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TORTS, CORRECTIVE JUSTICE, AND DISTRIBUTIVE JUSTICE

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Numerous legal theorists argue that corrective justice is distinct both conceptually and normatively from distributive justice. In particular, they contend that it is an error to view corrective justice as ancillary to distributive justice, necessary only to maintain or restore a preferred allocation of benefits and burdens. The specific arguments of these legal theorists are addressed and shown to be inconclusive in relation to what I term the *Dependence Thesis.* The Dependence Thesis holds that a normative account of the occasions of corrective justice is dependent on a larger theory of distributive justice. The nature of this dependence relation varies from theory to theory. The role of tort compensation schemes within libertarian, liberal egalitarian, and utilitarian theories of distributive justice is discussed. It is argued that such theories provide comprehensive and critical perspectives on historical corrective practices, neither simply endorsing nor invalidating them. An alternative normative account of the occasions of corrective justice, offered by legal theorists who support the autonomy of corrective justice from distributive justice, is also discussed.

Numerous practices in modern legal systems are aimed at restoring individuals to the condition they were in prior to some disrupting event. In tort law, for instance, the state requires those who are, in certain ways and under certain conditions, responsible for injuring others to provide their victims compensation. Legal theorists typically refer to tort compensation practices as instances of *corrective justice.* Other compensatory practices, as Robert Goodin notes, "aim not so much at righting wrongs as eradicating evils."[1] These practices include unemployment compensation, accidental injuries compensation, and compensation for public takings of citizens' private property.

It should be apparent that evaluation of the latter sorts of compensatory practices is dependent upon a broader theory of distributive (or social) justice.[2] Such theories provide, among other things, normative criteria for

1. Robert Goodin, UTILITARIANISM AS A PUBLIC PHILOSOPHY 213 (1995).

2. The concept of distributive justice is broader than the concept of social justice, at least as the latter has been discussed by political theorists in recent years. Theories of social justice are concerned with the fundamental distributional features of institutions and practices in political communities. Questions of distributive justice, in contrast, can arise in relation to the division of just about any good, no matter how mundane (*e.g.*, the slicing of a birthday cake). Though my discussion focuses exclusively on contemporary theories of social justice, I believe that the view I support extends to the other types of goods that raise problems of distributive justice.

evaluating the allocation of the benefits and burdens of social living, and the role of the state in ensuring the favored normative distribution. Whether the state should be in the business of mandating unemployment or accidental injuries compensation, or taking citizens' private property, are precisely the sorts of questions to which theorists of distributive justice provide conflicting answers. I shall not have much more to say about these kinds of compensation practices.

My focus is on the kinds of corrective practices embodied in tort law and the question whether theories of distributive justice are relevant to the moral evaluation of such practices. A number of legal theorists have recently presented arguments designed to establish the autonomy of corrective justice from distributive justice, at least with respect to tort law.[3] In their view, corrective justice is distinct both conceptually and normatively from distributive justice. In particular, they argue that it is an error to view corrective justice as merely ancillary to distributive justice, necessary only to maintain or restore the normative allocation of benefits and burdens endorsed by a theory of distributive justice.

My contention is that the arguments of these legal theorists are unconvincing, at least in relation to several prominent theories of distributive justice. Many of their arguments establish only the weaker claim that corrective and distributive justice play different roles within a comprehensive political theory. Because these theorists rarely discuss in detail the normative relations between corrective and distributive justice within prominent theories of distributive justice, this is a task I undertake in Section I of this article. In Section II I address the specific arguments of those who assert the independence of corrective justice from distributive justice. In Section III I discuss an alternative account of the normative occasions of corrective justice, one that has been developed by several of the theorists who urge the separation of corrective and distributive justice. I suggest that this account provides a truncated critical perspective on the justice of tort practices.

My primary aim throughout this discussion is to show that conceiving of corrective justice as ancillary to distributive justice, at least with regard to the corrective practices common to tort law, is a coherent, viable option. The arguments against such a view fail, and it provides a comprehensive and critical perspective on tort compensation practices. It also offers a plausible account of the relation between distributive and corrective justice within a larger political theory. Not only is my aim of reviving a position that has fallen into disfavor a modest one, but my focus is quite narrow. I ignore

3. The most important sources of these arguments include Ernest J. Weinrib, THE IDEA OF PRIVATE LAW (1995); Richard W. Wright, *Substantive Corrective Justice,* 77 IOWA L. REV. 625–711 (1992); and Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice,* 77 IOWA L. REV. 515–624 (1992). Though in places he invokes arguments similar to those discussed by the above authors, Jules Coleman's recent writings on the relation between corrective and distributive justice suggest a position that is closer to the one I support. *See especially* Coleman, RISKS AND WRONGS 350–54 (1992), and a paper he co-authored with Arthur Ripstein, *Mischief and Misfortune,* 41 MCGILL L. J. 91–130 (1995).

many of the issues that would have to be discussed in a comprehensive analysis of tort law. Also, my interest is less in explaining how historical tort practices function and more in thinking about how they ought to function.[4] Particularly worthy of note is one apparent difference in starting points between my own thinking and that of some of the legal theorists I criticize. Many of them seem to begin with the assumption that historical tort practices are instances of corrective justice. They then attempt to explain how this is so. I make no such assumption. Historical corrective practices are one thing; whether they are instances of corrective justice is quite another, and, in my view, something that we need a theory of distributive justice to determine.

I. THE DEPENDENCE THESIS AND THEORIES OF DISTRIBUTIVE JUSTICE

It will help to have a name for the position I support, so I call it the *Dependence Thesis*. The Dependence Thesis is this: *A normative account of the occasions of corrective justice in torts is dependent on a larger theory of distributive justice*.[5] As stated, the Dependence Thesis is quite formal. There is good reason for this. The precise manner in which an account of the justified occasions of corrective justice in torts depends on a larger theory of distributive justice varies from theory to theory. The nature of the dependency cannot be specified in the abstract. We shall simply have to wait and see the character of this dependency in each of the theories of distributive justice discussed.

The basic intuition underlying the Dependence Thesis is that tort practices manifest corrective justice if and only if they aim at restoring to individuals that to which they are entitled. Of course, different theories of distributive justice offer different accounts of that to which persons are entitled. Moreover, the institutions of any given society may not provide individuals with what a particular theory of distributive justice says they should have. If a society's tort practices restore to individuals things that a theory of distributive justice says they are not entitled to, one important question we face is whether those tort practices are properly viewed as manifesting corrective justice. The answer, as we will see, depends on the nature of the holdings and the theory of distributive justice under consideration. Even if the theory in question implies that the tort practices are not

4. I shall use the term *historical* to refer both to past corrective practices and currently existing ones. Usually it is the latter we will be most interested in evaluating, but a normative theory might also be used to evaluate past corrective practices.

5. James Nickel anticipates the Dependence Thesis in *Justice in Compensation*, 18 WM. & MARY L. REV. (1976). Nickel's article was written before legal theorists developed many of their arguments against the Dependence Thesis. He also does not distinguish the different ways in which corrective justice is dependent upon distributive justice within competing theories of distributive justice.

properly viewed as manifesting corrective justice, it does not follow that such practices are not justifiable in some other way.

Why might someone believe that the Dependence Thesis is an attractive position? A comprehensive political theory must provide some account of the normative relationships, assuming they exist, between those state practices that seek to promote or ensure distributive justice and those that seek to promote or ensure corrective justice. Various accounts of that relationship are possible. The Dependence Thesis suggests that evaluation of the interactions of individuals, and thus state responses to those interactions, depends on evaluation of either larger structural features of a social order or certain of its historical features. More specifically, the Dependence Thesis says that claims about the justice of historical corrective practices are defeasible in light of (distributive justice) evaluations of structural or historical features of the social order in which those practices occur. The Dependence Thesis should initially be plausible to anyone who thinks that considerations of distributive justice have significant implications for judgments about interactional justice between and among individuals. My sense is that this will be true of many political theorists. The major alternative to the Dependence Thesis, one that is articulated by several of the theorists who criticize it, wholly divorces evaluation of the interactions between and among individuals from evaluation of the structural or historical features of society. Whether such a position is preferable to the Dependence Thesis is something that remains to be seen, but it is a position that many political theorists ought to view with some skepticism.[6]

The following accounts of major theories of distributive justice are brief, but I assume that most readers are already familiar with such theories. Because considerable confusion has arisen among legal theorists about the ways in which such theories view the relation between corrective and distributive justice, my focus in each case will be on clearly articulating that relation. The discussion of each theory occurs in two stages. First, I discuss the relation between distributive and corrective justice at the level of ideal theory. I then offer some remarks about how each theory might approach the evaluation of historical tort practices, practices that often occur in social orders that are distributively unjust.

6. Another possibility is discussed by James Gordley, *Tort Law in the Aristotelian Tradition*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 131–58 (David G. Owen ed., 1955). Gordley contends that considerations of distributive justice sometimes constrain the operation of corrective justice. For instance, persons in desperate need might be justified in using others' property without their permission (though Gordley does not deny that the former may still have to compensate the latter). Gordley's position suggests that judges might reasonably introduce considerations of distributive justice into their deliberations about a tort case. Such a position is at odds with the one I support, as will become apparent. Also, Gordley's view suggests that considerations of distributive justice operate "around the edges" of tort law. The Dependence Thesis makes evaluation of whether tort practices manifest corrective justice much more thoroughly dependent on considerations of distributive justice.

A. Libertarianism

The libertarian position on social or distributive justice is that individuals have a limited set of basic moral rights that are typically negative in character.[7] Individuals' moral rights to life, liberty, and property must be understood as rights against certain types of interferences by other individuals—typically interferences involving the use of force. Individuals therefore have agent-general duties to others that require them to refrain from such interferences, but no agent-general duties to aid others. Agent-specific duties are acquired only through voluntary agreements among individuals, and no individuals' voluntary agreements of this type can bind other individuals. The state, or dominant protection agency, is a voluntary organization whose function is simply to relieve individuals of the burdens of self-enforcement of their rights. Individuals should not be forced to join the political community or to stay in it once they have discharged any obligations they may have voluntarily incurred when they joined.

Against this by now familiar backdrop, the role of corrective justice is fairly clear and straightforward. Libertarianism can be seen as consisting of a series of transaction rules that morally regulate the interactions of individuals. These rules, designed to shield the negative rights of individuals, generally require individuals to avoid force and fraud in their dealings with one another. When these transaction rules are violated, the violators should morally and legally be held accountable for the harms they cause their victims. Whether right violations must be intentional, or merely negligent, or neither in order to be actionable, is debated by libertarians.[8] Little turns on this debate for my purposes, assuming that libertarians would endorse some scheme or other of tort liability for right violations. What is important is that any duties generated by right violations will be agent-specific ones that fall on those who violated the relevant transaction rules and denied other individuals their rights. Others in the social order have no direct moral obligation to restore the victims of such injustices, though they may

7. Some, including some libertarians themselves, question whether libertarianism is a theory of distributive justice at all. Obviously, if we define such theories (as many legal theorists tend to do) as ones concerning the distribution of preexisting goods according to some patterned principle, libertarians will rightly balk at having their theory characterized as a theory of distributive justice. However, if we understand theories of distributive justice as articulating normative criteria according to which we are to determine what goods individuals are entitled to and what role (if any) the state is to play in the provision of such goods, then libertarianism is a theory of distributive justice. For discussions of libertarianism, *see* Robert Nozick, ANARCHY, STATE, AND UTOPIA (1974); Loren E. Lomasky, PERSONS, RIGHTS, AND THE MORAL COMMUNITY (1987); and Jan Narveson, THE LIBERTARIAN IDEA (1988).

8. Robert Nozick speaks of right violations as being the object of concern, but this seems ambiguous as between intentional violations, negligent violations, or even non-negligent violations. *See* Nozick, *supra* note 7, at 28–32. Loren Lomasky argues that right-violators ought to rectify the losses they cause their victims whether the violators' behavior was intentional or merely negligent. *See* Lomasky, *supra* note 7, at 142. Richard Epstein has argued from libertarian premises for a general theory of strict liability in torts. *See* Epstein, *A* THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW (1988).

have some obligation to help the victims collect compensation (or as Loren Lomasky urges, rectification) from the actual wrongdoers if doing so is one of the terms agreed to in joining the protection organization.[9] In the main, however, the duty to restore justice falls squarely on those who disrupted it.

What would libertarians say if their normative conception was brought to bear on actual societies with their entrenched corrective practices of various kinds? We cannot assume that they would simply approve of all such practices, nor that they would reject all of them. Libertarians would have to examine both the nature of the injuries or harms that existing practices correct and the character of the practices themselves. They would then have to assess the extent to which such practices protect appropriate entitlements and are consistent with libertarian transaction rules. Their conception might allow them to view tort compensation in cases of direct injuries to persons as instances of corrective justice. They could see such corrective practices as operating to restore things to which individuals are entitled, especially where such practices require those responsible for injuries to pay compensation.

More problematic are historical tort practices that aim to restore property damaged by tortious conduct. One notorious difficulty that confronts libertarians is that property holdings have often evolved in ways that repeatedly violated libertarian rules of just acquisition and transfer.[10] Yet libertarians have shown little enthusiasm for efforts to sort out and correct the past injustices that morally taint holdings. There may be numerous cases where historical tort compensation schemes properly restore property holdings that were damaged in ways that libertarian transaction rules prohibit. In those cases, libertarians could reasonably conclude that such schemes restore individuals' entitlements. But there will likely be many cases where such an interpretation of historical practices is not plausible, where the property holdings restored lack the required moral pedigree. Libertarians will then be faced with a dilemma. Either they must decide to ignore such pedigree problems and treat all historical legal holdings as prima facie just, or they must be prepared to undertake some, perhaps limited, rectification of past wrongs. The former seems a moral compromise of a dubious sort (some would suggest it is the abandonment of principle), whereas the latter may be difficult to reconcile with the usual libertarian antipathies to redistribution. I shall not pursue these matters further.

For libertarians, then, the extent to which historical tort compensation practices restore what individuals are entitled to is a complicated function of the nature of the injured interest, its pedigree (in the case of property), the circumstances of the injury, the character of the transaction rules that such corrective practices protect, and the character of the corrective prac-

9. Lomasky, *supra* note 7, at 142. Lomasky defines rectification as restoring to victims precisely what was taken from them, while compensation only restores something equivalent in value to victims.

10. Nozick was the first to note these difficulties. *See supra* note 7, at 152.

tices themselves. These are all matters about which libertarianism provides a critical perspective. I shall have more to say subsequently about the libertarian conception of the relation between distributive and corrective justice when I discuss the specific arguments of those legal theorists who criticize the Dependence Thesis.

B. Liberal Egalitarianism

Numerous liberal egalitarian theories are discussed in the contemporary literature. The most prominent such theory is that of John Rawls, and so it is his theory that I shall briefly describe in this section.[11]

Rawls meticulously defends two principles of social or distributive justice. I assume that most readers are familiar with the content of the two principles. For our purposes, the important point is this: Rawls maintains that these two principles apply to what he calls the "basic structure" of society, which is "the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation."[12] The two principles serve as a normative blueprint for shaping the basic structure, and thus for establishing the background conditions against which individual interactions of the more mundane sorts are to occur. Rawls is quite explicit about the fact that the two principles are not designed to morally regulate interactions between and among individuals.[13] At the same time, he argues that the moral character of such interactions crucially depends on maintenance of the appropriate background conditions. Rawls states that

> we cannot tell by looking only at the conduct of individuals and associations in the immediate (or local) circumstances whether, from a social point of view, agreements reached are just or fair. For this assessment depends importantly on the features of the basic structure, on whether it succeeds in maintaining background justice.[14]

Once the appropriate background conditions are established, then additional rules governing transactions between and among individuals will need to be developed and legally enforced.[15] Not surprisingly, these will be

11. For Rawls's theory, *see* A THEORY OF JUSTICE (1971), and POLITICAL LIBERALISM (1993). Ronald Dworkin is another prominent liberal egalitarian. In LAW'S EMPIRE (1986), Dworkin sketches a liberal egalitarian conception according to which the state should ensure each individual an equality of resources that each person will then invest or consume as he or she wishes. There would also need to be appropriate transaction rules that tort law would help to enforce. Although Dworkin does not comment specifically on this matter, it seems plausible to suggest that, in his view, corrective justice can only properly operate against the appropriate distributive background.

12. *See* Rawls, POLITICAL LIBERALISM, *supra* note 11, at 258.

13. *Id.* at 263.

14. *Id.* at 266–67.

15. *Id.* at 268.

rules that attempt to ensure that such transactions involve "free agreements fairly arrived at and fully honored."[16]

What role might tort law have under Rawls's liberal egalitarian scheme? Arguably, it would play a complementary role to that of contract law, the aim of which would be to facilitate and enforce consensual exchanges among individuals. The aim of tort law would be to protect individuals from the harms of certain nonconsensual interactions, and, failing that, to ensure them compensation. As such, the two types of law promote, in different ways, the liberty of persons to live their lives on their own terms (within limits of course). But neither of them will operate to ensure fairness in the transactions between and among persons in the absence of distributively just background conditions. Contracts or tort liability judgments that appear fair when examined from a narrow perspective that excludes consideration of background conditions may not appear fair when those conditions are properly taken into account.

According to the Rawlsian conception, therefore, tort practices can only restore what persons are entitled to if such practices require compensation for violations of fair transaction rules against a background of larger distributive justice. However, the corrective practices of tort law do not aim directly or even indirectly at maintaining that background of distributive justice. Rawls is quite emphatic about this point, arguing that transaction rules must be kept relatively simple and that attempts to make them serve the larger aims of distributive justice would render such rules hopelessly complex or would require individuals to gather too much information.[17] Instead, Rawls endorses the idea of a division of labor between distributive and corrective justice, though one in which the latter has a normatively subordinate role to the former. Corrective justice of the kind embodied in tort law plays a role in preserving free and fair transactions, but only under conditions that are the concern of distributive justice. Where such background conditions do not exist, the question whether tort practices manifest corrective justice becomes more difficult to answer.

To a greater or lesser extent, the basic structures of societies in the real world satisfy the conditions of Rawlsian background justice. Obviously, the less such conditions are satisfied, the more problematic are judgments about whether historical tort compensation practices restore individuals' entitlements. We might, in some circumstances, have to regard such practices as manifesting only partial or deficient corrective justice. In extremely unjust societies, a Rawlsian might refuse to regard tort practices as manifesting corrective justice at all. But even this may simplify too much. In radically unjust societies, there may be transactions that injure persons that we might be convinced the unjust background conditions played little role in. If tort practices require, in such cases, restoration of the injured parties by those

16. *Id.* at 265.
17. *Id.* at 267–68.

who injured them, a Rawlsian might regard those practices as manifesting at least approximate corrective justice.[18]

Conversely, a Rawlsian would have to be alive to the possibility that severe background injustice may engender propensities toward malevolent or risky behavior among the least advantaged members of society. Tort schemes that required these individuals to compensate those they injured might seem, as a result, to manifest a rather dubious corrective justice. Another possibility a Rawlsian would have to countenance is that background injustice would probably make it easier for wealthier or more powerful members of society to manipulate the legal system to their (unjust) advantage. For instance, such individuals might be able to purchase the sort of expensive legal expertise that allows them to avoid legal liability for damages in cases where they have, in fact, wronged others. In such instances, a Rawlsian might have to regard historical corrective practices as perpetuating injustice rather than manifesting corrective justice.

Much more could be said here, but the preceding indicates both the analytical power of the Rawlsian perspective and the complexities involved in using it to examine historical tort practices. One contrast between Rawls's views and those of the libertarians is worth emphasizing. Libertarians conceive of the purpose of corrective justice in terms of its undoing distributive injustices wrought by one or more individuals. This is not the case for Rawls. His view of the dependence relation is different and more complex. For him, corrective justice is dependent on distributive justice because it is only against the background provided by the latter that the former can properly operate. But corrective justice does not directly or indirectly aim at promoting distributive justice.

C. Utilitarianism

There is no single utilitarian position on distributive justice, and both distributive and corrective justice will be derivative notions within utilitarian theory. Many utilitarians have sided with a moderate egalitarianism on matters of distributive justice.[19] Accordingly, they endorse state protection of civil liberties and private property, market allocation of goods and services, and state redistribution of property, including the provision of a welfare minimum. I shall simply assume that such a conception of distributive justice can be expected to maximize average utility and refer to Robert

18. The Rawlsian approach to corrective justice thus seems more nuanced than does Coleman's, when Coleman suggests that corrective justice restores "real rights" as long as it restores rights "supported by the principles of distributive justice that apply in the second or third best world." *See* Coleman, RISKS AND WRONGS, *supra* note 3, at 352–53.

19. *See, e.g.*, R.M. Hare, *Justice and Equality, in* JUSTICE AND ECONOMIC DISTRIBUTION 116–31 (John Arthur & William Shaw eds., 1978); James Griffin, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 299–301 (1986); and Goodin, *supra* note 1, at 23.

Goodin's work on compensation to develop the utilitarian conception of corrective justice.[20]

In much the way Rawls does, utilitarians are apt to view distributive justice as the focus of larger political and economic institutions. If we are to maximize average utility over the long term, then these political and economic institutions must be structured to provide freedom, security, opportunities, and resources for all citizens in a moderately egalitarian fashion. As with Rawls's theory, the larger institutional structures that promote distributive justice will have to be supplemented with transaction rules that regulate the interactions of individuals. Let us assume that such transaction rules will aim to maximize expected utility by requiring the voluntary participation of individuals in any interactions directly affecting their interests. Let us also assume that utilitarians would agree to a tort compensation scheme of the sort common in many societies, one where those responsible for intentionally or negligently harming others are required to pay their victims compensation. This second assumption is, admittedly, a controversial one. Utilitarians must consider with an open mind the possibility that other ways of restoring injured individuals to their prior condition may be preferable.

But let us assume that corrective schemes holding injurers responsible for repairing the losses they impose will maximize expected utility.[21] If this is not so, then corrective justice may have little place within utilitarian political theory. Still, there will be debate among utilitarians about whether a general scheme of strict liability would be preferable to one that awards tort compensation only for intentionally or negligently inflicted harms. Obviously, those potentially injured by the actions of others might prefer a strict liability scheme. Potential injurers, in contrast, might favor a scheme of no liability or, at most, a scheme that requires them to pay compensation only if they intentionally or negligently injure others. Overall, the latter scheme, one that requires individuals to pay compensation when they intentionally or negligently injure others, would arguably be the best compromise between the interests we all have in both being free to act and not being injured by the actions of others.

Goodin's view is that compensation practices, of which tort law is one type, serve to underwrite individuals' reasonable expectations. It is important to underwrite such expectations because they are what individuals plan their lives around. Injuries inflicted by tortfeasors typically come as bolts from the blue, disrupting individuals' lives and thereby causing them pain, debilitation, and frustration. Tort compensation, "if sufficiently swift, full and certain, would restore the conditions that people were relying on when

20. Goodin, *supra* note 1, at 207–27.

21. Not only would such schemes compensate injured parties but they would also provide potential injurers incentives to avoid malevolent or careless conduct. The latter is surely a desirable feature of any compensation scheme. Thus, corrective practices like those of tort law would seem to have a firm basis in utilitarian ways of thinking.

framing their plans, and so allow them to carry on with their plans with minimal interruption."[22] Yet not all expectations around which people base their lives are appropriately underwritten by tort law. The expectations of thieves or monopolists that they will be able to retain their ill-gained booty should not be honored. It is only *reasonable* expectations that compensation should seek to stabilize. Expectations that are morally unreasonable, like those of the thief or the monopolist, should not be compensatable, because it is not true that their expectations were upset in ways they "had a reason to expect not to occur."[23]

Though Goodin is not as clear about this as he might be, the preceding suggests that tort compensation schemes can only properly function against the background furnished by distributively just political and economic institutions. For it is such institutions that ultimately determine the broad contours of the expectations about their lives that individuals form. Without just background institutions, encouraging morally reasonable expectations, Goodin's theory of compensation would be at odds with his larger theory of distributive justice. For all types of larger institutional structures, no matter how just or unjust, generate expectations in those who live and operate under them. Not only are the expectations so generated statistically well-founded in many cases but they may be "morally" well-founded, at least in the sense that those who have them may quite sincerely believe that they have good moral reasons for having their expectations honored. The prevailing societal ideology will back them up, even if, from our perspective, the individuals in question are little more than thieves or monopolists. If, as utilitarians, we believe that their moral reasons are hogwash, we cannot plausibly say of them that *they* had moral reasons to expect disruption to occur. They had nothing of the sort. We might think that there are good utilitarian reasons to not underwrite their expectations, but that is to bring a critical moral theory to bear on their social system and the expectations it fosters. If that moral theory is not reflected adequately in the basic political and economic institutions of the social order, then underwriting any expectations such a social order fosters is not likely to maximize utility. In short, corrective justice will only maximize utility if it underwrites expectations of the sort fostered by distributively just social orders.[24]

Many historical social orders diverge to some extent from what utilitarians typically regard as the requirements of distributive justice. Yet such social orders continue to generate expectations of various fairly predictable sorts in their citizens. Some of these expectations will no doubt be reasonable ones, in the larger utilitarian scheme of things, and tort compensation practices that underwrite them can therefore plausibly be viewed by utilitarians as manifesting corrective justice. For instance, the expectations that

22. Goodin, *supra* note 1, at 215.

23. *Id.* at 217.

24. Goodin acknowledges that we may have no good moral reasons to restore status quos embodying a pattern of entrenched and systematic injustice. *See id.* at 217.

individuals have with regard to their bodily autonomy or the disposition of their personal property are likely ones that are largely legitimate. Corrective practices that reinforce them restore individuals' legitimate entitlements. Other expectations generated by historical social orders will be ones that a distributively just social order would not encourage the formation of or would positively discourage. If tort compensation schemes nonetheless underwrite them, utilitarians should be disinclined to regard such schemes as manifesting corrective justice. Importantly, this is not to suggest that the proper thing for the courts to do when confronted with such expectations is to ignore or frustrate them, especially by attempting to introduce larger concerns about distributive justice into their decisions. It may well be that, in a very localized way, utility will be maximized if the courts continue to compensate such disrupted expectations. But doing so should not be confused with restoring to individuals things to which they are entitled and thus which they are owed as a matter of corrective justice.

This brings us to an important point that pertains to all of the theories just discussed. Even if from the perspective of some theory of distributive justice, historical tort compensation schemes cannot plausibly be regarded as in any way manifesting corrective justice, it does not follow that there are no moral reasons of any sort to support such schemes. All that follows is that such reasons will not be reasons of corrective justice. For one thing, there may be value in stabilizing individuals' expectations, even where they are not, according to some theory of distributive justice, legitimate. The alternative in many cases would be to risk anarchy by allowing existing transaction rules to be flouted without consequence by those who would intentionally or negligently injure others.

More profoundly, partisans of any theory of distributive justice must confront questions about how to implement their normative systems in social orders whose existing institutions and practices are deficient from the standpoint of justice. Many, though perhaps not all, will concede that in such cases any movement toward the ideal must be systematically undertaken through democratic political processes. Not only is distributive justice an inherently contentious matter, but the alternatives to democratic reform are singularly unattractive.

Moreover, democratic reform at least promises individuals some role in the design of the institutions and practices that in crucial ways determine their life prospects. Such a role is arguably a fundamental right of all individuals, one that will be incorporated into many theories of distributive justice, whatever their other differences. Concern for this fundamental right suggests a compromise position. We could regard the continued operation of tort compensation schemes in democratic societies as morally desirable for reasons of distributive justice, even if we regard the expectations such practices stabilize as to some extent illegitimate.[25] For whatever

25. Of course, theorists will likely disagree about the sorts of institutions needed to render a society fully democratic, and thus about whether a historical social order is democratic.

the perceived flaws in those expectations, they are ones generated by institutions and practices that citizens of a democratic social order have not yet seen fit to change. At the same time, those critical of the status quo could urge the larger societal reforms needed, according to their respective theories, to enable corrective practices to actually restore to individuals that to which they are entitled.

II. ARGUMENTS FOR THE AUTONOMY OF CORRECTIVE JUSTICE

Having sketched three contemporary theories of distributive justice, and having shown how, in each, corrective justice depends on distributive justice, we are now in a position to address the arguments designed to establish the autonomy of corrective justice. It is important to note that my responses to these arguments are premised on the ways in which the relation between corrective and distributive justice is conceived of at the theoretical level by each of the approaches I have just discussed. Whether and to what extent these theoretical approaches can be used to defend the claim that historical tort compensation schemes manifest corrective justice is a separate issue. Unfortunately, it is not an issue that legal theorists always keep separate in their discussions of the relation between corrective and distributive justice.

In fact, one argument frequently cited on behalf of the autonomy of corrective justice is that historical tort compensation schemes are systematically insensitive to the distributive justice of the status quo antes they aim to restore. For instance, Goodin argues that such schemes do not inquire into either the justice of the patterns of holdings they sustain or the historical bases of individuals' titles to their property.[26] Tort law requires the poorest, most downtrodden individuals to compensate those they intentionally or negligently injure, regardless of the wealth or advantages of the latter. It is the state, not individuals, that has the authority to redistribute property according to some substantive normative criteria of distribution.

However, this appeal to the character of existing corrective practices does not directly impeach the position that corrective justice is normatively subordinate to distributive justice. One who takes such a position could simply argue that existing practices are mistaken in divorcing considerations of corrective and distributive justice. Though this is not an argument I support, it does remind us that normative views are not refuted by appeals to existing practices.

It might be argued, however, that the appeal to existing practices can be recast in a slightly different form. If the Dependence Thesis asserts that corrective justice is dependent on distributive justice, then that thesis runs the risk of being irrelevant to the justification of most historical tort com-

26. Goodin, *supra* note 1, at 209–14. *See also* Coleman, RISKS AND WRONGS, *supra* note 3, at 304.

pensation practices. For such practices likely cannot be seen as restoring or maintaining individuals' entitlements. Yet this argument goes too far. The critical perspectives theories of distributive justice provide with regard to historical tort compensation schemes do not, as we have seen, rule out their justifying some of the outcomes of such schemes. Even in societies that are significantly unjust, according to some conception of distributive justice, there may be instances where tort compensation schemes do approximate corrective justice. Admittedly, the Dependence Thesis will not allow us to say that all historical tort compensation schemes manifest corrective justice. But it is far from clear why we would want to provide such a categorical endorsement of the workings of all tort compensation schemes.

Fortunately, those who regard corrective justice as autonomous from distributive justice have numerous other arguments to which they appeal. One important argument cites the very different conceptual structures of the two types of justice. Corrective justice is centered around transactions between or among individuals (or perhaps, groups of individuals), is bipolar, and generates agent-specific reasons for action. Distributive justice, in contrast, concerns the allocation of goods across a typically much larger group of individuals according to some substantive criterion. It involves multilateral, comparative judgments and generates agent-general reasons for acting.[27]

First, consider the structure of corrective justice. In tort cases the defendant is accused of having wronged the plaintiff in some manner and is alleged to owe the plaintiff compensation. Tort law is centered around such private wrongs and the relationship is bipolar because the plaintiff and defendant are viewed as linked in a normative relation to one another that excludes other individuals. A judgment of liability against the defendant gives the defendant specific reasons to compensate the plaintiff that are not shared by other individuals in society. The defendant is therefore obligated to the plaintiff in ways that others are not obligated.

With distributive justice, things are quite different. Suppose, for example, that distributive justice requires us to allocate income based on effort. The state or some other authoritative agent would be required by such a criterion to determine the relative merits of each individual and to ensure each a level of income commensurate with his or her respective efforts. Each individual would then presumably have agent-general reasons for refraining from interfering with or otherwise disrupting such an allocation of income. In other words, the duty to refrain from disrupting the preferred normative distribution would be one that it is owed by each individual to all other individuals. Given these two very different conceptual structures, many legal theorists conclude that corrective justice cannot coherently be viewed as subordinate to distributive justice.

27. Those who cite some version or other of this argument include Weinrib, *supra* note 3, at 61–83; Coleman, *id.* at 310–11; Coleman and Ripstein, *Mischief and Misfortune, supra* note 3, at 93; Wright, *supra* note 3, at 702–706; and Benson, *supra* note 3, at 535–39.

In response to this, even if we concede that the two types of justice have different structures, this does not, by itself, cast doubt on the Dependence Thesis. In Rawls's theory of justice, distributive and corrective justice play very different roles and arguably have precisely the sorts of conceptual structures the argument alleges. Rawls's theory of distributive justice is more complex than the simple, patterned theory cited above, but this makes little difference in the present context. In Rawls's theory, corrective justice is ancillary to distributive justice despite the fact that the two play different roles.

Something similar is true for both libertarian and utilitarian theories. The duties we have to others under distributive justice are, for libertarians, agent-general, whereas any duties individuals have based on corrective justice will be agent-specific. But once again, and in a more direct way than for Rawls, corrective justice presupposes the sort of antecedent normative distribution that is the subject of distributive justice. Utilitarians are quite comfortable with divisions of labor within their moral theory. They can plausibly construe distributive justice as concerned with the organization of basic institutional structures. Individuals would have duties to support such structures—and the basic rights they attempt to ensure—that are agent-general. But if we assume that it will maximize utility to hold individuals responsible for certain of the injuries they cause others, there may also be a role for transaction rules within utilitarian theory violations which generate agent-specific reasons for acting. Nevertheless, as we have seen, such transaction rules, and the tort compensation schemes that play some role in enforcing them, will only properly function to manifest corrective justice within a larger distributive framework that generates expectations that are morally reasonable.

It is worth noting, as well, that the claim that corrective justice always generates agent-specific reasons to act may not be as obvious as most of its proponents believe. It is not difficult to conceive of cases where entire political communities wrong individuals and therefore have duties of corrective justice to such individuals. For instance, the internment of Japanese-Americans by the United States government during World War II was, on any plausible interpretation, a grave injustice that demanded correction.[28] Nor was it an injustice perpetrated simply by a few political officials who exceeded their proper authority. The internment was sanctioned by the U.S. Supreme Court and would likely have been overwhelmingly approved if put to a citizen referendum. The wrong done was collective and the duty to compensate arguably fell on all citizens of the United States. Of course, other cases of collective wrongs will be more controversial, depending on,

28. For a discussion of this case and efforts by the United States government to correct its transgression, *see* Leslie T. Hatayima, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1993). I do not deny that difficult problems arise in such cases with regard to determining to whom compensation is owed, how much compensation is owed, and which citizens can be required to contribute compensation.

among other things, one's theory of distributive justice.[29] My point here is simply that it seems a mistake to focus too narrowly on private wrongs in constructing accounts of corrective justice.

A second argument made by some legal theorists is that if corrective justice is ancillary to distributive justice, then corrective justice will not be a distinctive form of justice.[30] Disruptions to a distributively preferred status quo and correction of those disruptions will simply be matters of distributive justice. In particular, such disruptions will not be wrongs directly done to individuals, but will only be maldistributions within the larger distributive scheme. We will, then, have no need for the separate category of corrective justice, something the proponents of this argument appear to take as a *reductio* of the sort of position I support.

This argument is unconvincing in relation to utilitarian and Rawlsian liberal-egalitarian theories, both of which assign separate roles to the two forms of justice. In Rawls's theory, in particular, corrective justice does not serve simply to maintain or restore distributive justice. Rawls specifically rejects proposals that would have us determine transaction rules by reference to considerations of distributive justice. Utilitarians could likewise argue that overall utility will be best served if transaction rules are kept relatively simple and if distributive justice is the concern of larger social institutions. Even in relation to libertarian theories, the fear that corrective justice will not be distinct seems exaggerated. Libertarians are well able to distinguish the duties all of us have under distributive justice from what those wrongdoers have under corrective justice. The fact that there are such different duties is enough to distinguish the two even if corrective justice is, in libertarian theories, aimed more directly at maintaining distributive justice.

29. For instance, there is the abiding controversy in the United States about whether compensation in the form of preferential treatment in some form is owed to victims of past injustices.

30. *See* Weinrib, *supra* note 3, at 79; Benson, *supra* note 3, at 530–32; and Stephen R. Perry, *The Moral Foundations of Tort Law,* 77 IOWA L. REV. 451 (1992). Perry adds that if corrective justice is merely ancillary to a simple patterned theory of distributive justice, it will be difficult to maintain the traditional view that corrective justice is concerned only with interactions between people. Corrective justice would appear to be relevant no matter how a normatively preferred status quo was altered, even if, for instance, it was disrupted by a natural disaster. As Perry admits, this objection may hold only for rather simple patterned theories of distributive justice. It does not appear to hold for any of the theories I discuss. Libertarians would sharply distinguish between alterations to the status quo by right-violating agents and natural occurrences. The latter may not generate any duties of repair under corrective justice, though libertarians might urge members of the community to extend charity to victims of natural disasters. Liberal egalitarians and utilitarians might have us respond to victims of natural disasters, but could view this as falling under the larger welfare responsibilities of the state. Disruptions wrought by individuals would be viewed differently and, as I have argued, would likely generate duties of repair under tort compensation schemes. Of course, the question might be whether both types of repair are to be viewed as instances of corrective justice. Perhaps we need some other way of referring to the restoration of a preferred distribution when that distribution is upset by natural forces. In any case, I have argued that it is a mistake to conceive of corrective justice as being relevant only to transactions between and among individuals. If entire communities can have duties under corrective justice to individuals they wrong, then they could conceivably have such duties when nature does the wrong.

Third, it is argued that if corrective justice is normatively subordinate to distributive justice, then we will be forced to allow the introduction of distributive considerations into the context of corrective justice.[31] For instance, it is thought that the so-called Robin Hood defense would thereby become germane to tort law. That defense would allow an unjustly (according to some distributive justice criterion) disadvantaged defendant to escape liability if his tortious conduct was directed against the unjustly advantaged. More generally, it is suggested that judges and juries in tort cases would always have reason to consider the relative positions of defendants and plaintiffs in the existing distributive scheme and to tailor their judgments of liability to promote their favored distributive ideals. Richard Wright argues persuasively that not only would this corrupt corrective justice, but it would fail to promote effectively distributive justice.[32] The natural sweep of distributive justice would be truncated by its injection into specific contexts where it could only be advanced in highly limited and ad hoc ways.

This argument poses a difficulty for the Dependence Thesis only if that thesis entails that we should always interject broader issues of distributive justice into decisions about the appropriate occasions of corrective justice. However, the Dependence Thesis entails nothing of the sort for the theories of distributive justice I have sketched. Libertarians would clearly not have us introduce these types of concerns about distributive justice into corrective justice contexts. The role of the state is simply to enforce negative rights, primarily by holding those who violate them responsible for their actions. The state is not to allow or encourage violations in order to promote greater material equality, nor even to minimize overall right violations. For libertarians, the only questions relevant to corrective justice would be whether transaction rules were violated, who violated them and so is liable, and what must be done to restore the normative status quo ante. Libertarians would not countenance Robin Hood defenses by defendants or approve of efforts by judges or juries to deny victims compensation based on alleged injustices suffered by defendants.

Again, Rawls specifically rejects the idea that the rules governing transactions between and among individuals should aim at distributive justice. The subject of distributive justice is the basic structure of society. That structure provides the appropriate background institutions against which transactions among individuals can be fully free and fair. Against that backdrop, transaction rules should be enforced by, among other things, the mechanisms of tort law. To introduce larger considerations of distributive justice into the context of tort law would be, for Rawls, to unwisely conflate the different functions of distributive and corrective justice. Indeed, he uses arguments similar to those Wright invokes to indicate the

31. *See* Weinrib, *supra* note 3, at 79; Wright, *supra* note 3, at 702–706; and Benson, *supra* note 3, at 530.

32. Wright, *id.* at 704–706. *See also* Richard Wright, *Right, Justice, and Tort Law, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 6, at 159–82.

difficulties we would face in formulating transaction rules aimed at distributive justice.[33]

Utilitarians can similarly insist that attempts to implement distributive justice at the level of corrective practices are misguided. There is little reason to believe that judges or juries, operating with limited information, limited abilities, and on sporadic occasions, would have more success at promoting distributive justice than appropriately designed and situated political and economic institutions, operating with predictable tendencies over extended periods of time. Utilitarians could argue that utility will be better served, over the long term, if the occasions of corrective justice are governed by rules that require us to keep a narrower focus. These rules should be crafted with an eye to restoring plaintiffs' legitimate expectations when they are upset by the tortious actions of defendants.

A fourth argument, articulated by Ernest Weinrib, is that the choice of a distributive scheme is political and there are many to choose from, whereas corrective justice "is a single conception whose meaning is judicially elaborated in the different circumstances of its application."[34] Weinrib also maintains that judges are not appropriately situated to make decisions about which distributive scheme to adopt and promote. Such decisions are more aptly left to the legislature, yet this point seems distinct from his claim that distributive justice is subject to differing reasonable interpretations, whereas corrective justice is not.

In response, it is hard to know what to make of Weinrib's assertion that there is but one conception of corrective justice that simply has to be judicially elaborated in the different circumstances of its application. The extensive literature that has sprung up concerning the nature of corrective justice appears to cast doubt on Weinrib's claim. Certainly there is much debate among scholars about the precise character of corrective justice. Coleman has recently suggested that there is a core element to corrective justice that any plausible account must incorporate.[35] He admits, however, that theorists disagree about how to understand each of the three elements in the core.

Even if, appearances to the contrary, Weinrib's contention about corrective justice is defensible, his argument would only establish that the two forms of justice are different. By itself, this would not threaten the Dependence Thesis, especially if competing conceptions of distributive justice can each accommodate the single conception of corrective justice. I see no reason to think they cannot and have, in fact, attempted to show that they each can make sense of corrective justice practices that hold tortfeasors responsible for compensating those they injure through their actions.

Perhaps Weinrib's argument is that questions about which conception of

33. Rawls, POLITICAL LIBERALISM, *supra* note 11, at 267–68.

34. Weinrib, *supra* note 3, at 212.

35. Jules Coleman, *The Practice of Corrective Justice, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 6, at 66–67.

distributive justice to adopt are appropriately left to political bodies like legislatures, but that questions about which conception of corrective justice to adopt are not political in this way. Maybe the idea is that it is just obvious that we ought to adopt a certain conception of corrective justice, whatever our other differences over matters of distributive justice. Again, however, even if this argument is persuasive, it would not threaten the Dependence Thesis for the reasons just cited. Further, it seems a dubious argument. Surely there are political questions to be raised and discussed about whether injuries should be compensated, under what conditions they should be compensated, and by whom. It may be that only one answer to these questions is ultimately persuasive, but that is not obvious on its face.

I contend that, at best, the arguments offered by legal theorists demonstrate only that distributive and corrective justice play different roles within a larger normative political theory. Conceding this, however, poses no threat to the Dependence Thesis. This brings us to attempts by such legal theorists to articulate a normative conception of the occasions of corrective justice.

III. AN ALTERNATIVE ACCOUNT OF THE OCCASIONS OF CORRECTIVE JUSTICE

Those who argue for the independence of corrective justice from distributive justice realize that they must provide some normative criterion for determining the occasions of the former. We must have some way of identifying the types of interactions between and among individuals that are subject to correction. Put slightly differently, such theorists must provide us with some account of what people are morally entitled to. Because autonomy theorists eschew, for this purpose, reference to distributive justice, they must therefore articulate some other normative criterion to govern the occasions of corrective justice. Wright, Weinrib, and Benson all attempt to do so and in remarkably similar ways.[36] In what follows, I focus on Wright's account, both because it is representative and because it is the most clearly presented of the three.

Invoking Aristotle and Kant, Wright argues that corrective justice "deals with private interactions, and it requires that those interactions be consistent with the absolute moral equality of the parties to the interaction, which is reflected, *inter alia,* in the parties' equality of entitlement to their respective holdings."[37] Corrective justice aims at safeguarding a citizen's existing holdings from actions by others that are inconsistent with the former's absolute moral equality. It protects such holdings "regardless of the distributive justice or injustice of the overall division of resources among the parties

36. Wright, *supra* note 3, at 699–708, and *Right, Justice, and Tort Law, supra* note 32, at 171; Weinrib, *supra* note 3, at 76–83; and Benson, *supra* note 3, at 549–601.

37. Wright, *supra* note 3, at 701.

to the interaction or among the members of the community as a whole."[38] Thus, if an unjustly poor person intentionally or negligently harms an unjustly rich one, corrective justice requires the former to compensate the latter. Their respective holdings, or lack thereof, are to be treated as normative givens, and the only question is whether their interaction was morally deficient. Presumably, if one party intentionally or negligently injured another party, then the offending party owes the injured party compensation as a matter of corrective justice.

Wright's approach appears to construe corrective justice as largely a matter of, in Goodin's words, "righting procedural wrongs."[39] Taking the distributional status quo as a given, Wright would require the righting of wrongs that involve denials of equal moral status. As such, his account has some normative teeth. It would not require us to regard all historical tort compensation schemes, whatever their character and circumstances, as manifesting corrective justice. For instance, if a society's legal system made it a tortious act for members of one race to stare for too long (whether intentionally or negligently) at members of another race, Wright could plausibly maintain that such a tort scheme was not consistent with respecting the absolute moral equality of all the parties. In such a case, the existing rules governing transactions would themselves be an affront to the moral ideal Wright endorses.

But what about cases of societal injustice that have little to do with the rules governing transactions among individuals, and more to do with deeper structural or historical injustices that leave some individuals politically or economically subjugated to others, or that simply leave some individuals destitute? Wright's account commits him to regarding tort compensation schemes that restore status quo antes amidst larger social injustice as manifesting corrective justice, at least as long as such status quo antes have been disrupted in ways that flout the moral equality of the parties involved. As such, it is not obvious that Wright's position is more attractive than ones that make individuals' entitlements dependent on either larger structural features of society or the histories of those entitlements. Indeed, Wright's position seems counterintuitive in contexts marked by extreme background or historical injustices. Where such injustices render some individuals destitute, or leave them highly vulnerable to the economic or political power of other individuals, in what sense do tort compensation schemes that right the wrongs of the poor or oppressed against those who oppress them manifest any type of justice at all? It seems odd to say in such cases that such schemes are needed to affirm or restore the moral equality of the parties to the transactions. It seems more plausible to say that such corrective practices simply reinforce injustice and the denial of moral equality.

38. Wright, *Right, Justice, and Tort Law, supra* note 32, at 171.

39. Goodin, *supra* note 1, at 213. As such, Wright's position appears close to that of libertarians who reject correction of anything but recent injustices.

Wright's position may still be preferable if we assume that the Dependence Thesis requires us to introduce considerations of distributive justice into corrective justice contexts, or that it forces us to say that in the absence of distributive justice, there is no reason to restore status quo antes. Yet as we have seen, neither one of these assumptions follows from the Dependence Thesis. Stripped of such supporting arguments, Wright's position must stand on its own. My sense is that tying corrective justice to distributive justice in the way required by the Dependence Thesis gains us two distinct advantages over Wright's approach.

First, we thereby acquire the kinds of comprehensive critical perspectives on historical tort compensation schemes that are needed to assess them fully. Wright's approach appears weaker in that regard; it insists that we abstract from background and historical conditions that seem relevant to our assessment of corrective practices. Second, the Dependence Thesis better accounts for something that is surely true with regard to the assessment of tort compensation schemes—namely that there are several competing critical perspective on such schemes available. Wright's position will struggle with explaining such diversity. Although there may be disagreements about what must be done if individuals are to treat one another as moral equals, such disputes do not seem as deep or pervasive as those apt to ground alternative evaluations of the justice of corrective practices.

IV. CONCLUDING REMARKS

I have tried throughout this discussion to show not only that the Dependence Thesis is plausible, but that it is not vulnerable to the arguments offered by numerous legal theorists. As I have noted, there is great concern among legal theorists that tying corrective justice to distributive justice will (a) force us to conclude that historical tort practices in unjust societies never manifest corrective justice; (b) force us to conclude that we should introduce considerations of distributive justice into corrective justice contexts; or (c) force us to conclude that there is no moral reason to support historical corrective practices that do not manifest corrective justice.

However, the Dependence Thesis does not entail any of these conclusions, and accepting it would allow us to integrate the two kinds of justice into a political theory that provides a comprehensive critical perspective on all legal practices, including corrective ones.

There are, no doubt, other arguments against the Dependence Thesis to which I have not responded. And much remains to be said by way of elaborating and defending it. But I hope to have said enough to convince legal theorists to once again take it seriously.