

ELIMINATING CORRECTIVE JUSTICE

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DISTRIBUTIVE justice describes the morally required distribution of shares of resources and liberty among people. Corrective justice describes the moral obligation of repair: the person morally responsible for wrongfully harming another has a duty to compensate the person harmed. A question arises about the relationship between distributive and corrective justice. The contemporary debate usually puts the matter in terms of normative priority or independence. Distributive justice is normatively prior to corrective justice if corrective justice is merely instrumental to the fulfillment of distributive justice's demands. Corrective justice is normatively prior if there is an obligation of repair even when an unjust distribution of holdings is wrongfully disturbed.¹ And corrective and distributive justice are normatively independent if an obligation of repair applies without regard to satisfaction of the demands of distributive justice.

A more accurate way to describe the contemporary debate is as one over the elimination of the notion of corrective justice. If corrective justice is merely instrumental to distributive justice, its normative character derives entirely from distributive justice. The obligation of repair, when it exists, therefore is one of distributive justice, and the notion of corrective justice is eliminated: distributive justice rather than corrective justice grounds the duty. If corrective justice is independent of distributive justice, however, the obligation of repair can exist whatever the distribution of resources and liberty may be. In this case, the notion of corrective justice cannot be eliminated.

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¹ Corrective justice is also normatively prior in a recognizable sense if distributive justice is meaningless, so that no distribution of shares is just. For the claim of meaninglessness, see, for example, H.B. Acton, *The Morals of Markets and Related Essays* 222–23, 242 (David Gordon & Jeremy Shearmur eds., 1993); 2 F.A. Hayek, *Law, Legislation and Liberty: The Mirage of Social Justice* 33, 70, 78 (1976).

Professors Kevin Kordana and David Tabachnick are eliminativists about corrective justice. They do not take a position on the general question concerning the relationship of distributive to corrective justice. Their Essay instead defends two more limited claims about particular sorts of principles of distributive justice: maximizing principles.² One claim is that Rawls's principles of distributive justice, as maximizing principles, conflict with corrective justice. The broader claim, which Kordana and Tabachnick make but do not defend in detail, is that all maximizing principles of distributive justice do the same. According to them, maximizing theories of distributive justice cannot "consistently" endorse both distributive and corrective justice; there is "insufficient 'space'" to allow a commitment to both types of justice, as they put it.³ In short, theories of distributive justice that endorse maximizing principles eliminate corrective justice as an independent moral principle. This Response will describe and assess Kordana and Tabachnick's arguments for both claims, and will conclude with some brief comments about the debate over the relationship between corrective and distributive justice.

I. CORRECTIVE JUSTICE AND RAWLSIAN METHOD

Rawls presents his two principles of distributive justice as principles that would be chosen by parties in the original position, subject to the veil of ignorance. Deprived of information about their particular circumstances and desires, and selecting principles that allocate social and economic benefits as well as liberties, the parties focus only on outcomes. They are motivated to choose one principle guaranteeing each maximum equal liberty, and another principle guaranteeing equal opportunity and allowing social and economic inequalities only when they benefit the worst off. As Rawls constructs the original position, parties care only about the effect of institutions on their budget of liberties, opportunities, and socio-economic benefits. They want to maximize their share, subject to the constraints on information imposed by the veil of ignorance. As others have noticed, Rawls's description of the choice situation

² See Kevin A. Kordana & David H. Tabachnick, *On Belling the Cat: Rawls and Tort as Corrective Justice*, 92 Va. L. Rev. 1279 (2006).

³ *Id.* at 1282, 1287–88, 1298; cf. *id.* at 1289.

guarantees that parties care only about outcomes, not the procedures by which they result.⁴ For instance, the veil of ignorance excludes as morally irrelevant information about the causes of social and economic inequality. Similarly excluded is information about how harm results and the person responsible for it. By contrast, for corrective justice the way in which harm occurs and the person responsible for it are both morally significant. A duty of repair makes repair contingent on responsibility for wrongful harm. Thus, Rawls's construction of the original position cannot recognize principles of corrective justice.

Two responses to this conclusion are possible. One is that the original position is merely a heuristic or representational device, not necessary to justify principles of corrective justice. A second response is that it is a necessary methodological device, but one that can be specified in a way that generates a choice of principles of corrective justice. Kordana and Tabachnick concede that the original position is merely a representational device, but conclude that Professor Arthur Ripstein's justification of a principle of corrective justice on Rawlsian grounds nonetheless fails. They argue that Rawls's principles define principles of justice and that Ripstein's justification does not "convert the original position back into argument form."⁵ The former argument is a definitional one about Rawls's principles, and the latter is a methodological argument about the appropriate support for Rawls's principles. I am not convinced by either argument.

Take the methodological argument first. Rawls uses the original position merely as a representational device: a means of modeling the fair conditions under which free and equal persons select principles of justice.⁶ Because it is only a device for representing a per-

⁴ See Thomas Nagel, *Justice and Nature*, 17 *Oxford J. Legal Stud.* 303, 311–12 (1997); Thomas W. Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 12 *Soc. Phil. & Pol'y* 241 (1995).

⁵ Kordana & Tabachnick, *supra* note 2, at 1286; cf. *id.* at 1287–88, 1298–99 n.53 (arguing to the same effect).

⁶ See *id.* at 1286. For Rawls's understanding of the original position merely as a device for modeling the choice of principles of justice, see John Rawls, *Justice as Fairness: Political not Metaphysical*, in *John Rawls: Collected Papers* 388, 401–02 (Samuel Freeman ed., 1999) [hereinafter *Collected Papers*]; John Rawls, *Kantian Constructivism in Moral Theory*, in *Collected Papers*, *supra*, at 303, 308; John Rawls, *Political Liberalism* 25–26 (1993) [hereinafter *Rawls, Political Liberalism*].

son's reasoning in choosing principles of justice, the derivation of these principles does not require the original position. The reasoning to principles of justice can be displayed without it. Kordana and Tabachnick therefore must concede that arguments for corrective justice need not be cast in terms of the original position. Thus, the strength of Ripstein's justification depends on its supporting argument. Ripstein believes that the values of freedom and equality, fundamental for Rawls, support a principle of personal responsibility: roughly, the principle that individuals have a responsibility to use only their share of primary goods to pursue their conception of the good, whatever it turns out to be.⁷ The responsibility principle, in turn, underlies a duty of repair when one wrongly uses primary goods allocated to others. According to Ripstein, this principle complements Rawls's principles of distributive justice.⁸ Understood as an underived moral constraint, Ripstein's principle is plausible enough.

A principle of responsibility can be understood in at least three different ways. One understanding is simply as an empirical claim about the tendency of the responsibility principle to guarantee a certain share of primary goods required by Rawls's principles: when the principle is embedded in a scheme of tort law, the budget of primary goods held by victims of harm tends to better approximate the demands of distributive justice. As Kordana and Tabachnick rightly observe, this understanding of the responsibility principle makes it merely instrumental in attaining distributive justice; it has no independent normative force as corrective justice.⁹ A second understanding is constitutive: the responsibility principle somehow constitutes the set of primary goods to which distributive justice entitles one. The entitlement may derive from the nature of personhood or the moral powers Rawls takes persons to possess,¹⁰

⁷ See Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *Fordham L. Rev.* 1811, 1832–33 (2004). Ripstein's principle is not idiosyncratic. For a similar notion of personal responsibility, not tied to primary goods, see Ronald Dworkin, *Sovereign Virtue* 6 (2002); cf. Brian Barry, *Why Social Justice Matters* 136–37 (2005).

⁸ See Ripstein, *supra* note 7, at 1830.

⁹ See Kordana & Tabachnick, *supra* note 2, at 1288–89.

¹⁰ See Rawls, *Kantian Constructivism in Moral Theory*, *supra* note 6, at 312–13; John Rawls, *Social Unity and Primary Goods*, in *Collected Papers*, *supra* note 6, at 359, 370 (“The idea of holding citizens responsible for their ends is plausible, however, only on certain assumptions. First, we must assume that citizens can regulate

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or perhaps from the bare notion of ownership of property. This seems to me implausibly strong.¹¹

A third understanding is moral: that pre-theoretic moral convictions find responsibility a consideration in the selection of principles of justice. The finding of responsibility may be based on values of freedom and equality or on other underived values. These convictions themselves need be no more or less contingent than the constraints by which Rawls defines the original position. As a moral constraint, responsibility limits the procedures by which primary goods are transferred. Of course, this moral understanding is contestable and needs elaboration. It must be shown that people do not have claims that can be satisfied from others' shares. As important, it must be demonstrated that interfering with others' shares for one's own purposes creates a duty to compensate them, rather than a duty that can be discharged by the state. A defensible principle of responsibility must also specify the conditions under which one can be held accountable for the outcomes of one's choices. But, as Ripstein observes, a principle of responsibility is consistent with Rawls's remarks on the division of responsibility between society and individuals.¹² Having conceded that arguments for corrective justice need not model the original position, Kordana and Tabachnick must allow for the possibility that responsibility serves as an underived constraint on the selection of principles of justice. This possibility allows the case for corrective justice in a Rawlsian scheme to be "put in argument form." The only remaining questions about the responsibility principle are substantive, not methodological: is the underived principle of corrective

and revise their ends and preferences in the light of their expectations of primary goods. This assumption is implicit in the powers we attribute to citizens in regarding them as moral persons.") (footnote omitted).

¹¹ Accord Stephen Perry, Ripstein, Rawls, and Responsibility, 72 *Fordham L. Rev.* 1845, 1850 (2004) (discussing ownership of property).

¹² See Ripstein, *supra* note 7, at 1829–30 (quoting Rawls's description of a division of responsibility between society and individuals and individuals with respect to each other); see also John Rawls, Reply to Alexander and Musgrave, *in* *Collected Papers*, *supra* note 6, at 232, 241 ("Society on its part assumes the responsibility for maintaining certain basic liberties and opportunities and for providing a fair share of primary goods within this framework, leaving it to individuals and groups to form and to revise their aims and preferences accordingly. Thus there is an understanding among members of a well-ordered society that as citizens they will press claims only for certain kinds of things and as allowed for by the principles of justice.").

justice morally compelling and does it, together with Rawlsian premises, yield the principles of corrective justice that are wholly or partly independent of principles of distributive justice?

Kordana and Tabachnick's other principal argument against the compatibility of corrective justice and Rawlsian distributive justice relies on the scope of Rawlsian principles of justice. It takes the form of a dilemma: either corrective justice regulates institutions that are part of the basic structure of society, or it regulates institutions outside it. If tort law is part of the basic structure, then principles of distributive justice regulate it, and corrective justice has no independent normative force. If not part of the basic structure, then the principles regulating tort law are not principles of justice.¹³ So, according to Kordana and Tabachnick's argument, corrective justice either is normatively inert or not justice. The dilemma is not genuine, however, because the latter alternative contains an invalid inference. While Rawls's two principles by assumption constitute principles of distributive justice, they need not constitute the entire set of principles of justice. Taking Rawls at his word, his principles of justice apply to the basic structure; they do not apply to transactions within that structure, which may be subject to other principles of justice.¹⁴ Corrective justice therefore is a possible complementary principle of justice.

Kordana and Tabachnick recognize this at points, and weaken their claim accordingly. They say that it does not follow that corrective justice regulates tort law if tort law is outside the basic structure.¹⁵ The claim, thus weakened, is true, but harmless to corrective justice. Proponents of corrective justice believe that the core of tort law exhibits a principle of corrective justice.¹⁶ Their belief is based on (fallible) evidence about tort law, not on the fact

¹³ See Kordana & Tabachnick, *supra* note 2, at 1295 (“Justice, for Rawls, has already been satisfied elsewhere: by the background conditions that are guaranteed by the basic structure. It is difficult to see, for Rawls, what (justice-oriented) values are at stake outside the bounds of the basic structure, apart from the natural duty of justice, which merely requires compliance with the just rules of the basic structure.”); cf. *id.* at 1287–88.

¹⁴ See Rawls, *Political Liberalism*, *supra* note 6, at 11–12, 268; John Rawls, *The Domain of the Political and Overlapping Consensus*, in *Collected Papers*, *supra* note 6, at 473, 480.

¹⁵ See Kordana & Tabachnick, *supra* note 2, at 1293–95.

¹⁶ See Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 36, 54–57 (2001).

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that an institution falls outside the basic structure. Kordana and Tabachnick find that Rawls's few remarks on contract law focus on its response to practical concerns of institutional design, not on substantive moral requirements. They infer from this that Rawls takes a similar view of tort law. Rawls's own views on the characterization of the basic structure and its membership are equivocal.¹⁷ As far as the exegesis of key passages in Rawls's writings is concerned, their opacity makes Rawls's treatment of tort law difficult. But Rawls's views on the matter are irrelevant to whether corrective justice can be derived from the values of freedom and equality, suitably elaborated.¹⁸ The location of tort law within or outside the basic structure has no bearing on this question.

II. THE SCOPE OF RAWLSIAN DISTRIBUTIVE JUSTICE

Another argument for the independence of corrective and distributive justice based on scope turns on an asserted difference in temporal scope of principles of justice. Corrective justice's duty of repair is static: it requires compensation for a wrongful harm that has occurred. Distributive justice is dynamic: it is concerned with the distribution of resources and liberties over the entire life of individuals, not at any point within their lives. Because distributive justice is dynamic, its principles do not require distributive shares at any moment in a person's life. As long as a person receives her mandated distributive shares over her entire life, distributive justice has nothing to say about her shares at any particular moment in time. Corrective justice creates duties of repair that, when they obtain, apply at particular moments. Because these duties may obtain at times when distributive justice's requirements are unaffected, corrective justice cannot be morally ancillary to distributive justice. It therefore is normatively independent of distributive jus-

¹⁷ For assessments of Rawls's different statements on the subject, see G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 *Phil. & Pub. Aff.* 3, 18–23 (1997) (replying to Rawls's restriction of justice as fairness to the basic structure); Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *Phil. & Pub. Aff.* 251, 257–62 (1998).

¹⁸ Rawls simply could be wrong about the character or implications of his own theory. Marx's mistaken views about the irrelevance of the class struggle and human nature to his theory of history illustrate the possibility. See G.A. Cohen, *Karl Marx's Theory of History: A Defence* (1978); Norman Geras, *Marx and Human Nature: Refutation of a Legend* (1983).

tice in such cases. This, essentially, is Professor Stephen Perry's argument.¹⁹

Perry's argument relies on the inapplicability of distributive justice to momentary states. The reliance is questionable. Even if distributive justice's requirements apply only across entire lives and not to momentary states, it does not follow that distributive justice has nothing to say about momentary states. For distributive justice's requirements, even understood dynamically, can be promoted or impeded by allocations in momentary states. After all, it is true or false that a particular distributive scheme, as implemented, accords with distributive justice. Whether the relevant principles of distributive justice are conceived of as dynamic or static does not make statements about the scheme less susceptible to truth-values. It is also true or false that a duty of repair under that scheme preserves or impedes the allocation of distributive shares over a life required by distributive justice. Perry challenges his reader to defend the idea that a duty of repair can promote or impair distributive justice, conceived dynamically.²⁰ The defense is easily met: in many cases we can in principle specify the conditions under which momentary distributive states will promote or impair distributive shares required across a lifetime. For instance, a duty of repair imposed on the worst off may be so onerous as to bring them below their required lifetime shares. In such cases, it therefore makes sense to conclude that distributive justice, even conceived dynamically, says something about these states. Our willingness to rank some institutional schemes by a principle of distributive justice rests on the idea that corrective justice sometimes can affect the principle's requirements.

The claim that distributive justice is inapplicable to momentary states may be more modest. It might be conceded that distributive justice can apply to momentary states and can therefore have something to say about momentary distributive states. But the claim may be that the requirements of distributive justice, conceived dynamically, are compatible with a number of different momentary states and are unaffected by distributions in these

¹⁹ See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *Oxford Essays in Jurisprudence* 237 (Jeremy Horder ed., Fourth Series 2000).

²⁰ See *id.* at 246.

states.²¹ Kordana and Tabachnick maintain that there will be few distribution-neutral states in which distributive principles of justice are maximizing principles. Their idea apparently is that institutions that maximize the relevant variable are likely to adopt rules requiring its maximization in each momentary state. Institutions incorporating both a duty of repair and the demand to maximize the relevant distributive shares, therefore, are likely to be inferior to schemes that maximize only distributive shares.²² This, of course, is an empirical claim about the nature of institutions selected by maximizing distributive principles, and it is hard to evaluate. Its truth surely turns on the range and plasticity of candidate institutional schemes, as well as on the motivations of actors. Nothing conclusive can be said about these variables. In the abstract, there is no reason to assume an institutional scheme that satisfies maximizing distributive principles requires maximization at each momentary state. Kordana and Tabachnick's claim unjustifiably supposes a plasticity in institutional rules and behavior within them that allows constant maximization across momentary states. Without empirical evidence suggesting an extensive malleability in rules and behavior, Kordana and Tabachnick are not entitled to their key supposition. For instance, to reverse an example used by Kordana and Tabachnick, imagine a situation in which people are overdeterred from taking actions that protect liberty. Suppose, too, that optimal deterrence requires a fine of 0.5 times the harm victims suffer; the duty of repair requires only a compensatory award of damages. Kordana and Tabachnick would conclude in such a case that even a dynamic principle of distributive justice requires selection of a scheme incorporating the undercompensatory measure of damages and rejection of compensatory awards.

True, under certain conditions, the example might be one in which institutions implementing distributive principles are not indifferent to momentary distributive shares. Nevertheless, the example arguably is unrepresentative. Institutional schemes that maximize relevant distributive shares may well be incapable of determining and adjusting distributions at each momentary state. Whether they can depends on available informational resources

²¹ See *id.* at 246, 261.

²² Kordana & Tabachnick, *supra* note 2, at 1298.

and the rigidity of institutional adjustments, as well as on the effect of ongoing adjustments on the incentives of affected persons. (For his part, Rawls seems to take seriously broadly practical limitations on institutional design.²³) For these reasons, generalizations in the abstract do not allow Kordana and Tabachnick to conclude that institutions satisfying maximizing distributive principles systematically call for constant maximization.

III. THE POINT OF CORRECTIVE JUSTICE

This brings me back to the general question of the relationship between distributive and corrective justice. The question is completely general, not one peculiar to the character of particular types of principles of distributive justice. It arises, for instance, whether or not the principles require maximization of some maximand. This is because the implementation of corrective justice can upset distributive shares demanded by the relevant principle of justice, whatever it is. The possibility that corrective justice can disturb a distribution demanded by distributive justice does not require that distributive principles call for the maximization of the values of one or more variables. I shall very briefly suggest that the point or purpose of corrective justice must be determined before the relationship between corrective and distributive justice can be determined. Its point or purpose affects the conceptual character of principles of repair—as a type of distributive principle or as an independent principle. The conceptual question must be decided before the relationship between corrective and distributive justice is taken up.

While the literature touches on point or purpose, it typically focuses on other matters, such as the content or scope of the duty of repair, its grounds, or the extent to which the duty is embedded in tort law. The passing treatment of point or purpose allows for different conclusions to be drawn about the character of corrective justice and its relationship to distributive justice. Compliance with corrective justice clearly can affect the morally required distribution of shares.²⁴ The question is whether this is part of its point or

²³ See Rawls, *Political Liberalism*, supra note 6, at 268.

²⁴ See Jules L. Coleman, *Risks and Wrongs* 351 (1992); Jules L. Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 *McGill L.J.* 91, 93 (1995).

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its purpose. In particular, disagreement arises from the different notions of corrective justice's purpose. Corrective justice might have at least four different purposes. One is to preserve the required distribution of shares. An alternative purpose is to remedy a wrongful harm only if doing so does not upset the required distribution of shares. A third purpose is simply to remedy a wrongful harm. A fourth possibility might operate in tort law. Here, the duty of repair arises upon the violation of legal entitlements, whether or not the entitlements are morally legitimate. Institutional and perhaps moral concerns might preclude judicial inquiry into the morality of legal entitlements. Thus, the purpose of corrective justice in tort law might be to remedy violations of legal entitlements. These different ways of specifying corrective justice's purpose affect the conceptual character of a duty to repair a wrongful harm. Depending on the particular purpose identified, the duty of repair may be one of either corrective or distributive justice.

Consider Professor Perry, who explicitly takes purpose into account. Perry maintains both that a moral duty of repair arises from interference with a legitimate entitlement and that distributive justice defines the legitimacy of the entitlement.²⁵ He concludes that the duty is one of corrective justice, not distributive justice, because corrective justice's purpose is only to remedy wrongful harms, not to preserve or promote a distribution of shares, even if that is one of its effects. Thus, for Perry, the basis of liability is partly a matter of distributive justice, while the duty of repair is wholly one of corrective justice. There are problems of detail here. Even taking a dynamic view of distributive justice, in cases where satisfying the duty of repair upsets or impedes a just pattern of distribution, corrective justice is incompatible with distributive justice. But Perry can take the position he takes about the character of the duty of repair because he adopts a particular view of corrective justice's purpose. For him, its purpose is simply the repair of wrongful harms. Corrective justice preserves a distribution of shares simply

²⁵ See Perry, *supra* note 19, at 262. Because of the conceptual dependence of wrongfulness on the legitimacy of entitlements defined by distributive justice, Perry rightly characterizes his position as one of "partial normative independence" of corrective from distributive justice. See also Ripstein, *supra* note 7, at 1815 (describing "a certain kind of independence").

in the sense that it leaves that distribution unaffected.²⁶ Preservation of distributive shares is not part of its purpose.

Competing views of the purpose or point of corrective justice are possible. Two alternative purposes described above are to preserve a required distribution of shares or to remedy a wrongful harm only if doing so does not upset the required distribution of shares.²⁷ Either alternative, if adopted, would result in a different characterization of the duty of repair as a duty of corrective justice. To illustrate, consider the possibility that corrective justice's purpose is to remedy wrongful harms only if doing so does not upset the required distribution of shares. This purpose is partly responsive to distributive justice because distributive justice constrains the occasions on which corrective justice requires a remedy. The purpose Perry endorses is completely insensitive to distributive justice: the duty to repair wrongful harms is unresponsive to distributive justice because distributive justice is not part of the purpose.

The character of corrective justice depends partly on whether its purpose is completely distribution-insensitive or partly distribution-responsive. A duty of repair and distributive justice are implicated in three different cases: (1) cases in which there is wrongful harm and a demand by distributive justice that it not be repaired; (2) cases in which there is both wrongful harm and a demand for repair by distributive justice; and (3) cases in which there is wrongful harm but no demand by distributive justice for or against repair. The completely distribution-insensitive view recognizes a duty of repair in case (1) as a duty of corrective justice. Thus, it must describe case (1) as a conflict between corrective and distributive justice, case (2) as an instance of compatibility between the two, and case (3) as an instance when there is only a duty of corrective justice. The partly distribution-responsive view describes case (1) differently. In (1) there is no conflict, because corrective justice requires repair only if distributive shares are not disturbed, and repair disturbs them in this case. Cases (2) and (3) are both describable as cases in which corrective justice requires repair: case

²⁶ See Perry, *supra* note 19, at 263.

²⁷ For a description of the view that corrective justice is completely responsive to distributive justice, see Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *Analyzing Law: New Essays in Legal Theory* 257, 309–10 (Brian Bix ed., 1998).

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(2) because distribution, and therefore corrective justice, requires repair; case (3) because only corrective justice requires it. Thus, the different views of purpose differ only over case (1). Before the relationship of corrective to distributive justice in case (1) can be decided, the character of corrective justice must be settled. Therefore, the purpose of corrective justice must also be determined. Of course, merely identifying the different purposes corrective justice may have does not suggest the most defensible purpose among them. Like competing conceptions of the scope and content of corrective justice, purpose identifies an additional feature that might be used to decide on a preferred conception of corrective justice. But without a preferred conception of corrective justice, the relationship between corrective and distributive justice cannot be decided. The debate over the relationship therefore must first settle on the purpose of corrective justice. Without doing so, any conclusions reached are premature.