies both fairness and equality. In Aristotle's account, fairness as a norm is inseparable from equality as a mathematical function.

Aristotle's conception of corrective and distributive justice as mathematical operations arises out of his general treatment of ethics. For Aristotle, ethics is the study of virtues considered as excellences of character. Just as nothing felicitously can be added to or taken from an excellent work, so excellence of character involves the absence of both excess and

deficiency.[3] Aristotle analyzes virtues as intermediate states, or means, which lie between vices that are deficiencies or excesses relative to that mean. Courage, for instance, lies between the deficiency of cowardice and the excess of recklessness. Similarly, temperance lies between profligacy and insensibility, generosity between prodigality and stinginess, gentleness between irascibility and apathy, wittiness between buffoonery and boorishness, and so on.

Aristotle begins his account of justice by asking how justice fits into the analysis of virtue as a mean.[4] The difficulty is that justice has a different orientation than other virtues. While other virtues are excellences of character internal to the virtuous person, justice is directed "towards another" (*pros allon*).[5] Its reference is not internal but external; it looks not to the perfection of one's moral being but to the terms of one's interaction with others.[6] Whereas virtue is one's own good, "justice seems to be the good of someone else."[7] Given this external focus, how is justice a mean?

One answer is that the external focus changes nothing. Even virtues that are primarily concerned with character have external effects. To use Aristotle's examples, the coward who deserts in battle and the rake who commits adultery[8] not only evince defects of character but cause harm to others. The virtues come within the purview of justice once they are regarded from an interpersonal point of view.[9] Justice so conceived is virtue practised toward others. Because adding the external perspective of justice does not change the nature of virtue, the analysis in terms of means is unaffected. Here, justice is coextensive with virtue.

This, however, is not the entire answer. Aristotle recognizes that not all issues of justice involve external effects of character. The other-directedness of justice figures also in controversies concerning one's

---

3. Aristotle, supra note 1, at 41-44, ll.1106a14- 1107a25.

4. Id. at 111, l.1129a (Aristotle opens Nicomachean Ethics V by remarking that concerning justice and injustice we must investigate what sort of acts they are about, what sort of mean justice is, and intermediate to what does the just lie.)

5. Id. at 114-15, ll.1129b27, 1130a4, 1130a13.

6. Aquinas comments on the opening sentence of Nicomachean Ethics that

> [t]he virtues and vices . . . are concerned with the passions, for there we consider in what way a man may be internally influenced by reason of the passions; but we do not consider what is externally done, except as something secondary, inasmuch as external operations originate from internal passions. However, in treating justice and injustice we direct our principal attention to what a man does externally; how he is influenced internally we consider only as a by-product according as he is helped or hindered in the [external] operation.

1 St. Thomas Aquinas, Commentary on the Nicomachean Ethics 384 (C. Litzinger trans., 1964).

7. Aristotle, supra note 1, at 114, l.1130a2. Aristotle's use of this phrase is provocative: it is the description of justice given by the immoral Thrasymachus in Plato's Republic 343c (Allan D. Bloom trans., 1968).

8. Aristotle, supra note 1, at 113, l.1129b20.

9. Id. at 114-15, l.1130a12.