

The Idea of Private Law

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3 Corrective Justice

3.1. Introduction

Aristotle's account of corrective justice¹ is the earliest—and in many respects, still the definitive—description of the form of the private law relationship. 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 bipolarity, its constrained standards of relevance, and its relationship to adjudication. His treatment of corrective justice reveals both what unites the private law relationship and what sets private law apart from other kinds of ordering. In the history of legal philosophy, private law is Aristotle's discovery.

Aristotle observed that what we would now call private law has a special structure of its own. Justice is effected by the direct transfer of resources from one party to the other.² The resources transferred simultaneously represent the plaintiff's wrongful injury and the defendant's wrongful act. Corrective justice thus treats the wrong, and the transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other.

Implicit in Aristotle's inquiry is the basic question of private law: what entitles a specific plaintiff to sue and recover from a specific

1. Aristotle, *Nicomachean Ethics*, V, 4 (Martin Ostwald, trans., 1962).

2. Aristotle is particularly interested in the structure of the relationship for which the award of damages (or the equivalent specific relief) is a rational response to the commission of the wrong. Since what matters is the conceptual structure of the relationship between the actor and the victim, his analysis does not require that a wrong actually has taken place or that damages actually have been awarded. His remarks are therefore as applicable to an injunction that prospectively restrains a wrong as to damages that retrospectively repair a wrong.

defendant? Aristotle realized that the answer to this question lies in the elucidation of the intrinsic unity of the plaintiff-defendant relationship. Only if the plaintiff and the defendant are linked in a single and coherent justificatory structure can one make sense of the practice of transferring resources directly from the defeated defendant to the victorious plaintiff. In his treatment of corrective justice, Aristotle sets out the most general representation of that structure.

Because he is primarily concerned with structure rather than substance, Aristotle's account of corrective justice is sparse and formal. Aristotle presents corrective justice in mathematical terms, as an equality between the two parties to a bipolar transaction. He contrasts corrective justice with distributive justice, conceived mathematically as a proportion in which each participant's share is relative to whatever criterion governs the distribution. Thus the difference between these two forms of justice is a difference between the mathematical operations that reflect their respective structures.

In this chapter I deal both with what is significant and with what is problematic in Aristotle's account. I begin by recapitulating Aristotle's position in a way that makes its formalism salient. Because the hallmark of this formalism is Aristotle's mathematization of justice, I shall have to give particular consideration to why Aristotle portrays corrective justice as a specific mathematical operation and what he thereby achieves. Then I shall argue, in response to modern criticism of Aristotle, that despite its abstraction from particular prescriptions, Aristotle's formalism is by no means empty. Aristotle's attention to structure enables us to appreciate both the internal coherence of the private law relationship and the categorical difference between private law and other legal orderings. For this reason 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 serious, because corrective justice remains opaque to the extent that the equality that lies at its heart is unexplained. However, the omission is also understandable, 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 explanation in terms of his own ethics.

In the final section of this chapter I attempt to fill in the lacuna in Aristotle's account by connecting corrective justice to Kant's legal philosophy. If my argument is correct, the equality of corrective justice is the abstract equality of free purposive beings under the Kantian concept 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 Kantian right in a single approach to the understanding of private law. Consideration of Aristotle's omission leads to Kant's legal philosophy, the subject of Chapter 4.

3.2. Aristotle's Account of Justice

3.2.1. 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 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 from his general treatment of ethics. For Aristotle, ethics is the study of virtues considered as excellences of character. Just as nothing can felicitously 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, that 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

3. *Nicomachean Ethics*, II, 6.

4. 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." *Nicomachean Ethics*, 1129a3.

different orientation than do 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 can justice be 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 adultery⁸ 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 practiced 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 holdings—wealth, honor, and security are Aristotle's examples.¹⁰ An excess or deficiency in one's holdings can be unjust quite apart from any vice of character.¹¹ Indeed, being deprived of one's due is not the exhibition of a dispositional vice at all, but the suffering of a wrong.

5. Id. at 1129b27, 1130a4, 1130a13.

6. Aquinas comments on the opening sentence of *Nicomachean Ethics* that "the virtues and vices discussed before 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." Thomas Aquinas, *Commentary on the Nicomachean Ethics*, vol. 1, 384 (C. I. Litzinger, trans., 1964).

7. *Nicomachean Ethics*, 1130a2. Aristotle's use of this phrase is provocative: it is the description of justice given by the immoral Thrasymachus in Plato, *Republic*, 343c (Allan Bloom, trans., 1968).

8. *Nicomachean Ethics*, 1129b20.

9. Id. at 1130a12.

10. Id. at 1130b2. Aristotle's term for justice in holdings is "partial justice," in distinction to the "perfection" and "completeness" that he ascribes to the justice that is coextensive with virtue. *Nicomachean Ethics*, 1130a14, 1129b26–1130a1, 1130a9. The term "justice in holdings" is not completely felicitous. See below, note 57.

11. Id. at 1130a15–1130a27.

Judgments of excess and deficiency about vices differ from judgments of excess and deficiency about unjust holdings. Judgments about vices compare the actual and ideal qualities of a single person. A reckless person, for instance, exhibits too much (and a coward too little) of the emotion which, if exhibited in proper measure, would make that very person courageous. Excess or deficiency in holdings, however, is interpersonal. The holdings of any one person can be termed “excessive” only in relation to the holdings of another. Whereas the excess and deficiency of vice is compared to a dispositional mean, the excess or deficiency of an unjust holding is relative to the holdings or the actions of others.

To capture the relativity of one’s holdings to the holdings or actions of someone else, Aristotle identifies equality as the mean of justice in holdings.¹² On the one hand, equality is a relational concept, because something is equal, not to itself, but only to something else.¹³ On the other hand, equality is a mean because it lies between the unjust excess of having too much compared with another and the unjust deficiency of having too little.¹⁴ Equality thereby serves as the mean applicable to the pure other-directedness of justice in holdings.

Thus although Aristotle sees both justice in holdings and the justice that is coextensive with virtue as other-directed, he draws a distinction between them. In the justice that is coextensive with virtue, equality plays no role: the external standpoint is merely grafted on to a virtue already intelligible in terms of a single person. In contrast, equality is the defining feature of justice in holdings, because justice in holdings is intrinsically other-directed.

Aristotle’s account of justice in holdings assimilates three ideas: justice, equality, and the mean. Aristotle encapsulates the function of these ideas in his remark that “*qua* mean, [justice] is between certain things (these are the more and the less); *qua* equal, it links two; *qua* just, it applies to certain persons.”¹⁵ The last member of this triptych defines the domain of justice: because justice is other-directed, the just applies to the relationship among persons, rather than to a person considered singly. The middle member sums up the formal principle

12. In so doing, Aristotle puts to theoretical use the common Greek notion that justice is a matter of *to ison*, an expression that denotes both fairness and equality. See *Nicomachean Ethics*, 1131a10–1131a14.

13. *Nicomachean Ethics*, 1131a15; see Thomas Aquinas, *Summa Theologiae*, II-II, 58, 2 (T. Gilby, trans., 1975).

14. *Nicomachean Ethics*, 1133b33.

15. Id. at 1131a17–1131a18. By “two” Aristotle means “at least two,” as is clear from the previous sentence.

that organizes this domain: equality represents the baseline for determining whether one has, compared with another, too much or too little. The first member distinguishes justice from injustice: justice is a mean that is intermediate between the injustices that consist in having more or having less than one’s equal share.

Aristotle’s identification of justice in holdings with equality does not imply that everyone’s holdings ought to be the same in quantity or value. His point is formal. Like equality, justice in holdings orders the relationship between distinct entities; like equality, justice in holdings is disturbed by excess or shortfall. In maintaining that in every just arrangement the parties are equals, Aristotle is not committed to any particular set of holdings or to any particular criterion of equality. Equality is merely a way of representing the norm that injustice violates.

3.2.2. Distributive and Corrective Justice

The idea of equality allows Aristotle to describe justice in holdings as mathematical operations. Justice functions for holdings as equality functions for mathematical terms. In mathematics, equality relates one term to another through an equal sign. The specific arrangement of the terms on either side of an equal sign, however, depends on the mathematical operation being performed. Just as different mathematical operations link various elements in different ways, so justice in holdings has different ways of ordering the relations among persons. Aristotle calls these different modes of ordering the “forms”¹⁶ of justice.

Justice in holdings assumes two contrasting forms: distributive justice and corrective justice. Each of these forms regulates holdings through a different mathematical operation. Injustice consists in having more or less than the equal allotment due under one or the other of these mathematical operations.

In introducing the two forms of justice, Aristotle remarks that distributive justice occurs “in distributions” and corrective justice occurs “in transactions.”¹⁷ “Distributions” and “transactions” are general terms that refer to all the particular manifestations of the two forms of justice. A transaction is an interaction regulated in conformity to corrective justice. Similarly, a distribution is an arrangement that has

16. Id. at 1130b31, 1131b27.

17. Id. at 1131a1, 1131b25, 1131b31.

the structure of distributive justice. Distributive and corrective justice are “in” distributions and transactions as the modes of ordering implicit in these arrangements.

Distributive justice divides a benefit or burden in accordance with some criterion. An exercise of distributive justice consists of three elements: the benefit or burden being distributed, the persons among whom it is distributed, and the criterion according to which it is distributed. The criterion determines the parties’ comparative merit for a particular distribution. The greater a particular party’s merit under the criterion of distribution, the larger the party’s share in the thing being distributed. Thus distributive justice corresponds to a mathematical operation in which a series of equal ratios align comparative shares with comparative merit. Aristotle explains this operation in the following passage, in which *A* and *B* represent the parties to the distribution, and *c* and *d* their relative shares:

Consequently, the just is something proportionate . . . Proportion is equality of ratios and involves at least four terms. The just, too, involves at least four terms, and the ratio [between the terms of one pair] is equal [to that between the terms of the other], for persons and things are similarly distributed. Therefore, $A:B = c:d$ and, by alternation, $A:c = B:d$ Consequently, the combination of term [person] *A* with term [share] *c* and of term [person] *B* with term [share] *d* is just.¹⁸

Distributive justice, in other words, consists in an equality of ratios.¹⁹

In contrast, corrective justice features an equality of quantities.²⁰ It focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner. Corrective justice embraces quantitative equality in two ways. First, because one party has what belongs to the other party, the actor’s gain is equal to the victim’s loss.²¹ Second, what the parties would have held had the wrong not occurred provides the baseline from which the gain and the loss are computed. That baseline, accordingly, functions as the mean of equality for this form of justice. Of course this equality is a notional

18. Id. at 1131a29–1131b10. The words enclosed by square brackets are clarifications that Martin Ostwald has inserted in the text of his translation.

19. Aristotle terms this kind of equality “geometrical.” Id. at 1131b13.

20. Aristotle terms this kind of equality “arithmetical.” Id. at 1132a30.

21. Aristotle notes the difficulty of conceiving of personal injuries in this way. Id. at 1132a10. For a discussion and proposed resolution of the difficulty, see Chapter 5.

one. Equality consists in persons’ having what belongs to them.²² The parties do not have the same quantity of holdings, but they are equal as the owners of whatever they do have. This equality is a mean because the parties have neither more nor less than what is theirs.

These two aspects of quantitative equality are interconnected. The quantitative equality of gain and loss is the basis for the simultaneous annulment of both in corrective justice. There would be no point, however, in concentrating on this quantitative equality unless the annulment vindicated equality in some sense. For if the initial sets of holdings embodied only an inequality, the subsequent gain by one party at the expense of another, to the extent that it mitigated the initial inequality, would itself be just. Thus attention to the equality of gain and loss in corrective justice presupposes the notional equality of initial holdings, and the annulment of those gains and losses affirms that initial equality.

A violation of corrective justice involves one party’s gain at the other’s expense. As compared with the mean of initial equality, the actor now has too much and the victim too little. Because the actor has gained what the victim has lost, equality is not restored merely by removing the actor’s gain (which would still leave the victim with a shortfall) or by restoring the victim’s loss (which would still leave the actor with an excess). Rather, corrective justice requires the actor to restore to the victim the amount representing the actor’s self-enrichment at the victim’s expense.²³

3.3. The Bipolarity of Corrective Justice

Presenting corrective justice as a quantitative equality captures the basic feature of private law: a particular plaintiff sues a particular defendant. Unjust gain and loss are not mutually independent changes in the parties’ holdings; if they were, the loss and the gain could be restored by two independent operations. But because the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost.

Without some conception such as Aristotle’s, private law’s linking of the particular parties becomes a mystery. For Aristotle, the defendant’s gain at the plaintiff’s expense justifies simultaneously diminishing the defendant’s resources and augmenting the plaintiff’s. In con-

22. Id. at 1132a28–1132a29.

23. Id. at 1132a32–1132b5.

trast, to reject Aristotle is to postulate that the reason for taking resources from the defendant is not the same as the reason for giving resources to the plaintiff. But then, how could reasons separately applicable to the two parties justify directly *linking* the two parties? And even if a set of reasons embraced both parties, how could such reasons exclude others, so as to enable *this* plaintiff to recover from *this* defendant? Once plaintiff and defendant are separated, the reason for diminishing the defendant's resources will connect the defendant not to the plaintiff but to other persons to whom that reason applies, without justifying the plaintiff's singling out the defendant. Similarly, the reason for increasing the plaintiff's resources will connect the plaintiff to others who are similarly circumstanced, without providing a reason for holding the defendant liable to the particular plaintiff.²⁴

In Aristotle's account of corrective justice, quantitative equality pairs one party with another. Corrective justice treats the defendant's unjust gain as correlative to the plaintiff's unjust loss. The disturbance of the equality connects two, and only two, persons. The injustice that corrective justice corrects is essentially bipolar.

The bipolarity of corrective justice is also evident in its conception of interaction. Aristotle repeatedly describes the two parties to corrective justice as being active and passive with respect to each other. Corrective justice looks to "whether one has committed and the other has suffered injustice, and if the one has harmed and the other been harmed."²⁵ The injustice of battery and murder, for instance (in Aristotle's words, "when one has hit and the other has been hit, and when one has killed and the other has been killed"), lies in the fact that "the doing and the suffering have been unequally divided."²⁶ Just as when

24. Assume, for example, that tort liability combines the rationale of deterrence for careless defendants and compensation for injured plaintiffs. Deterrence would be applicable to all those who are careless, even if their carelessness did not result in injury to the plaintiff, and there would be no reason for the plaintiff to recover from one careless person rather than another. Similarly, compensation would be justified for all who are as disabled as the plaintiff, so that there would be no reason for any particular disabled person to recover from his or her injurer. On the impossibility of making sense of the plaintiff-defendant relationship through considerations, such as deterrence and compensation, that apply independently to each party and others similarly situated, see above, section 2.7.2.

25. *Nicomachean Ethics*, 1132a5–1132a6.

26. Id. at 1132a8–1132a9. The language of division (*dieiretai*) does not imply distribution (*nome* or *dianome*). Aquinas explains Aristotle's reference to unjust division as follows: "[T]his division of action and passion brings about inequality because the assailant and the murderer have more of what is esteemed good, inasmuch as they have done their own will and so seem as it were to have gained. But the man who is

the equality of corrective justice is disturbed, one person's gain necessarily entails another's loss, so the doing of injury by one entails the suffering of injury by another. The correlativity of gain and loss supervenes on the correlativity of one person's doing and another's suffering harm.

The bipolarity of corrective justice also fashions the remedy, that is, the rectification, that corrective justice accomplishes. The rectification responds to—indeed corresponds to—the injustice that is being rectified. Because the defendant has realized a gain correlative to the plaintiff's loss, the correction entails a loss to the defendant that is simultaneously a correlative gain to the plaintiff. In this way the rectification reverses the unjust act by undoing the excess and the deficiency that constitute the injustice.

The agent of this rectification is the judge. Aristotle connects adjudication to the bipolarity of corrective justice by deriving the word for judge (*dikastes*) from *dicha*, split in two.²⁷ Aristotle compares the judge to a geometer. We are to imagine a line divided into unequal segments. The judge is like one who reestablishes the midpoint of the line, thereby reattaching to the smaller segment the amount by which the larger segment exceeds the half.²⁸ By splitting the line into two equal parts, the judge vindicates quantitative equality. "For when the whole has been divided into two (*dicha*), then people say they have what belongs to them when they take equal parts."²⁹ This fanciful etymology draws attention to the regulative function of quantitative equality. A controversy in corrective justice involves an allegation that the defendant has disturbed the equality pertaining to transactions. The parties to the dispute "have recourse to the judge. To go to the judge is to go to justice; for the judge means to be justice ensouled."³⁰ For Aristotle, the judge is the living representative of the quantitative equality between the parties.

Thus the bipolar nature of corrective justice has many aspects. Corrective justice embraces: a bipolar conception of interaction that relates the doer of harm to the sufferer of that harm; a bipolar conception of injustice as a violation of quantitative equality; a bipolar

wounded or murdered has more of evil insofar as he is deprived against his will of well-being or life, and so he seems, as it were, to have suffered loss." Aquinas, *Commentary on the Nicomachean Ethics*, vol. 1, 411.

27. *Nicomachean Ethics*, 1132a30–1132a32.

28. Id. at 1132a21–1132a32.

29. Id. at 1132a27–1132a29.

30. Id. at 1132a22.

conception of damage as a loss by the plaintiff correlative to the defendant's gain; a bipolar conception of the adjudicative process as a vindication of the quantitative equality of the litigants; and a bipolar conception of the remedy as the annulment of the parties' correlative gain and loss.

3.4. Kelsen's Critique

What does Aristotle's treatment of justice in holdings as two different mathematical operations achieve? At first blush, the assimilation of justice to mathematics appears to be an inconsequential conceit: merely evidence of the stylishness of mathematics in the philosophical discourse of the ancient Greeks. At best, Aristotle's account of justice seems an exercise in pointless elegance; at worst, a sham that presents metaphors as solutions.

This indeed was Hans Kelsen's view. In a well-known critique,³¹ Kelsen argued that Aristotle merely stated in an elaborate and tortuous way the tautology that justice consists in rendering to each his due. What is required, according to Kelsen, is a mechanism for determining what *is* each person's due, and this Aristotle does not provide. This failure on Aristotle's part was inevitable, Kelsen claimed, because the formula "to each his own" is a tautology devoid of specific content.

This criticism exploits the fact that the corrective justice and the distributive justice of Aristotle's account are formal categories, not substantive prescriptions. Aristotle's outline of distributive justice, for example, does not present an ideally just set of arrangements against which all distributions can be measured. His representation of distributive justice as an equality of proportions under a criterion of merit suggests neither the relevant indicia of equality nor the optimal criterion of merit. As Kelsen rightly remarks, given the inevitable existence of differences of age, sex, wealth, and so on, "[t]he decisive question for social equality is: Which differences are relevant? To this question Aristotle's mathematical formula of distributive justice has no answer."³² And as for the criterion, Aristotle himself notes that different political philosophies are committed to different conceptions of merit. "Everyone agrees," Aristotle observes, "that in distributions the just shares must be given on the basis of what one deserves, though not everyone would name the same criterion of deserving: democrats

31. Hans Kelsen, *What Is Justice?* 125–136 (1957).

32. *Id.* at 127.

say it is free birth, oligarchs that it is wealth or noble birth, and aristocrats that it is excellence."³³

Aristotle's description of corrective justice is similarly devoid of specifics. None of the issues that preoccupy modern scholars of private law—the standard of liability in tort law, the measure of damages in contract law, and the definition of causation, for example—receives any attention. Instead, Aristotle presses the obvious point that, because a defendant who has taken something from a plaintiff has a comparative excess of twice the amount taken, the initial equilibrium is restored when the defendant returns to the plaintiff the amount taken. For Kelsen, restoring a quantity "is no solution to the problem of just return . . . [i]t is only another way of presenting the problem."³⁴

One can expand Kelsen's criticism to include Aristotle's failure to value one form over the other. Modern thinkers often assert the superiority of one of the forms of justice. Sometimes the issue is localized to a given set of problems, as when one advocates that the regulation of personal injury through the corrective justice system of tort law be replaced by a distributive system of social insurance.³⁵ Sometimes the issue is more general, as when one claims for corrective justice a moral force so strong that it leaves no room for an independent notion of distributive justice.³⁶ Aristotle offers no assistance in these controversies. He presents the two forms and contrasts the mathematical operations that each embodies, but he gives no grounds for preferring one over the other.

Although these criticisms accurately point to Aristotle's omissions, they are nonetheless misguided. The strength of Aristotle's treatment of justice lies precisely in the differentiation between corrective and distributive justice. Even if, as Kelsen argues, each of the forms taken separately is tautologous, this does not mean that Aristotle's account as a whole is tautologous. The two forms of justice may be reducible to the empty formula "to each his own," but the emptiness is not the same for both. Corrective and distributive justice both require that every person be given his or her due, but what is due under corrective justice is due correctively and not distributively, and what is due under distributive justice is due distributively and not correctively.³⁷ Even if

33. *Nicomachean Ethics*, 1131a25.

34. Kelsen, *What Is Justice?* 130.

35. E.g., Marc A. Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement," 53 *Virginia Law Review* 774 (1967); Stephen D. Sugarman, "Doing Away with Tort Law," 73 *California Law Review* 555 (1985).

36. E.g., Robert Nozick, *Anarchy, State, and Utopia*, 149–160 (1974).

37. Aquinas, *Summa Theologiae*, II-II, Q. 61, Art. 1, ad 5.

empty, each form of justice has its own emptiness and not the other's. The tautology that Kelsen alleges is itself qualified by Aristotle's distinction between corrective and distributive justice.

Kelsen says that a form of justice is a "way of presenting the problem of just return," and he criticizes Aristotle for not offering a solution. But before criticizing the absence of a solution, we should explore Aristotle's formulation of the problem. For without a correct formulation of the problem, no solution will be adequate; and, conversely, the formulation of the problem presumably imposes a certain structure on the solution and is, therefore, the first step in its discovery. Indeed, one consequence of Aristotle's account is to cast doubt on Kelsen's own reference to "*the* problem of just return." For by dividing justice into corrective and distributive, Aristotle indicates the existence of *two* different problems of just return.

Although Aristotle presents no specific content for the forms of justice, the forms (as I shall now argue) are nevertheless decisive for whatever content one might consider. These forms are structures for coherent justification. Accordingly, even without offering solutions Aristotle contributes fundamentally to our understanding of problems of just return.

3.5. The Forms as Classifications

To see the significance of the forms of justice, we must first understand how they further Aristotle's insight that justice is other-directed. Since Aristotle views justice as the domain of external relationships, the external perspective obtains both for justice in holdings and for the justice that is coextensive with virtue. But whereas the justice that is coextensive with virtue adds an external standpoint to the internal phenomenon of character, justice in holdings deals with inherently external relationships. Dividing justice in holdings into corrective and distributive justice is a way of classifying those relationships. What kind of classification is it?

Broadly speaking, classification of external relationships can be either empirical or conceptual. Empirical classification observes the physical or social world upon which justice operates, and cuts that world into different slices. One might, for instance, divide the realm of justice according to legally significant effects. For example, if the occurrence of physical injury were such an effect, one would group together the various ways (tort law, insurance contracts, safety regulation, state welfare provisions, public compensation schemes, and so

on) in which the law involves others, directly or indirectly, in the handling of someone's injury. Or one might divide the empirical world on the basis of the different causes of legally significant effects. (The Talmudic law of torts, for example, begins by classifying tortious injuries under paradigm causes, such as oxen, pits, and fires.)³⁸ Or one might base the classification on the different roles of the interacting persons (corporate directors, insurance agents, the manufacturers of products, and so forth) and on the legal incidents that attach to each of these roles.

In contrast, a conceptual classification of external relationships looks at the different ways in which one can conceive of the operations of justice. The focus is not on the empirical world that makes up the subject matter for the operations of justice, but on the structure of the operations. Conceptual classification does not work in an empirical vacuum that ignores effects or causes or social roles; the point is rather that the empirical factors do not themselves function as organizing principles. What matters is how the constituent elements of the external relationships of justice stand toward one another. The issue that animates a conceptual classification is: how can one understand the relationships of justice as relationships?

Aristotle's classification is conceptual. Having identified the subject matter of justice in holdings as the relationship of one person to another through their respective holdings, he examines the different dynamics possible among the constituent elements of such relationships. His focus is not on persons and holdings as the discrete elements connected, but on the different forms of the connection. Given that justice in holdings has the external focus of direction (as Aristotle puts it) "toward another," he explicates the possible meanings of "toward."

This conceptualism is evident in the abstractness of Aristotle's presentation. He works with the broadest possible conceptions of the components of justice in holdings, namely, the persons entitled to the holdings and the holdings to which they are entitled. Further particularization of persons or holdings is irrelevant, because conceptual differences in kinds of relationship do not vary with who specifically holds what. He combines persons and holdings in a correspondingly broad way, because the more abstractly he can portray the operations of justice, the more salient he can render the conceptual differences between the kinds of external relationship. Accordingly, he formu-

38. *Babylonian Talmud, Baba Kamma* 2a (I. Epstein, trans., 1935).

lates the operations of justice in language so abstract that they assume the shape of operations of mathematics.

Because Aristotle's classification is conceptual rather than empirical, corrective justice and distributive justice differ in structure, not subject matter.³⁹ Neither corrective nor distributive justice lays exclusive claim to a certain slice of the empirical world. Both forms of justice have as their subject matter the things and events that figure in external relations among persons; they differ in the structure of the operation that each performs upon those things and events. Just as proportions and quantities can both apply to any numbers,⁴⁰ so either of the forms of justice can apply to any external incident.

To take a modern example, the legal regime of personal injuries can be organized either correctively or distributively. Correctively, my striking you is a tort committed by me against you, and my payment to you of damages will restore the equality disturbed by my wrong. Distributively, the same incident activates a compensation scheme that shifts resources among members of a pool of contributors and recipients in accordance with a distributive criterion. From the standpoint of Aristotle's analysis, nothing about a personal injury as such consigns it to the domain of a particular form of justice. The differentiation between corrective and distributive justice lies not in the different subject matters to which they apply, but in the differently structured operation that each performs on a subject matter available to both.

Corrective and distributive justice reflect two different conceptions of interaction. In corrective justice the interaction of the parties is

39. Aquinas makes this point specifically in *Summa Theologiae*, II-II, Q. 61, Art. 3.

40. Aquinas, in fact, explains the difference between the two mathematical operations by showing how the same numbers (6 and 4) can figure in each: "He [Aristotle] says first that the just thing that exists in transactions agrees somewhat with the just thing directing distributions in this—that the just thing is equal, and the unjust thing, unequal. But they differ in the fact that the equal in commutative justice is not observed according to that proportionality, viz., geometrical, which was observed in distributive justice, but according to arithmetical proportionality which is observed according to equality of quantity, and not according to equality of proportion as in geometry. By arithmetical proportionality six is a mean between eight and four, because it is in excess of the one and exceeds the other by two. But there is not the same proportion on the one side and the other, for six is to four in a ratio of three to two while eight is to six in a ratio of four to three. On the contrary by geometrical proportionality the mean is exceeded and exceeds according to the same proportion but not according to the same quantity. In this way six is a mean between nine and four, since from both sides there is a three to two ratio. But there is not the same quantity, for nine exceeds six by three and six exceeds four by two." Aquinas, *Commentary on the Nicomachean Ethics*, vol. 1, 410.

immediate; in distributive justice it is mediated through a distributive arrangement. Corrective justice joins the parties directly, through the harm that one of them inflicts on the other. Aristotle represents this immediacy in mathematical terms by identifying the victim's loss with the injurer's gain. In distributive justice, by contrast, the parties interact not directly but through the medium of a distributive scheme. Instead of linking one specific party to another, distributive justice links all parties to the benefit or the burden that they jointly share.

Corresponding to the distinction between immediate and mediated interaction are two different structures of injustice. An unjust advantage in a distributive context is an overdrawing of a common resource that diminishes the benefit available to the other participants in the distribution. Such overdrawing, however, affects any one of those other participants only derivatively: they receive less individually because there is less for all to share. Under corrective justice, by contrast, the wrongdoer directly diminishes the holdings of the sufferer, so that a single operation enriches the former at the expense of the latter. Under corrective justice, unlike distributive justice, the injustice immediately implicates a specific victim.

By presenting the forms of justice mathematically, Aristotle formalizes the distinction between immediate and mediated interaction, thereby allowing the implications of that distinction to emerge with particular clarity. The contrast between proportional and quantitative equality guarantees the categorical nature of the distinction between the corresponding forms of justice. The two forms of justice are no more reducible to each other than are the two kinds of equality. The difference in their mathematical representations shows that each form of justice is independent of the other and has its own integrity.

The contrast between the equalization of quantities in corrective justice and the equalization of proportions in distributive justice is especially evident in the number of parties that each can embrace. Because the transfer of a single quantity increases one amount at the expense of another, it can occur only between two amounts. Accordingly, the form of justice that Aristotle describes as an equalization of quantities is restricted to two parties at a time, with each interacting pair being treated discretely. In contrast, a series of equal proportions can be continued infinitely. Aristotle's mathematical representation of distributive justice mirrors the open-endedness of the number of parties that can participate in a distribution. Whereas the addition of parties in corrective justice is inconsistent with its structure, the addi-

tion of parties in distributive justice merely decreases the size of each person's share in the subject matter of the distribution.⁴¹

Moreover, the contrast between the two mathematical operations certifies that the two forms of justice cannot be integrated into a broader form. No single mathematical operation combines proportionate and quantitative equality, because no single mathematical operation can have both a restricted and an open-ended number of terms. Similarly, there is no overarching form of justice into which corrective and distributive justice can be dissolved.⁴²

The categorical distinctiveness of the two forms of justice and the absence of any overarching form that might unite them mean that corrective and distributive justice are comprehensive and fundamental modes of ordering external relationships. They are comprehensive because they map justice in holdings through the barest and most inclusive abstractions: persons, holdings, immediate interaction, and mediated interaction. They are fundamental because there are no larger conceptions of interaction that embrace these mutually irreducible forms.

3.6. The Juridical Significance of the Forms

What does the contrast between corrective and distributive justice signify for the functioning of a legal system? The answer to this question lies in considering the forms of justice as modes of *ordering*.

Corrective and distributive justice are modes of ordering because they represent the different ways in which external relationships can be coherent. Coherence signifies a unified conceptual structure, the constituents of which express a single idea. Justice in holdings necessarily involves a plurality of elements, namely, the interacting parties and their holdings. Aristotle's forms of justice are two ways of organizing these elements into integrated wholes.

In distributive justice, the criterion of distribution expresses the

41. To be sure, certain distributions involve no more than two parties. That, however, is merely a contingent feature of those particular distributions, rather than an essential quality of distributions as such. In contrast, bipolarity is a defining characteristic of transactions under corrective justice. See above, section 3.3.

42. Even if we formulate corrective justice in distributive terms ("to each of these two litigants in accordance with the corrective criterion of liability"), we do not eradicate the conceptual difference between corrective and distributive justice or employ some overarching form that integrates them. In this formulation distributive justice does no work, but merely supervenes verbally upon the still independent functioning of corrective justice.

group's collective unity. The criterion is the principle that relates the persons to their holdings and to one another. It represents the purpose common to the parties *qua* participants in the distribution. The holding of shares pursuant to that criterion is the concrete manifestation of the governing criterion. Thus the criterion is what renders the distribution a single structured arrangement, rather than a random collection, of goods and persons.

In corrective justice, however, the unity of the plaintiff-defendant relationship lies in the very correlativity of doing and suffering harm. In Aristotle's language of gain and loss, the gain that consists in doing is also a loss that consists in suffering. Corrective justice construes the doing and the suffering of harm as the active and the passive aspects that together constitute a single unit of juridical significance. When the defendant harms the plaintiff, neither the doing nor the suffering counts independently of the other. The doing of harm is significant only because of the suffering that is correlative to it, and vice versa. The doing and the suffering are, for purposes of corrective justice, not two separate events but the two correlative aspects of a single event.

Corrective and distributive justice provide the most abstract representations of the unity of justificatory considerations. If these considerations elaborate what the doer of harm owes to the sufferer of harm, they have the shape of corrective justice; if they point to the desirability of dividing a benefit or burden among a group, they have the shape of distributive justice. Thus the two forms of justice are structures of justificatory coherence: the terms "corrective" and "distributive" apply to an external relationship by applying to the type of justification that supports that relationship.⁴³

Because corrective and distributive justice are the categorically different and mutually irreducible patterns of justificatory coherence, it follows that a single external relationship cannot coherently partake of both. Aristotle's contrast of corrective and distributive justice does not determine whether the law should treat an incident correctively or distributively. But if the law is to be coherent, any given relationship cannot rest on a *combination* of corrective and distributive justifications. When a corrective justification is mixed with a distributive one, each necessarily undermines the justificatory force of the other, and the relationship cannot manifest either unifying structure.

This conclusion has far-reaching consequences for private law. To

43. Robert Nozick, *Anarchy, State, and Utopia*, 27 (1974) ("the term 'redistributive' applies to the types of reasons for an arrangement rather than to an arrangement itself").

the extent that private law relationships are characteristically bipolar, their coherence is a matter of corrective justice. The bipolarity of corrective justice is evident in the lawsuit, which takes the form of an action by the plaintiff against the defendant for harm that the plaintiff has suffered at the hands of the defendant. Similarly, the concepts and many of the principal doctrines of the common law—for example, offer and acceptance, consideration, unconscionability, and expectation damages in contract law,⁴⁴ and causation, fault, and compensatory damages in tort law⁴⁵—reflect the bipolarity of private law relationships. Inasmuch as such relationships are coherent, the justificatory considerations that underlie them have the structure of corrective justice. And if courts are to maintain this coherence, their reasoning about these relationships will also have to adhere to the contours of corrective justice.

Conversely, the introduction of distributive considerations renders these relationships incoherent. Admixing distributive considerations into the corrective framework of private law precludes the relationship from attaining the coherence of either corrective or distributive justice. It precludes the former because it introduces considerations that are alien to the immediate interaction of doer and sufferer. It precludes the latter because the bipolarity of private law institutions and concepts truncates the natural reach of distributive principles. And it precludes a coherent mixture of the two because no such mixture is possible within a single legal relationship.

To illustrate this point, consider again the example, discussed in Chapter 2, of spreading losses through tort law, and recall that the justificatory considerations that underlie causation and loss-spreading frustrate each other, because they do not form a single interlocking justification. Expressed in the terms of Aristotle's analysis, the difficulty is that the introduction of loss-spreading into tort law mixes corrective and distributive justice. The principle that accident losses should be distributed so as to minimize their felt impact has the proportional structure of distributive justice—it mandates the sharing of burdens in accordance with a criterion. Its use in tort law, however, fails to achieve distributive justice, because continuing the proportion by applying the principle to everyone within its reach is inconsistent with its being channeled through the doer and sufferer of a single harm. Conversely, since the issue of how the loss is ultimately spread

44. See below, section 5.6.2.

45. See below, Chapter 6.

is not germane to the relationship of doing and suffering as such (indeed the best conduit for loss-spreading might be some third party), the orienting of tort law toward loss-spreading cannot adequately actualize corrective justice. The combination of elements from both forms of justice ensures that neither form is achieved. And since coherence consists in having a legal relationship reflect one of the forms of justice, loss-spreading as a tort doctrine is incoherent.

The problem with combining corrective and distributive justice within a single relationship is that distributive justice splits asunder what corrective justice joins together. Corrective justice involves the intrinsic unity of the doer and the sufferer of the same harm. A distributive criterion disassembles this unity by selecting a feature morally relevant to only one of the parties to the transaction. It then groups that party with other persons to whom that feature applies and who therefore should also be subject to the burden or the benefit to be distributed. Thus the distributive criterion has a vitality of its own that is not confined to the transaction whose unity it has decomposed. Rather, it floats free to cover all the persons who fall under its independent sway.

Aristotle's account of corrective and distributive justice outlines the modes of ordering that inform legal arrangements. As Kelsen observes, Aristotle does not specify the content of justice. This formalism, however, is not a defect. Aristotle's assimilation of the forms of justice to different mathematical operations demonstrates that the forms are categorically different and mutually irreducible. Thereby they represent the contrasting structures of justification that underlie the coherence of external relationships.

3.7. Corrective Justice as Form

Corrective justice is the form of the private law relationship. As shown in Chapter 2, form involves the integration of three aspects: unity, kind, and character. Corrective justice embraces these three aspects as they apply to the private law relationship.

The correlativity of gains and losses is a way of representing the unity of the private law relationship. Because they are correlative, a gain cannot be considered independently of a loss. When mapped onto the private law relationship, this correlativity ties the parties to each other. Corrective justice thus treats the plaintiff-defendant relationship as a single normative unit.

Corrective justice also defines a distinct kind of legal relationship.

The equalization of correlative gain and loss is a categorically different operation from equalization within a series of proportions. Only in an interaction of two parties can gain and loss be correlative to each other; no such limitation applies to the sharing of burdens and benefits under distributive justice. Corrective justice thus constitutes a distinctive justificatory structure that informs the bipolar relationships of private law.

Finally, corrective justice reflects the character of private law. The most distinctive feature of private law, expressed both in its procedures and in its doctrines, is the bipolarity of the relationship between the parties. By representing this bipolarity through correlative gains and losses, corrective justice singles out a particular plaintiff and a particular defendant and makes the duties of one correlative to the rights of the other.

Corrective justice brings together the aspects of unity, class, and character in a single approach to legal intelligibility. It is because the correlative gain and loss represent a distinctive unity that the structure of corrective justice differs from that of distributive justice. Conversely, the categorical difference between corrective and distributive justice means that the introduction of distributive considerations into corrective justice not only blurs separate categories but brings incoherence to the plaintiff-defendant relationship. Moreover, open-ended distributive considerations are incompatible with the bipolar link between the parties that characterizes the doctrines and institutions of private law. Thus under corrective justice, unity, kind, and character are the mutually reinforcing aspects of a formal understanding of private law.

3.8. The Problem of Equality in Corrective Justice

There is, however, a troubling lacuna in Aristotle's explication of corrective justice. Aristotle's corrective justice presupposes the equality of the two parties to a transaction.⁴⁶ The problem is: in what respect are the parties equal?

This question is fundamental. Corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours. Because Aristotle conceptualizes violations of corrective justice as disturbances of the equality between the parties, he rests the entire normative weight of corrective justice on that equality. Con-

46. *Nicomachean Ethics*, 1132a2–1132a5.

sequently, we cannot understand the normative character of corrective justice until we elucidate the normative significance of its equality.

The closest Aristotle comes to addressing the problem is in an important but very obscure passage, just after he introduces corrective justice by contrasting its quantitative equality with the proportional equality of distributive justice. He remarks: "Whether a worthy person has taken something from an unworthy person or vice versa, makes no difference nor whether a worthy or a worthless person has committed adultery; but the law looks to the difference in the harm alone, and it treats them as equals, if the one commits and the other suffers injustice, and if the one has inflicted harm and the other has suffered harm."⁴⁷ This sentence describes the equality of corrective justice first in terms of what does not matter and then in terms of what does. The parts of the sentence on either side of the semicolon formulate the identical point negatively and positively. We must understand each side in a way that harmonizes with the other.

The first part of the sentence formulates the equality of corrective justice negatively, by pointing to a consideration that corrective justice excludes. The passage's context (the contrast with distributive justice) and content (the distinction between worth and harm) enable us to supply the reason that moral or social worth is irrelevant to corrective justice. Such worth (or lack of it) is a quality of persons as individuals; it is not, in and of itself, part of a process through which the worthy (or unworthy) person does a particular harm or wrong to someone else. To factor moral or social worth into justice in holdings, one must link persons to one another not through the correlativity of doing and suffering harm but through a comparison of the degree to which they each have such worth. This comparison could serve as a criterion under the proportional equality of distributive justice ("To each according to his or her worth"), but it could not constitute the purely bipolar link reflected in the quantitative equality of corrective justice. The immediate interaction of corrective justice allows no place for considering the various degrees to which the individuals have qualities that might be the basis of a mediating proportion under distributive justice.

Aristotle here is implicitly suggesting a distinction between the forms of justice that goes beyond this specific illustration: Whereas the proportional equality of distributive justice involves comparing the parties by reference to some criterion, the equality of corrective justice

47. *Id.* at 1132a2–1132a6.

excludes *all* comparative assessments. Corrective justice is therefore as unmindful of the parties' comparative wealth or need, for example, as it is of their comparative virtues or social positions.

The second part of the sentence, which highlights the significance of harm, formulates the equality of corrective justice positively. Equality in corrective justice does not reside in what one is in comparison to another, but in what the one has done to the other. As Aristotle elsewhere notes, the logic of correlativity implies equality, because in the correlativity of doing and suffering harm, anything predicated of the doer can equally be predicated of the sufferer.⁴⁸ Corrective justice puts this logic to normative use by construing the immediate interaction as itself expressing (or if wrongful or harmful, disturbing) the just equality between the parties, which, for its part, exists in and through such interaction.

The question therefore remains: how are a normative equality and the possibility of its violation implicit in the correlativity of doing and suffering? To this Aristotle provides no answer. Nonetheless, he says enough to eliminate one initially plausible possibility.

One might suppose that although corrective justice is concerned with immediate interactions, the equality toward which it works is the proportional equality of distributive justice. Corrective justice presupposes the existence of entitlements, which, presumably, are the creation not of corrective justice itself but of distributive justice. On this view, the function of corrective justice is to preserve a given distribution of wealth.⁴⁹ Accordingly, the equality presupposed in transactions is the proportional equality of distributive justice.

This answer is unsatisfactory. At this point Aristotle is explaining how corrective equality *differs* from distributive equality. Corrective justice cannot, therefore, be merely a reassertion of the distributive equality disturbed by the defendant's action. In dismissing the rele-

48. Aristotle, *Rhetoric*, II, 1397a23: "Another topic is derived from correlatives. If to have done rightly or justly may be predicated of one, then to have suffered similarly may be predicated of the other. Similarly with ordering and executing an order. As Diomedon the tax-contractor said about the taxes, 'If selling them is not disgraceful for you, buying them is not disgraceful for us.' And if rightly or justly can be predicated of the sufferer, it can equally be predicated of the doer, and if of the doer, then also of the sufferer."

49. For this picture, see James Gordley, "Equality in Exchange," 69 *California Law Review* 1587 (1981). For other criticisms of Gordley, see Peter Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory," 10 *Cardozo Law Review* 1077 at 1194-1195 (1989).

vance of distributive criteria and claiming that doing and suffering has its own kind of equality, Aristotle affirms that the equality of corrective justice is implicit in the transaction as such, not in the distributive shares with which the parties enter the transaction.

The suggestion that the equality that defines corrective justice is that of the antecedent distribution is suspect for several reasons. First, the suggestion collapses the two forms of justice. Instead of their being the separate categories that Aristotle expressly postulates,⁵⁰ corrective justice becomes a species of distributive justice. Moreover, on this view a judge always has reason, at least in principle,⁵¹ to consider the justice or injustice of the underlying distribution and to allow the Robin Hood defense, that an apparently wrongful taking has produced a more just distribution. This defense is inconsistent not only with the universal practice of private law, but, more specifically, with Aristotle's evident exclusion from corrective justice of comparisons (including, as I argued above, comparisons of wealth or need, which would usually be necessary to decide whether a distribution is just). Furthermore, if one deals with this difficulty by assuming that corrective justice operates only when the distribution is just, one is left with the problem of explaining why Aristotle should single out transactional disturbances of distributive justice. The arrangements of distributive justice can be upset in any number of ways—gifts from one participant to another, the destruction of someone's share through natural catastrophe, the growth of the pool through accession or birth, the diminishing of the pool through death or departure, and so on. The enrichment of one person at the expense of another is in some ways the least problematic of these, since the readjustment can be localized to the two parties. Finally, once one conceives of corrective justice in this way, transactional injustice would not be a wrong directly done to the sufferer. The inequality would consist not in something that the defendant has done to the plaintiff, but in the defendant's having more and the plaintiff less than each's fair share of the distribution. One could rectify this inequality in two separate steps, by giving something to the plaintiff and taking something from the defendant. Entitling the plaintiff to a direct transfer from the defendant would have the merely contingent advantage of administrative economy rather than provide the mark of a conceptually distinct structure of justice.

50. *Nicomachean Ethics*, 1130b31-1131a1, 1131b25.

51. I add this qualifying phrase to exclude administrative reasons not relevant to the theoretical point at issue.

Of course corrective justice presupposes the existence of entitlements. One cannot infer from this, however, that distributive justice provides the standpoint of equality for corrective justice. As an autonomous form of justice, corrective justice operates on entitlements without addressing the justice of the underlying distribution. The differing equalities of the two forms of justice represent the different structures of justification that apply to distributions and transactions. Even if corrective justice works against a distributive background, it accepts the distribution as given and does not incorporate the justification of the distribution into its own structure. Therefore, the existence of a distribution in no way implies that the equality of corrective justice is identical to the equality embodied in the distribution.

How, then, are we to make sense of Aristotle's assertion that "the law treats [the parties] as equals"? They cannot rightly be treated as equals unless they are equal in some relevant respect. What conception of the parties would put them on an equal footing?

Aristotle, unfortunately, cannot help us unravel the mystery that his account of corrective justice presents. The object of Aristotle's ethics generally is to elucidate the excellences of character that mark proper human functioning. Corrective justice, where "it makes no difference whether a worthy person has deprived an unworthy person or vice versa,"⁵² obviously stands apart from Aristotle's general concerns. By ignoring considerations of worthiness, corrective justice abstracts from the considerations that pertain to Aristotle's rich and full notion of the good.

A comment by Aquinas indicates the extent of the impasse. "The law treats [the parties] as equals," he notes, quoting Aristotle's statement, but then he adds, "however much they may be unequal."⁵³ This formulation contains a paradox. The point of justice in holdings is to treat equals equally. The contradictoriness of treating unequals equally would disqualify corrective justice as a coherent justificatory structure. Aquinas, as it were, pauses on Aristotle's expression "as equals" and interprets it as stating something that is contrary to fact. So understood, private law is nothing more than an elaborate fiction.

3.9. From Corrective Justice to Kantian Right

Despite its compactness, the crucial sentence in Aristotle's text suggests the framework for a solution. The sentence formulates the dis-

52. Id. at 1132a2.

53. Aquinas, *Commentary on the Nicomachean Ethics*, vol. 1, 411.

tinctiveness of corrective justice in three ways: (1) corrective justice prescind from considerations such as social rank and moral character ("whether a worthy person has taken something from an unworthy person or vice versa makes no difference"); (2) it regards the transacting parties as equals ("the law treats them as equals"); and (3) it focuses on the immediate relationship of doer to sufferer ("the law looks to the difference in the harm alone . . . if the one has inflicted and the other has suffered harm"). Accordingly, three ideas come together in corrective justice: the abstraction from such particulars as social status and moral character, the equality of the parties, and the sheer correlativity of doing and suffering.

In corrective justice these three ideas are intimately connected. Equality and the abstraction from particulars go hand in hand, because particulars are factors that might differentiate individuals and make them unequal. Similarly, abstraction from particulars and the sheer correlativity of doing and suffering go together, because when doing and suffering are each considered solely in relation to the other, the qualities particular to the doer or to the sufferer as individuals are irrelevant. Equality and the sheer correlativity of doing and suffering also go together, because the correlative elements are the active and passive poles of a single transaction, so that whatever applies to the doer applies equally to the sufferer. The three ideas thus form an integrated conception in which the immediate relation of doer and sufferer expresses an equality that consists in abstracting from the parties' particularities.

The solution, then, to the problem posed by Aristotle's reference to equality lies in an account that integrates that equality with corrective justice's abstraction from particularity and with the correlativity of doing and suffering. Only Kant's exposition of the concept of right, aside from subsequent treatments that incorporate its insights, provides such an account.⁵⁴ Kant understood right as the juridical manifestation of self-determining agency. The fundamental feature of this agency is the agent's capacity to abstract from—and thus not to be determined by—the particular circumstances of his or her situation.

54. Many of the points developed here and subsequently in Kantian terms could also be expressed in Hegelian ones. See Ernest J. Weinrib, "Right and Advantage in Private Law," 10 *Cardozo Law Review* 1283 (1989). For a different view of the relationship between the Kantian and Hegelian approaches to private law, see Alan S. Brudner, "Hegel and the Crisis of Private Law," 10 *Cardozo Law Review* 949 (1989). For an exchange on the issue, see Ernest J. Weinrib, "Professor Brudner's Crisis," 11 *Cardozo Law Review* 549 (1990), and Alan S. Brudner, "Professor Weinrib's Coherence," 11 *Cardozo Law Review* 553 (1990).

Inasmuch as this capacity is a defining feature of self-determining agency, all self-determining agents are equal with respect to it. In Kantian legal theory private law governs the interaction of doer and sufferer on terms that respect their moral status as self-determining agents.

The three ideas found in Aristotle's crucial sentence each have Kantian counterparts. First, the abstraction from particulars corresponds to what Kant termed "negative freedom," the capacity of the agent to rise above the givenness of inclination and circumstance.⁵⁵ Second, the equality of the parties corresponds to the irrelevance for the normative dimension in agency of the particular features—desires, endowments, circumstances, and so on—that might distinguish one agent from another and that therefore might form the basis of comparing them and judging them unequal. Third, the sheer correlativity of doing and suffering corresponds to Kant's treatment of doing and suffering as a single normative sequence in which, regardless of the particularities of doer and sufferer, the doing must be capable of morally coexisting with the suffering that it causes.

Accordingly, the equality of corrective justice acquires its normative force from Kantian right. Indeed, one might describe corrective justice in Kantian terms as the point of view from which noumenal selves see each other,⁵⁶ that is, as the ordering of immediate interactions that self-determining agents would recognize as expressive of their natures. Such agents are duty-bound to interact with each other on terms appropriate to their equal status. Implicit in corrective justice's relationship of doer and sufferer are the obligations incumbent in Kantian legal theory on free beings under moral laws.⁵⁷

From his observation of the regulation of contract and delict by the law of his day, Aristotle brilliantly outlined the justificatory structure

55. Immanuel Kant, *The Metaphysics of Morals*, 42 [213], 52 [226] (Mary Gregor, trans., 1991). Georg W. F. Hegel, *Philosophy of Right*, sect. 5 (T. M. Knox, trans., 1952), formulates the same idea when he notes that the first moment of the will "involves the dissipation of every restriction and every content either immediately presented by nature, by needs, desires, and impulses, or given and determined by any means whatever."

56. John Rawls characterizes the original position as "the point of view from which noumenal selves see the world." John Rawls, *A Theory of Justice*, 255 (1971).

57. Kant, *Metaphysics of Morals*, 56 [230]. Corrective justice therefore deals with the immediate interaction of free beings as they express their freedom. It is a part of "justice in holdings" only if one understands "holdings" to include not only the plaintiff's entitlements but also the defendant's freedom to act. See above, note 10.

that characterizes what we would today call private law. In doing this, he rightly saw that distributional considerations and dispositional virtue were irrelevant to this structure's distinctive equality. His account invites us to ask: what kind of equality can inform private law without regard to considerations of distribution or virtue? Inasmuch as corrective justice disregards everything whose justificatory significance derives from its possible role in distributive justice, all that remains as the subject matter of this equality is the capacity to abstract from one's particular situation that is the minimal condition of every exercise of agency.

In Kant's legal philosophy, the conception of agency presupposed in corrective justice becomes the deliberate focus of analysis. Kant attempts to demonstrate how corrective justice arises from the structure of self-determining agency. His argument moves from agency as the ground of right to private law as a consequence of that ground.

The differences between the Kantian and the Aristotelian accounts of private law are expository, not substantive. Kant treats from the standpoint of self-determining agency what Aristotle describes as a structure of interaction. With interaction as his starting point, Aristotle elucidates the other-directedness of justice and links the parties through the notion of equality. Kant, in contrast, starts with agency and shows its necessary embodiment in a juridical order of abstractly equal agents. Aristotle's account of corrective justice and the Kantian account of right move over the same ground but from different directions.

The convergence of corrective justice and Kantian right bridges the oft-asserted chasm between ancient and modern conceptions of law. The trite contrast between the rich particularity of Aristotelian good and the impoverished starkness of Kantian right does not apply to private law. Nor is it invariably true that in the classical tradition "to be a man is to fill a set of roles each of which had its own point and purpose: member of a family, citizen, soldier, philosopher, servant of God," whereas in modernity "man is thought of an individual prior to and independent of all roles."⁵⁸ Inasmuch as Aristotle's corrective justice is concerned with the sheer correlativity of doing and suffering, it presupposes a conception of the person that abstracts from role. Aristotle's account of corrective justice is inchoately Kantian.

58. Alasdair MacIntyre, *After Virtue*, 59 (2nd ed., 1984).