Thoughts on Corrective Justice

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STEPHEN UTZ

Thoughts on Corrective Justice

A. Introduction

Last summer in Berlin, over dinner in the open air, Jürgen Pröss, a younger colleague and I talked late into the evening about "corrective justice". We struggled with old issues: why is fault a good reason for shifting a loss, and how are corrective and distributive justice compatible? The novelty of my friends' solutions, which I consider striking, seemed to partake in some way of the late summer calm. These further reflections on that conversation are offered in homage to Jürgen Pröss, who has often made philosophy a theme of our meals together.

B. The Puzzling Limits of Corrective Justice

I. Efficiency and Fault as Bases for Tort Law

A long tradition in American legal theory holds that the underlying purpose of the common law of tort is to allocate costs efficiently. On this view, a person who causes another a loss must pay if, by taking precautions, the injurer could have avoided the loss less expensively than the victim. The goal of efficiency is proposed not only as the foundation of tort law in general but also to explain specifically why moral fault does not tell us which losses tort law shifts from victim to injurer. The law-and-economics movement, striving as usual to show that familiar legal rules are best seen as promoting economic efficiency rather than other goals, has championed this view.

Although efficiency may incidentally produce just and fair results, a long-recognized peculiarity of what has been called corrective justice impedes the hope for a coincidence here. The losses with which tort law deals may alter the welfare, opportunities, and general endowment of those affected. An unjust or unfair prior

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1 Unless the context indicates otherwise, I use the term "tort law" throughout as a generic equivalent of Deliktsrecht and of the tort-law-like component in any national legal system.
2 Learned Hand, a famous appellate judge, is given credit for proposing this analysis. See United States v. Carroll Towing Co. 159 F2d 169 (2d. Cir. 1947).
4 In this article I ignore questions about the foundations, moral or economic, of contract law, which can also be regarded as providing a sort of corrective justice. Following other writers, I presume that the justifications of contract and tort law may not coincide.
assignment of rights among the parties to a dispute can therefore be worsened if we deliberately ignore all but the immediate claim of one party against the other, as tort law always does. Surely, courts cannot appropriately wear blinkers and ignore these further consequences of their decisions. Corrective justice must be reconciled with distributive justice. But the efficiency view is silent about this.

It also attempts to sidestep another puzzle about tort law. As all law students quickly learn, moral fault is neither necessary nor sufficient for tort liability. The efficiency view agrees: tort liability vel non does not turn on whether the injurer knew what it would have cost the victim to take successful precautions. Moreover, a comparison of precaution costs would be no guide to moral fault anyway, because tort liability, though it may depend on intent, does not depend on the moral quality of that intent. A well-meaning attempt to help another may be tortious. The displacement of all sense of censure or desert from the rationale of tort, however, would make it hard to understand why the state should single-mindedly select the author of a loss to bear it, and not just fold the reallocation of losses into the broader task of maintaining a just distribution of rights and opportunities.

An older tradition views fault as the key to justifying tort law’s selective intervention. Whether Aristotle, who first distinguished corrective and distributive justice, had this in mind or not, many have since regarded corrective justice as having to be based on a notion of fault, not necessarily of the moral variety, in order to pass muster. The general idea is that the shifting of a loss to the person whose conduct places him or her under a special obligation for that loss is compatible with distributive justice. Efficiency alone has nothing comparable to excuse the possible detraction from overall fairness that the infliction of a loss on the injurer may occasion. Although tort law may also promote efficiency, only an understanding of the role of fault in tort law promises to reconcile corrective justice with distributive justice explicitly.

This article considers two proposals on the themes of fault and corrective justice as exemplified by tort law. Jürgen Pröss, in the conversation referred to above, suggested that the category of wrongs to which tort law is addressed holds the key to reconciling corrective and distributive justice. His suggestion modifies the proposal of a younger colleague on Law Faculty of the Free University in Berlin, who sees tort law as replacing the individual’s pre-legal right to liquidate claims by force against others for harm done. The emended theory is not inconsistent with the efficiency view but limits that view’s relevance. The new theory instead both (1) affirmatively reconciles corrective justice with distributive justice and (2) grounds shifting private losses from victims to injurers in the moral obligation of injurers to victims. To come to grips directly with the novel theory that results from Jürgen Pröss’s emendation of the replacement theory, we must first examine the relationship, or lack thereof, between fault in tort law and moral fault.

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II. Moral Grounding for Blinkered Remediation

Tort law may satisfy some widely shared desire for collective vindication of claims against moral wrongdoers. The conception of tort law as a substitute for a part of pre-legal moral "law" is appealing. It would, however, beg the question to assume that the substitution must be exact or straightforward. The first step in our inquiry must be to ask whether morality on its own even hints at something like a system of corrective justice. In the absence of law, would moral judgments normally or under any circumstances do the work now done by tort law?

We must of course take a long view of what we know and do not know about morality. Philosophers have learned to be cautious in generalizing about moral phenomena. Even the simplest description of how "we" judge the goodness or badness of actions has often been found to rely heavily on theoretical assumptions that cannot easily be tested against the facts of "our" actual moral reasoning. One of the most commonly questioned characterizations of morality ascribes to it a structure reminiscent of a legal system, with rules and principles that must be consulted in reaching a decision about what is right or wrong. Critics have pointed out that the moral "law" is only a metaphor and that actual reasoning about right and wrong produces few if any broad or peremptory rules. In the sequel, I will therefore do my best to avoid broad generalizations about ethics and to make as few assumptions as possible about the structure of moral standards.

Nevertheless, it is a commonplace that in many societies the agent of morally blameworthy harm is thought to owe his victim something. What is owed may only be an acknowledgment of responsibility, an apology to the victim or remorse before the community, but a moral environment in which one who causes another some injury could simply shrug it off would be foreign indeed. On the other hand, morality as such has no enforcement mechanism apart from the pressure of public opinion. In fact, given its lack of any institutional structure, it is not at all surprising that morality does not specify what the perpetrator of a moral wrong owes the victim, beyond some ill-defined obligation. Moral judgments tell us who is responsible to whom, without holding the key to what is owed. Liquidation of moral debts is at best a figurative ideal.

Morality then does not foreshadow the remedial aspect of tort law. It may inspire the liability aspect of tort law, tort law's way of deciding who is responsible in some way. It is possible that morality recognizes responsibility wherever tort law does, and vice versa. But morality does not go as far as law does.

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6 Bernard Williams is best known for his critique of "morality", as an abstraction misbegotten by theorists. See Bernard Williams, Ethics Within the Limits of Philosophy (1980). See also Anti-Theory in Ethics and Moral Conservatism (ed. Stanley G. Clarke & Evan Simpson) (1989) (anthology of articles concerning view that normative theory is "unnecessary, undesirable, or impossible, and usually...all three").

7 John Austin famously held that the very distinction between law and morality lay in the fact that law is (and, he thought, must be) enforced by physical or economic sanctions, but that morality has no sanctions but the approval or disapproval of one's peers for one's actions. John Austin, The Province of Jurisprudence Determined 2-4 (1861).
Our next step then must be to ask: Does morality (does any system of moral values) place an injurer under an obligation towards the victim, when tort law would classify the conduct as a wrong but morality would not? Morality does impose a sense of special obligation to particular other individuals quite apart from injury. The most conspicuous example is “filial piety,” the broad obligation of children towards their parents, not only to obey but also to respect and defer in other respects towards them (for the purpose of this discussion it does not matter whether every moral system or set of moral values in fact requires “filial piety”; it is enough someone’s morals might do so). Good manners may impose an obligation of behavior that “says you’re sorry”, but this tells us little. The commission of a tort therefore may not always create a moral obligation. Does it perhaps give rise to something else that is related to and perhaps functionally equivalent to moral obligation?

Some world views (whether they should be described as moral systems or as ideologies is an interesting question) recognize only legal obligations. Nozick has spoken for a libertarian vision with “dog eat dog” as its basic premise. General insensitivity towards others’ well-being, however, is more often regarded as a defining characteristic of the amoralist. David Hume argued that benevolence lay at the root of all moral judgments, although he treated this as a mere empirical fact about the sociology of moral reasoning and reasoners. Bernard Williams has maintained that a gangster might have benevolent feelings towards his friends and family but that only a person who exhibits benevolence towards others generally – one who follows benevolence as a rule – can be regarded as having a sense of morality. If morality without benevolence is possible, it is certainly exotic. Morality may impose a generalized obligation towards others. If so, it seems likely to impose a heightened obligation towards those we have injured, though we do so without moral fault.

Let us explore this possible category of faultless obligation further. If morality requires benevolence, failures to treat others well even unintentionally may be occasions for moral concern, and the person who has caused harm should presumably not only acknowledge the misstep to himself or to others generally, but also owes special acknowledgment in some way to the “victim” of the faulty conduct. To the extent that this is so for all moral systems, the commission of a tort may result in the moral obligation of the tortfeasor towards the victim, even if torts are not necessarily moral wrongs. The moral obligation in question could be very limited. Given that morality typically (perhaps always) lacks rules to specify penalties or other burdens to be imposed for wrongful conduct, it is certain that morality is no more forthcoming as to penalties or burdens where there is no fault.

On a set of moral beliefs that requires benevolence towards others generally and that recognizes a heightened obligation for unintended wrongs, a sharp difference must nonetheless be recognized between this sort of special obligation towards another and the sort that results from a willful and morally culpable act, lest the difference between unintended wrongs and culpable ones be blurred. Morality has no

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9 David Hume, An Inquiry Concerning the Principles of Morals (1751).
10 Bernard Williams, Morality: an Introduction to Ethics (Cambridge University Press 1972), pages 4-8.
way of keeping score, so to speak, apart from the attitudes of its followers towards their own and others’ acts. If I ought to feel equally apologetic, deferential, or obligated towards both those I could not avoid harming and those I harm deliberately, the difference between accidental and deliberate harm would be morally unimportant.

We need not draw finer distinctions concerning these levels of obligation for the moment. Morality at best places an injurer under a broad but unspecific obligation to the person injured. Introductory law lectures on contract and tort often spend a great deal of time persuading students that the answers given by the legal system in question correspond with Everyman’s view of things. This is to some extent brainwashing, because our unschooled assumptions and views are neither consonant nor identical with those implicit in any legal system. The discrepancy is most extreme when tort law imposes strict liability, for then public policy obviously controls and ignores fault. Tort law at best completes our pre-legal intuitions about justified, individualized restoration of losses; it does not simply preserve the consequences of the morality it supersedes.

Assuming that collective action through the agency of the state could be rooted in some collective sense of the tortfeasor’s moral obligation to the victim, it remains to be seen whether any such moral obligation explains society’s selection of wrongs to be set right by tort law, even if the legal community generally believes that moral fault does not guide this selection, at least at a practical level.\(^\text{11}\)

Legal systems obviously go beyond our moral intuitions and do not merely embody them. In doing so, they must in effect raise normative questions that pre-legal morality does not, in much the same way that a thermometer extends and refines our pre-scientific conception of heat and must be justified as replacing that conception with something better.\(^\text{12}\) Here, the law’s refinement of our moral intuitions may reflect everyday morality, and this may partly justify a legal regime, but law invariably clarifies morality’s demands, which again are not specific as to remedies. Whether the legal specification of morality’s mute demands is justified or seems so to a broad public presents both a sociological and a philosophical problem.

III. Moral Obligation Without Moral Fault

We have asked whether harming someone without moral fault may subject one to a special moral obligation towards the person harmed, in order to determine whether moral intuitions about a tortfeasor’s pre-legal obligation to the tort victim

\(^{11}\) See, e.g., Oliver Wendell Holmes, Jr., The Common Law 142-49 (1887) (on the role of moral fault in determining the scope of intentional torts and torts of negligence).

\(^{12}\) Rudolf Carnap famously suggested the philosophy’s purpose is often to “explicate” a confused or fuzzy pre-scientific concept, just as science refined our intuitive understanding of heat and cold with the invention of the thermometer. Carnap, R. (1950). Logical foundations of probability, University of Chicago Press, Illinois.
provide any kind of reason for society’s acceptance of corrective justice in the form of tort law. Now we put the results of that inquiry to use. We ask how moral obligation without fault may provide a basis for tort law. As mentioned at the outset, our younger colleague proposed that the state’s “monopoly of force” requires it to offer a substitute for what individuals could properly obtain by force from those who injure them in the absence of the state. The state, of course, cannot be permitted, much less required, to provide a substitute for mistaken or excessive retaliation by victims. If the state legitimately protects individuals’ pre-legal interests, these interests must deserve preservation. Justification in the pre-legal context is usually based on morality. We are therefore asking if moral obligation without fault can justify preserving a pre-legal sense of right.

This inquiry serves the course of our discussion by anticipating an aspect of the theory to be developed later. In order to square the corrective justice of tort law with distributive justice, Jürgen Pröss has suggested that restoring natural endowments alone would not disturb distributive justice. By “natural endowment,” I believe he meant those primarily physical capacities with which we are born. Physical injuries in most instances reduce victims’ innate endowments by causing a loss of these basic physical capacities, and tort law would return the victim to the status quo ante. Tort law also seeks to vindicate victims of “intentional” torts that need not involve physical injury, awarding compensation for injuries to victims’ dignity and personal autonomy. (Note that the efficiency view of tort may have to struggle to accommodate this.) Everyone has roughly the same physical and dignitarian interests. Jürgen Pröss reconciles the narrow focus of tort-centered corrective justice with distributive justice by pointing out that the restoration of a victim’s basic endowment is automatically in accord with distributive justice, precisely because this endowment stands apart from the contingent additions to that endowment that social and economic life may effect. His theory, in other words, asserts a line of demarcation between the scope of corrective justice that deals with primitive rights and capacities and distributive justice that deals with other rights and capacities as well.

These views, I will argue, complement each other to provide a more intuitive justification for the narrow focus of corrective justice than the efficiency thesis, one that helps to explain how the gap between morality and tort principles is not fatal to the intuitive demand for tort remediation, despite morality’s vagueness as to

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13 Our moral intuitions may better prefigure the kind of corrective justice implemented by contract law. The mere morality of promise keeping and remedies for broken promises, I suspect, anticipates remedies like those provided by various countries’ contract law regimes, though it is worth remembering that remedies do vary considerably from country to country. German contract law, for example, favors specific performance of contracts while the common law favors economic damages for contract breaches and is skeptical of the equity of and need for specific performance. BGB § 241; James G沌lcy & Arthur Taylor Von Mehren, An Introduction To The Comparative Study Of Private Law: Readings, Cases, Materials 533 (Cambridge U.P. 2006). German civil law also expressly excuses performance that is much more costly to the performing party than the advantage of the bargain would be to the other party to mitigate. BGB § 275(2).

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remedies. That vagueness does not prevent morality from giving direction to our expectations of the state.

IV. A View of Tort Law as Dependent on Pre-legal Moral Prerogatives

First, consider whether states must offer tort law in exchange for the pre-legal liberty of the individual to rectify wrongs caused by others. We may think of this exchange, in the tradition of Rousseau, as part of the fundamental social contract between the state and the individual. We may also think of it as a mere pragmatic expedient occasioned by what people in fact want from governments: the state must for its own preservation settle grievances between residents to dissuade them from “taking the law into their own hands” and rivaling the state’s monopoly on force.

Some personal wrongs for which tort law provides remedies fit well within this account of its purpose. Several intentional torts – assault, battery, false imprisonment, intentional infliction of emotional distress – are acts usually regarded as moral wrongs, intentional inflictions of harm to the physical integrity or dignity of the victim. The intentional torts of libel and slander have an economic flavor that hints at a difference from similar moral wrongs, but we can regard them too as moral misdeeds to some extent. The law of intentional torts of course rather improves on the ability of most victims to "get their own back" by force or other private contrivance.

The tort of negligence, on the other hand, offers a more sweeping scheme for shifting losses. But the law of negligence does not correspond straightforwardly with any well-recognized type of moral wrong. Its foreignness to our intuitions makes the law of negligence puzzling. The strong suit of the efficiency view is that it explains which cases of negligent harm to others are likely to win tort remediation. The explanation, however, postulates the somewhat implausible strategy for negligence law, of shifting losses to induce precaution-taking by those who can do so least expensively, without regard to whether such behavior modification is at all likely, given the rarity of tort recoveries and the difficulty of recognizing when one person can take a precaution more cheaply than another.

Given the extent to which tort law, especially the law of negligence, departs from the vindication of victims’ moral claims, the view that tort law replaces pre-legal self-help faces two difficulties. The first is to define the principle to be preserved. Outraged victims might indeed turn against a state without tort law, but that all victims would is not likely, given that some suffer only mild losses. Nonetheless, the tort system may be a necessary response to marginal outrage. To mollify the few, the state may well have to provide a system of relief for all. Differences in victims’ levels of outrage alone could not be allowed to determine levels of redress. Conspicuous aid only to vocal and emotional victims would alienate others who might otherwise put up with their losses. The state must offer a principled and systematic alternative to self-help or risk alienating those who would otherwise be content if self-help were vanquished without replacement. In this as in many other respects, subjects of the state are not likely to acquiesce in powerful state interven-
tion unless it is principled, consistent and of general application. The pragmatic view must both identify the principle and show that it is one the state must defend and enforce to avoid public outrage. The first of these tasks makes the pragmatic argument rather similar to the theoretical one embodied in social contract theory.

The second difficulty facing the pragmatic view is that of persuading us that real-world tort systems in fact provide roughly the sort of corrective justice people want. Do people want the law of negligence? Given the prevalence of roughly equivalent tort systems in legal systems all over the world, what real-world legal systems offer does appear to satisfy a popular desire, possibly reflecting what ordinary people would wish or expect the government to do in order to further the economy as whole. But the public may accept the law of negligence as part of tort law without realizing that, unlike intentional tort law, it does not penalize harmful immoral acts as such. A no-fault scheme that relieved losses regardless of the fault of those who caused these losses and that settled the burden of some private losses on the population generally without singling out the injuring parties for special burden, could not be considered to provide a substitute for the pre-legal use of force to shift losses to wrongdoers. The law of negligence singles out some injurers to bear losses they cause, but not necessarily wrongdoing injurers. Therefore, the law of negligence is an odd replacement for private moral enforcement. It is possible, however, that the law of negligence satisfies the desire for private moral enforcement, without precisely duplicating such enforcement.

That desire may be based in part on the relationship of corrective justice to distributive justice. A bit of history may illuminate that relationship. The posture of tort law and broader principles of justice towards each other has altered dramatically since ancient times. The Code of Hammurabi, where tort law made an early appearance, laid great emphasis on social rank, allowing only a minimum of its tort-like prescriptions to be applied without regard to it. Aristotle consciously defined corrective justice as altogether ignoring merit, by which he meant inherited class distinction. Evidently, the corrective justice of the ancient world was more egalitarian than were the principles of hierarchical distributive justice most states openly embraced. By the end of medieval times, states had begun to restore losses "wrongly" inflicted by one individual on another but never intervened in a broad or principled way to regulate entitlements in any other way (e.g., though taxation in accordance with ability to pay, land redistribution, etc.). In retrospect, tort law regimes of the past may have anticipated the democratic and egalitarian elements we now associate with distributive justice. If so, corrective and distributive justice might simply have merged by now, if contrary goals that have now disappeared were all that kept them apart.


16 Richard Posner, op. cit., page 189 (discussion of Aristotle’s definition of corrective justice); see M.I. Finlay, The Ancient Economy (Charto & Windsus 1975[broad discussion of status as predominant over economic attributes in classical Greek culture]).
They have not merged, however, and their seemingly persistent separateness is all the more puzzling. Tort remediation is not the least expensive way to alleviate individual hardship, and other ways do not require judicial scrutiny of theoretically difficult liability questions. The state could encourage and require individuals to act for the safety of others by a variety of less costly means. We would not invent the tort system if we merely wanted to preserve existing rights and entitlements; we could achieve that result more cheaply by providing governmental “no-fault” insurance of some classes of loss, with inexpensive claims adjusters instead of courts. None of these alternatives to tort law focuses on the responsibility of the injurer. The novel concept of responsibility so cleverly identified by the efficiency theory of negligence law is not the kind of responsibility individuals in a state of nature would care about. A system based on it, therefore, is not one that recognizably replaces the pre-legal private recoupment of losses.

V. The Integration of Pre-Legal Interests With Principled State Action

Tort law aims to shift losses from victims, not to the state, but to private, more appropriate bearers of these losses. Neither mere causal responsibility nor ordinary moral responsibility quite explains why tort law chooses to shift just the losses it does, and neither serves in all cases to identify the party to whom the loss is shifted. Some standard has long been asserted to exist, though neither courts nor commentators agree on its general formulation. That there must be a perceived standard, however, is crucial to the justification of tort law. In the absence of government, people might by their own efforts obtain compensation from those who injure them. In its absence, however, they might also shift losses inappropriately. The principal benefit of the state monopoly of force is that it does not countenance theft, coercion, fraud, blackmail, and other unjustified private acts. Some standard of appropriate liability – call it fault – is therefore needed to make sense of the state’s intervention in shifting losses from one individual to another.

The standard of fault for purposes of tort law must also justify tort law’s concentration on only the parties to, and circumstances of, a particular injury, without regard to matters beyond those circumstances. Jürgen Pross’s solution depends on the special character of the deprivations tort law addresses. Intentional torts are acts that may be considered moral wrongs, because they are intentional inflictions of harm to the physical integrity or dignity of the victim. The chief non-intentional tort is the negligent infliction of harm. The tort of negligence challenges our understanding of fault in tort because it is not an element of negligence that the harm done have been intended. Hence, negligence seems superficially not to involve moral fault, because an agent normally acts wrongly in causing harm only when he or she intends the particular harm done. This superficial view of negligence is partly mistaken. It can be morally wrong to act carelessly, that is, without appropriate prudence, and this type of moral wrong corresponds very closely with the tort of negligence. What differentiates the tort of negligence from the moral wrong of careless or imprudent conduct is the difference in the severity with which the law penalizes
negligence and the severity with which morality judges, but of course does not punish, the same conduct. This difference in the severity with which negligence is treated by tort law and in our moral judgments, however, indicates incontrovertibly that the tort and morality find different levels of fault in the same negligent acts. It can therefore be said that the fault morality finds there and the fault tort law means to single out are different. Nevertheless, though different, these two kinds of fault may be closely related. In order to show that this is so, a brief survey of conceptions of distributive justice will be useful.

VI. Two Broad Conceptions of Distributive Justice

If justice requires that outcomes, goods, benefits, or results should be fairly shared, this may mean that all things must be equally divided among individuals or only that some minimum should be equally divided, all without regard to the effort or merit of recipients. Fairness may alternatively require division according to effort or status or class, as it did for Aristotle and does still for those who think one’s contribution to society or to the economy should determine how much of society’s wealth one receives. On either view fairness is concerned with consequences, not with mere possibilities or probabilities of good outcomes.

By contrast, distributive justice is sometimes thought to require that everyone have the same opportunity for at least some kinds of good outcomes. The kinds of outcomes that “equal opportunity” justice requires every individual to be able to acquire may have to be limited, given the scarcity of some good things. Society cannot realistically owe everyone a meaningful chance of gaining some rare benefit, any more than everyone can have a real chance of winning a national lottery. Conditions beyond human control have limited the range of achievable goods in all past and present societies; fiction has difficulty creating even a description of a society in which no scarcity exists. John Rawls has famously argued that justice requires all to have the opportunity to gain basic goods such as nutrition, housing, medical care, education, and leisure, and he focuses on basics, as opposed to luxuries or idiosyncratically identified goods because he believes that justice cannot depend on accidental features of individuals, which includes individual tastes, talents, and so forth. He also argues that there can be no issue of justice in a society that lacks the “circumstances of justice” — some scarcity but not too much.

Loss-shifting without regard to the status quo ante can be contrary to either conception. Tort-like loss shifting seems least compatible with “equal outcomes” distributive justice. If the status quo ante is distributively unjust in this sense, then making a victim whole, given the insensitivity of tort to the initial distribution of goods, is as likely as not to reduce an injurer’s disproportionately small share of goods and increase the victim’s disproportionately large share. Since tort regimes deal almost exclusively with goods and not directly with opportunities, on the other hand,

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17 Some authors do a fair job of describing circumstances of unlimited abundance. See, e.g., Arthur C. Clarke, Childhood’s End (1953) (science fiction novel about future society in which abundance eliminates many moral and political standards).
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Reducing an injurer's allotment of goods is not inherently likely to worsen the injurer's opportunities. It may do so when the goods transferred from the injurer cut into the minimum endowment of goods the injurer needs as a basis of taking advantage of opportunities, either specific opportunities or any opportunities. If a court orders an injurer who already cannot afford the basics of life to pay even a modest judgment to a victim, this makes the injurer significantly less able to take advantage of any opportunity without making the victim better off. This danger is eliminated, however, if the state's approach to distributive justice of opportunity takes note whenever anyone falls below the minimum endowment of goods needed for taking advantage of opportunities and supplies that minimum by intervention under auspices other than tort law.

It is not the purpose of this article to decide between consequentialist and opportunity-based conceptions of distributive justice. In brief, the potential conflict between any form of corrective justice and any form of distributive justice concerned only with outcomes is fundamental. That between corrective justice and opportunity-based distributive justice is neither inherently great nor difficult to resolve through what may be the ordinary means of assuring such distributive justice, viz., basic social programs designed to assure a minimum level of welfare for all.

VII. Restoration of the Individual's Basic Human Endowment

With a view towards reconciling corrective and distributive justice, Jürgen Prölls observes that the former may safeguard the natural endowment of individuals — bodily integrity, personal dignity, physical liberty — and not disturb distributive justice. The relevant endowment is the average set of capacities and attributes of human beings, although not everyone comes into life so equipped. Nevertheless, some innate or average endowment can be distinguished from innate differences in talent or socially and economically created differences of other sorts. Without collective action there would of course be no mechanism to ensure that everyone shared this starting point of capacities and attributes. The modern state, however, is universally regarded as having at least some responsibility for protecting or even guaranteeing this minimum.

Restoring the impaired endowment of a particular individual, considered separately from the effect of the restoration on others, is not likely to affect distributive justice in either outcome or opportunity terms. Mere re-creation of the status quo ante may leave inequities in place that should be removed, but it cannot make matters worse. By definition, our shared starting point is not a source of inequity but is separate from the differences that good or bad fortune must be allowed to cause — "must," because these differences cannot or should not be controlled or eliminated. If corrective justice is confined to the task of safeguarding the starting point in this sense, its intrusion on other legitimate operations of the state poses no problem for distributive justice.

Consider first a victim from whom an injury has removed some basic capacity such as the use of an arm. To the extent that the state through its machinery for
safeguarding corrective justice compensates this individual for the loss, for example, by providing a prosthetic device and rehabilitative care, it does not cause distributive injustice, no matter what the individual's previous wealth, talent, or accomplishments. That is, the addition to the victim's well-being cannot be unjust, because distributive justice must put the goal of protecting every individual's initial set of capacities and attributes before other goals. Only if circumstances were such that the state could not try to achieve this goal without compromising other individuals' basic endowment would there be a potential conflict with distributive justice. In conditions of such scarcity, however, there could be no distributive justice: treating everyone alike would only hold everyone to a level of capacities and attributes below the level many would enjoy without the state's intervention.

In other words, the narrow limits within which the benefits conferred by corrective justice can do no harm are roughly those prescribed by the ancient formula "an eye for an eye, or a tooth for a tooth." Indeed, Jürgen Pröss's proposal gives new meaning to that biblical phrase, suggesting that it should not be taken as brutal and remorseless but as limiting the intervention of society or the state in the affairs of tortfeasors and their victims. These are recoveries beyond the play of markets and independent of historical accident. They concern human characteristics an individual may sacrifice through his or her own improvident conduct or by accident beyond his or her control. But they are such that the state may fairly restore, if it can afford to do so. Note, however, that the ancient formula also refers to the loss that may be inflicted on an injurer in order to restore the victim's loss. The distributive justice of inflicting losses is, for the moment, not before us.

Corrective justice meets the requirements for avoiding conflict with distributive justice only if it does not incidentally aggravate inequities. For this reason, disproportionate wealth might be a bar to a tort recovery, if the recovery did not replace some aspect of the victim's natural endowment. Recoveries for personal physical injuries best exemplify this. If an injury necessitates medical treatment, rehabilitation, or the replacement of a limb, damages that "make the victim whole" restore the status quo ante, at least as far as the victim is concerned. Recoveries for injuries to the victim's dignity, that do are not measured by undeniable reductions of the victim's prior endowment, do not unambiguously exemplify the goal of restoring the status quo ante or making the victim whole. All intentional torts have a dignitarian element and hence belong to this category, while recoveries for false imprisonment and defamation may, but also may not, restore the victim's prior endowment.

Now we must consider whether the operation of corrective justice can be squared with distributive justice if it subtracts something from the injurer's welfare. "Two wrongs do not make a right." At first glance, it may seem that shifting a loss to an injurer does not impair distributive justice because it merely penalizes harmful conduct. A just penalty cannot ex hypothesi be inconsistent with distributive justice. Inflicting a loss on the person responsible for the impairment may be such a penalty. Remedies for intentional torts look like, and historically developed as, surro-

\[18 \text{ Exod. 21: 23–27. See Charles F. Hamel, op. cit.} \]

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gates for criminal punishment. We have noted that intentional torts often, perhaps always, involve moral fault. *Mens rea* is one of the elements for these torts. But there is a range of cases in which corrective justice in the form of tort law recognizes responsibility without moral fault. It is not an element, however, of the non-intentional torts, of which negligence is a prime example.

Although tort law’s shifting of some losses may be squared with distributive justice on the penalty theory, other applications of tort law cannot be so characterized. Still confining our attention to cases in which the benefit to the victim’s welfare by itself does not offend distributive justice, we must now consider whether any or all such cases pass muster, not as penalties, but as otherwise appropriate reductions of the injuring party’s welfare. Two kinds of case should be distinguished: that in which the injurer’s own basic endowment is not impaired by the infliction of the loss, and that in which it is.

In the first kind of case, the injurer’s moral obligation to the victim, even in the absence of moral wrong, provides a basis for saying that distributive justice is not offended by the shifting of the loss. For example, if someone negligently damages another’s arm (or eye or tooth!), the award to the victim of compensation at the injurer’s expense is enough to satisfy the injurer’s moral obligation. That obligation, discussed at length in II. above, is admittedly not specific, precisely because morality is not specific about such remedies. The state, through even-handedly applied rules, chooses the level of adjustment of the wrong in question without morality’s guidance. But in doing so, it does provide a substitute for the pre-legal interest of the victim and places the burden on the injurer who owes the victim a pre-legal obligation. The legal system thus liquidates the moral debt that would exist in the state’s absence. The gist of Jürgen Pröss’s proposal is that this discretionary choice on the part of the state will always be consistent with the state’s commitment to principles of justice that go beyond the pre-legal setting.

Consider now the second kind of case, in which the injurer’s own basic endowment is impaired by the infliction of the loss. Let us say the injurer can compensate the victim for the loss of his arm only by giving up some part of the injurer’s own basic endowment. Now a rift opens up between the remedy that is supposed to do corrective justice and the distributive justice of preserving the pre-legal starting point. Many legal systems block recoveries that impair the defendant’s retention or purchase of basic needs, such as food and housing. This may well evince recognition of a possible conflict between corrective and distributive justice. Arguably, however, even in this setting the injurer’s moral obligation to the victim (obligation, that is, without moral fault in causing the injury) may reconcile the two forms of justice. A state with the resources of a wealthy society, however, could scarcely appeal to this inchoate moral obligation to justify the perpetuation of below-par endowment for any individual.

At first glance, this seems to privilege the basic endowment too greatly. Even though the restoration of an injured person’s basic endowment (i.e., the change that only restores the injured person’s endowment and not the change, if any, to any other person’s endowment) may not need to be justified in the individual case by a full review of the benefits and opportunities available to all individuals, it does
not follow that everyone’s basic endowment must be maintained (i.e., left intact or “topped up” when otherwise impaired) for the sake of distributive justice. Adjustments to basic endowment may be neutral in a more limited respect. In a society that faces great scarcity of resources, for example, special concern for the basic endowment of individuals may require that, as between an injurer and his/her victim, the loss should be borne by the injurer only— for economic efficiency, but also for deterrence, for the correction of possible unjust enrichment, and for the internalization of the consequences of actions as a necessity for the integrity of the injurer’s character. These purposes for loss shifting are consistent with a broad concern for distributive justice. Indeed, the distribution of goods and opportunities that distributive justice requires cannot be static, because life is not static.

We need not conclude that only injurers with deep pockets could be made to bear the losses they cause. But the line of demarcation between just penalties and exactions that do not pass muster as penalties is important. No system of corrective justice should be built on a deliberate breach of this distinction. More than this it is not necessary to say at the general level of this discussion.

It is worthwhile to remember at this point that the utilitarian tradition gives distributive justice an unusual twist. Because utilitarianism, and variants of utilitarianism that belong to the genus of “consequentialism,” make consequences the ultimate determinants of human well-being as well as of the value of moral and political choices, distributive justice for these schools of thought is primarily, if not exclusively, a function of gains and losses in outcomes, like those of victims and injurers in the tort context. This of course renders distributive justice especially complex for these views, given the changing circumstances individuals face in the course of their lives. Accordingly, even a consequentialist view of distributive justice must allow for departures from equal net distribution of goods and harms. If distributive justice does not require a constant readjustment to assure equal distribution, the burden visited upon an injurer in order to restore the basic endowment of a victim does not necessarily violate distributive justice.

On the other hand, if the privileged status of the basic endowment does not require everyone to be assured the same minimum endowment, why should the victim’s plight deserve society’s attention? This is the question to which the view that corrective justice is a replacement for pre-legal self-help responds so well. The state’s monopoly of force deprives victims prospectively of their moral prerogative to restore their losses from their injurers’ coffers, and so the state must make good the extinction of the right of self-help. In order to see why this does not offend distributive justice, we need Jürgen Pröls’ proposal that limits the scope of justified loss shifting by the state to things of value that do not depend on the play of events in which the state has intervened or for which the fortunes of societal life, and not birth, are responsible.

Our examination of Jürgen Pröls’s suggestion must leave many issues to be examined elsewhere in greater detail. The interaction of tort law with taxation, welfare programs, and other state functions may affect the reality of the proposed

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19 See Nicholas Rescher, Distributive Justice (1966).
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reconciliation of corrective and distributive justice. A detailed account of the reconciliation should also ask whether distributive justice itself is not somehow still, as in ancient times, a developing aspiration that corrective justice may clarify rather than a static asymptote to which corrective justice must absolutely conform. For the moment, however, the framework of the theory under discussion is, in my view, relatively clear and very promising.

C. Conclusion

The combination of my friend Jürgen Prölss’s views with that of our younger colleague offers a satisfying account of corrective justice as we know it, going significantly further than the efficiency view and effectively dealing with the dilemma implicit in Aristotle’s original distinction between corrective and distributive justice. On the one hand, a close consideration of the relationship between the moral prerogative of the individual in a pre-legal environment to exact a recovery for any personal injury caused by another and the due-process-governed right created in a legal environment to recover for cognizable torts exposes the significant gap between what morality may say about such recoveries and the more constrained and systematic approaches of existing tort law regimes. While the efficiency view of tort law does account for the existence of a gap of this sort, it does so, at least as interpreted by the law and economics movement, in a manner that makes pre-legal intuitions about such matters completely irrelevant.