

Corrective Justice and the Revival of Judicial Virtue

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INTRODUCTION

Judges must be wise. Sound judicial reasoning requires moral virtue. These sentiments about judging have been lost.¹ They apparently belong to a bygone era. While many advocate self-restraint or prudence as judicial virtues,² moral virtue has been conspicuously absent from the list. Except for avoiding obvious vices such as bribery, favoritism, prejudice, sloth, and arbitrariness, conventional wisdom maintains that being a good judge does not require being a good person. Even theorists sympathetic to a relationship between law and morality balk at making moral virtue a prerequisite of judicial decision making.³ Rather, many contend that

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1. Cf. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993) (describing a spiritual crisis in the legal profession due to the loss of the ideal lawyer-statesman who strives not to be a technician but to become a person of practical wisdom).

2. See, e.g., David Luban, *Justice Holmes and Judicial Virtue*, in *VIRTUE: NOMOS XXXIV* 235, 242-56 (John W. Chapman & William A. Galston eds., 1992) (summarizing and criticizing Justice Holmes's philosophical justification of self-restraint as a judicial virtue) [hereinafter *VIRTUE*]; Terry Pinkard, *Judicial Virtue and Democratic Politics*, in *VIRTUE, supra*, at 265, 281-82 (criticizing legal realist and majoritarian premises supporting Holmesian self-restraint); Judith N. Shklar, *Justice Without Virtue*, in *VIRTUE, supra*, at 283, 286-88. Although recognizing that judges need to abstain from certain moral vices, Shklar argues that prudence rather than rationality is the guiding virtue of judges, which involves judges being "democratically patient and politically skilled enough to convince their fellow citizens that they are doing a fair and honest, though not a flawless job." *Id.* at 287-88.

3. Ronald Dworkin claims that "[m]ost cases at law—even most constitutional cases—are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction." RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 11 (1996). Dworkin argues further that "constitutional clauses are moral principles that must be applied through the exercise of moral judgment." *Id.* at 6. However, constitutional interpretation is basically a question of "how an

judicial decision making is a matter of technical reasoning. On this view, judicial reasoning involves reasoning correctly either about the applicable legal rules or principles or about how the decision achieves an aim or end like economic efficiency.⁴ It is an art or a craft rather than a moral enterprise. Still others argue that reason, even with the help of moral virtue, cannot explain judicial decision making but that we must deconstruct judges' reasoning to determine what hidden presuppositions are guiding it such as presuppositions linked to race, gender, or class.⁵ On this account, judicial decision making is a matter of politics, not morality.

Aristotle, however, contends that judges must possess the moral virtue of corrective justice and the intellectual virtue of practical wisdom in order to determine the just result in all cases. Despite the widespread inattention to this claim, Aristotle's discussion of justice in Book V of the *Nicomachean Ethics* has had an extraordinary impact on the history of philosophy of law and legal theory. Aristotle's discussion of a particular form of justice, corrective justice, has been generally thought to mark the beginning of the

abstract moral principle is best understood" in the context of a particular legal dispute. *Id.* at 2. "Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest." *Id.* at 10.

4. Richard Posner argues that "[j]udges have got to understand that the only sound basis for a legal rule is its social advantage, which requires an economic judgment, balancing benefits against costs." RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 208 (1999). He further claims that "[m]ost economic analysis of law is pragmatic," *id.* at 239, and argues that "pragmatist judges always try to do the best they can do for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past," *id.* at 241. Posner's legal pragmatism, however, is not the same as philosophical pragmatism; it is entirely consistent with resorting to the technical reasoning employed by the economic analysis of law.

5. Roberto Unger argues that the critical legal studies movement rejects the claims that law and morality can be based on an apolitical method or procedure of justification and that the legal system can be objectively defended as embodying an intelligible moral order. The legal order is merely the outcome of power struggles or practical compromises. Thus, he advocates "the purely instrumental use of legal practice and legal doctrine to advance leftist aims." Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 567 (1983). For a good introduction to critical legal studies, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987). Similarly, Robin West claims that masculine jurisprudence proceeds from the presupposition of individuals as essentially separate from one another ("separation thesis") while feminist jurisprudence proceeds from the presupposition that individuals are essentially connected or related to one another. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988), reprinted in *FEMINIST LEGAL THEORY* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). Finally, critical race theorists have tried to show that "areas of law ostensibly designed for our benefit often benefit whites even more than blacks." Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Sense*, 44 VAND. L. REV. 1, 6 (1991). See also Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

philosophical examination of tort law.⁶ This influence has not only been important historically but also continues to have significant influence on legal scholars today.⁷ Many scholars consider corrective justice, of one form or another, the main normative alternative to the economic analysis of law for explaining not only tort law⁸ but also other areas of private law⁹ and law in general.¹⁰ Several legal theorists have developed new or modified versions of corrective justice to explain private law adjudication.¹¹ Others have taken Aristotle's notion of corrective justice as central to their theories about private law or tort law.¹² For example, Ernest Weinrib claims that "private law was Aristotle's discovery" and that "[c]orrective justice is the normative structure that underlies the private law relationship."¹³

According to Aristotle's corrective justice understanding of legal adjudication, the judge is required to look only at the distinctive character of the alleged injury rather than at the virtue of the

6. See David G. OWEN, *Foreword: Why Philosophy Matters to Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 1 (David G. Owen ed., 1995) [hereinafter PHILOSOPHICAL FOUNDATIONS].

7. Two recent collections of articles include the leading scholars of corrective justice theories. See PHILOSOPHICAL FOUNDATIONS, *supra* note 6; *Symposium: Corrective Justice and Formalism, The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992).

8. See, e.g., Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

9. Private law is "[t]hat portion of the law which defines, regulates, enforces, and administers relationships among individuals, associations, and corporations." BLACK'S LAW DICTIONARY 1196 (6th ed. 1990). By contrast, public law is "[t]hat portion of the law that defines rights and duties with either the operation of government, or the relationships between the government and individuals, associations, and corporations." *Id.* at 1230.

10. See, e.g., Richard W. Wright, *Right, Justice, and Tort Law*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 160 ("I believe it is clear that the equal freedom theory [Kantian-Aristotelian theory of right or justice], rather than the utilitarian efficiency theory, provides the foundation for morality and law in general and for tort law in particular.").

11. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 303-28 (1992); Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 53 ("[C]orrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice."); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 444 (1992) [hereinafter Coleman, *The Mixed Conception*]; Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) (arguing that substantive corrective justice is developed based on the principle of causal responsibility); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972) (arguing that the paradigm of reciprocity is derived from the "intuitions of corrective justice"); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

12. See ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56 (1995) [hereinafter WEINRIB, PRIVATE LAW]; Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) [hereinafter Weinrib, *Corrective Justice*]. See also James Gordley, *Tort Law in the Aristotelian Tradition*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 6, at 131; Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851 (1992); Wright, *supra* note 10; Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992) [hereinafter Wright, *Substantive Corrective Justice*].

13. Weinrib, *Corrective Justice*, *supra* note 12, at 425; see also WEINRIB, PRIVATE LAW, *supra* note 12, at 56-57.

disputing parties. She must treat the parties equally and decide which party inflicted the wrong or injury and which received it. This requires a determination of the position of equality (i.e., legal rights) of the parties before the injury occurred. In accordance with the position of equality, the judge determines if there has been any unjust gain or loss and, if so, equalizes it. Consequently, corrective justice (the position of equality) is the mean between the two excesses of unjust gain and loss and provides a standard for judges to evaluate unjust gains and losses.

In general, this picture of judicial decision making hardly appears controversial and seems to reveal the structure of private law adjudication. It suggests that a judge looks backward (*ex post*) to the time of the alleged injury to determine whether there was an injury and if so, whether it was caused by the wrongful conduct of the defendant. Without getting into the conundrums of causation, the central idea is that the judge must determine whether the defendant's actions caused an unjust injury to the plaintiff which must then be corrected or equalized by compensating the plaintiff.¹⁴ The central problem I will focus on, however, is whether or how corrective justice provides a standard or a method for determining whether there was an injury (an unjust gain or loss). My thesis is that the moral virtue of corrective justice receives its content, as all the moral virtues do, through judges exercising the intellectual virtue of practical wisdom in relation to the particulars of the case and the *telos* of the good life.

The issue of the content of Aristotle's theory of corrective justice has been the subject of much debate.¹⁵ Many interpreters of

14. Corrective justice is often characterized as adopting an *ex post* perspective that looks backward in an attempt to apportion gains and losses caused by the defendants in violation of the plaintiffs' rights. See, e.g., Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 435-37 (1985). By contrast, the economic analysis of law is usually characterized as an *ex ante* perspective. In the tort context, the economic analysis of law minimizes or eliminates the role of causation in determining liability and looks at liability as a means of creating efficient incentives for future behavior rather than as a means for *ex post* compensation for injuries caused by the defendant. See *id.* at 436-37. Some have argued that the *ex post* corrective justice approach is incompatible with the *ex ante* economic approach because they have inconsistent normative justifications for imposing liability. See, e.g., John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 454-55 (1979). However, in the conclusion, I suggest that the teleological conception of corrective justice, when fully elaborated and properly understood, requires the practically wise judge to combine the *ex post* and *ex ante* perspectives in judicial decision making.

15. See, e.g., HANS Kelsen, WHAT IS JUSTICE? 125-36 (1957) (criticizing corrective justice as an empty tautology consisting of rendering each his due); WEINRIB, PRIVATE LAW, *supra* note 12, at 58 (proposing a Kantian content for Aristotle's formal definition of corrective justice: "The equality of corrective justice is the abstract equality of free purposive beings under the Kantian concept of right"); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201, 203 (1981) (arguing that the concept of corrective justice "is a procedural principle" that "is not only compatible with, but required by, the economic theory of law"); Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURIS 211, 218

Aristotle's theory have claimed that the notion of corrective justice does not have any specific content. Some claim it is merely formal, and others claim it is empty. For example, Weinrib argues that corrective justice provides the formal structure of justification for private law and that "the equality of corrective justice is the abstract equality of free purposive beings under the Kantian concept of right."¹⁶ Although rejecting Weinrib's formalism, Richard Wright similarly claims that "the moral equality of the parties in corrective justice seems to prefigure (through ethical presuppositions rather than formalist conceptual implications) Kant's foundational assumption of the 'absolute moral worth' of each individual."¹⁷ Finally, Steven Heyman argues that corrective justice is political and that "Aristotle's doctrine of juridical equality reasonably can be understood based on a conception of freedom" developed in Aristotle's *Politics*.¹⁸

Despite the insights of these accounts of corrective justice, none of them adequately explains how the moral virtue of corrective justice relates to the standard reading of Aristotle's *Nicomachean Ethics* as proposing a teleological form of ethics. By contrast, this Article argues for a teleological¹⁹ interpretation of Aristotle's conception of corrective justice. The teleological conception of corrective justice does not attempt to analyze corrective justice merely as a formal (Weinrib), substantive (Wright), or political (Heyman) conception of equality or freedom that can be applied by technical reason to various circumstances. Rather, it maintains that corrective justice is a moral virtue of the judge that cannot be fully understood without

(1989) [hereinafter Weinrib, *Aristotle's Forms*]; Weinrib, *Corrective Justice*, *supra* note 12, at 413, 419-21, 423; Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 981 (1988) [hereinafter Weinrib, *Legal Formalism*].

16. WEINRIB, *PRIVATE LAW*, *supra* note 12, at 58.

17. Wright, *Substantive Corrective Justice*, *supra* note 12, at 702.

18. Heyman, *supra* note 12, at 858, 862.

19. By teleological, I mean an interpretation that emphasizes Aristotle's tendency to explain things primarily with respect to a telos or final end (i.e., with respect to a state of affairs or characteristic of reality to be pursued). Cf. FRANKLIN I. GAMWELL, *THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD* 61 (1990) ("[A] teleological ethic is one in which the distinction between moral and immoral action as such is identified by reference to one or more states of affairs or characteristics of existence to be affirmed or pursued."). For example, in the *Nicomachean Ethics*, Aristotle posits a normative ethic grounded on a teleological principle—a principle that grounds moral claims in a telos (end or goal). By contrast, Kant proposes a radically nonteleological or deontological principle—the categorical imperative. Rather than identifying a state of affairs that should be pursued (a telos), Kant claims that morality must be cleansed of everything empirical by pure practical reason. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 56 (H.J. Paton trans., Harper & Row 1964) (1785). Kant proposes the science of morality to purify ordinary practical reason (the will) of these empirical influences (ends) so that duty may become the ground of action. In addition, Kant argues that the "supreme moral principle" is categorical or rationally necessary. Moreover, "if freedom of the will is presupposed, morality, together with its principle, follows by mere analysis of the concept of freedom." *Id.* at 115.

specifying its relationship to the intellectual virtue of practical wisdom and the telos of the good life. Under this reading, Aristotle's conception of corrective justice specifies a method of judicial decision making whereby only the practically wise (i.e., morally virtuous) judge can know the content of corrective justice in all cases. Judging requires moral virtue, not technical, philosophical, or legal expertise. Aristotle points to Pericles as an example of a man who exhibits practical wisdom—he knows the good for himself and for humans in general.²⁰ In other words, he knows about the good life, its relationship to the position of equality, and what corrective justice requires in particular situations. Pericles will thus be used to identify the ideal Aristotelian judge who has the practical wisdom required to determine corrective justice in all cases.²¹ Consequently, this Article advocates a revival of Aristotle's notion that judicial virtue requires moral virtue and proposes Pericles as the ideal judge.

Because of the striking absence of the teleological conception of corrective justice in the legal literature, a substantial portion of the following discussion will be spent elaborating the relationship of Aristotle's conception of corrective justice to his understanding of practical wisdom and the telos of the good life. Those familiar with these arguments may not feel the need to revisit this discussion, but for those exposed to corrective justice through its predominantly non-teleological interpretation, this background will be essential to understanding the later arguments. The first part will set forth the forms of justice, including corrective justice. The second part will discuss the relationship between the moral virtue of corrective justice, the intellectual virtue of practical wisdom, and the telos of the good life. The third part will specify how all laws are subjected to the standard of practical wisdom in the process of their application. The fourth part will address the issue of the emptiness of corrective justice and the attempts of legal theorists to deal with this alleged emptiness. Finally, the last part will attempt to demonstrate how Pericles, the ideal Aristotelian judge, would exercise practical wisdom in deciding hard cases.

20. See ARISTOTLE, *NICOMACHEAN ETHICS* 1140b:8-10 (William D. Ross trans. & rev. by J.O. Urmson) in 2 *THE COMPLETE WORKS OF ARISTOTLE* 1729 (Jonathan Barnes ed., rev. Oxford trans., Princeton Univ. Press 1984) [hereinafter N.E.]. Thucydides notes that Pericles was chosen to give the funeral oration for the first to die in the Peloponnesian War because of "his intellectual gifts" and "his general reputation." THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 143 (Rex Warner trans., Penguin Books 1972).

21. Ronald Dworkin is well-known for his model of the ideal judge, Hercules, who always knows the right answer to any legal dispute whether it is an easy case or a hard one. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 354 (1986). My idea for Pericles as the ideal Aristotelian judge originated in part from Dworkin's ideal judge, Hercules, but also from Aristotle's description of Pericles as the archetype of the practically wise person. See N.E., *supra* note 20, at 1140b:8.

I. THE FORMS OF JUSTICE AND CORRECTIVE JUSTICE

Aristotle classifies many types or forms of justice in Book V of the *Nicomachean Ethics*. The first kind of justice is justice in its broadest sense, meaning complete virtue “not without qualification, but in relation to our neighbors.”²² Aristotle distinguishes justice from the other virtues because its possessor “can exercise his virtue not only in himself but towards his neighbor also; for many men can exercise virtue in their own affairs, but not in their relations with their neighbors.”²³ In other words, the just person can judge both what is good for himself and what is good for others. This ability to determine what is good for another is what distinguishes justice from the other moral virtues. For this reason, justice is often considered the “greatest of virtues.”²⁴ Aristotle then distinguishes justice as virtue entire from particular justice “which is a *part* of virtue.”²⁵ Although particular justice and justice as virtue entire “both consist in a relation to one’s neighbor,”²⁶ particular justice classifies the particular forms of those relations with others as distributive and corrective (rectificatory) justice. Both of these forms of justice are concerned with the just as the fair and equal.

A. Distributive Justice

Distributive justice is concerned with apportioning shares of money and honor between people according to merit in some sense. The shares will be unequal in amount but they will be equal in relation to the geometrical proportion of merit (i.e., equality of ratios). In other words, the thing each person gets will be proportional to that person’s merit, and the ratio of persons to things will be equal because those relationships are determined by the same proportion or standard of merit. Thus, the just in this sense is the proportionate.²⁷

B. Corrective Justice

On the other hand, corrective or rectificatory justice is concerned with justice in transactions and is a different sort of equality. It involves both voluntary and involuntary transactions and is determined by an arithmetical, rather than a geometrical, proportion. “[T]he just is intermediate between a sort of gain and a

22. N.E., *supra* note 20, at 1129b:25.

23. *Id.* at 1129b:32-35.

24. *Id.* at 1129b:25.

25. *Id.* at 1130a:14.

26. *Id.* at 1130a:35.

27. *See id.* at 1131b:16.

sort of loss . . . it consists in having an equal amount before and after the transaction.”²⁸ Voluntary exchanges such as a sale or purchase are just (assuming there is no fraud) because people exchange what they consider to be equal in value. Conversely, involuntary transactions (clandestine or violent) require an equalization between the gain and the loss resulting from the transaction. This equalization is referred to as corrective justice.

Corrective justice is the intermediate between an involuntary gain and loss. According to the corrective justice understanding of legal adjudication, “the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it.”²⁹

Aristotle further emphasizes that “[j]ustice is a kind of mean, but not in the same way as the other virtues, but because it relates to an intermediate amount, while injustice relates to the extremes.”³⁰ For example, between rashness and cowardice, courage is the mean, and between self-indulgence and insensibility, temperance is the mean. In those cases, the mean is between an excess and a defect with respect to one person’s virtuous disposition. By contrast, corrective justice is a mean between “acting unjustly and being unjustly treated,” both of which are extremes that corrective justice rectifies.³¹ In that case, the mean is between two extremes because justice is a virtuous disposition that has to do with our relation to our neighbors. Consequently, if I act unjustly toward you, my excess or injustice produces an excess of what is useful for me and an excess of what is harmful to you. Moreover, Aristotle analogizes corrective justice to an arithmetical proportion. This is why the equal is also

called the just (*dikaion*), because it is a division into two equal parts (*dikha*), just as if one were to call it *dikaion*; and the judge (*dikastes*) is one who bisects (*dikhastes*). For when something is subtracted from one of two equals and added to the other, the other is in excess by these two; since if what was taken from the one had not been added to the other, the latter would have been in excess by one only.³²

Aristotle notes, however, that the terms “gain” and “loss” may not be appropriate for describing all involuntary transactions, but he

28. *Id.* at 1132b:18-20.

29. *Id.* at 1132a:4-7.

30. *Id.* at 1133b:33-35.

31. *Id.* at 1133b:32.

32. *Id.* at 1132a:30-34.

intends the terms “gain” and “loss” to apply figuratively to the person who inflicts a wound and to the person who suffers the wound.

For the purpose of the following discussion, it is important to recognize that determining whether there is a gain or loss requires the judge to determine three things: 1) the position of equality, 2) the gain, and 3) the loss. The key element is the position of equality. Corrective justice, like all the virtues, is proposing a mean (the position of equality) as the norm for determining just action and just treatment. The gain and loss are merely relative to the determination of the position of equality. In easy cases, the position of equality is merely the status quo before the interaction of the parties (i.e., pre-interaction holdings or the apparent legal rights of the parties before the involuntary transaction occurred). For example, if *A* hits *B*, the law of most communities would recognize *B*’s right to recover in most cases. Excluding exceptions such as where *A* is acting in self-defense, *B* would have the right to be free from bodily invasion, which is what we would consider part of the parties’ pre-interaction holdings (position of equality). Consequently, an injury or loss has occurred because the action in question violated the mean of equality.³³

Despite this formal analysis of corrective justice, we can still ask: What gains and losses does corrective justice rectify? Does corrective justice only rectify unjust acts or does it rectify the unjust injuries suffered by actions which are not unjust? In order to identify more particularly when a gain or loss has occurred, Aristotle specifies three kinds of injury that corrective justice rectifies.³⁴ To understand these three types of injury, it is important to realize that Aristotle focuses on “the distinctive character of the injury” rather than on the “character of the person.” He argues that “it makes no difference whether a good man has defrauded a bad man or a bad man a good one . . . the law looks only to the distinctive character of the injury.”³⁵

33. Cf. Wright, *Substantive Corrective Justice*, *supra* note 12, at 699 (“[T]he criteria of equality for distributive and corrective justice, respectively” are “the criteria for identifying unjust gains and losses.”). To the contrary, many legal theorists have focused on the notions of “wrong” and “loss” as central to understanding corrective justice. See, e.g., Coleman, *The Mixed Conception*, *supra* note 11, at 441. Coleman appears to be right to emphasize that in certain circumstances there are injuries that are not compensated for directly by the person causing the injury. For example, in states adopting a no-fault insurance scheme, the parties make claims against their own insurance company for their injuries. However, it is not that there is a separation of the wrongfulness of the action from the injury in these cases but that the action itself is not considered wrongful by the society. The position of equality or the norm governing our relationship in the context of an automobile accident holds that no wrong or injury has occurred in relation to the other party.

34. See N.E., *supra* note 20, at 1135a:15-1136a:10.

35. *Id.* at 1132a:2-4.

He recognizes a separation between the justice of persons and the justice of actions. In the following three types of injury, note that certain actions indicate that the actor is unjust while other actions are unjust or only incidentally unjust without the actor being unjust. First, injuries resulting from intentionally unjust actions are injuries caused by “unjust persons.” These intentionally unjust actions are actions that are done voluntarily (i.e., with knowledge and not coincidentally or under compulsion)³⁶ and by choice (i.e., after deliberation or intentionally). In such cases, the action and the actor are unjust. Second, injuries resulting from unintentionally unjust actions or “acts of injustice” are those done voluntarily but not by choice. Here, the actions are unjust but the person is not because the person unintentionally caused the injury. Aristotle gives the example of actions “due to anger or to other passions necessary or natural to man.”³⁷ Finally, injuries resulting from mistakes are unjust injuries that are caused by actions done in ignorance. Aristotle claims that these actions are involuntary because they are performed without knowledge such that “the person acted on, the act, the instrument, or the end that will be attained is other than the agent supposed.”³⁸ Mistakes are unjust, but only incidentally, because they are the unintended consequence of the actions causing them. Aristotle further divides this general notion of mistakes into: 1) a particular notion of mistake—actions resulting in injuries by misjudgments of reasonable expectation (i.e., objectively foreseeable results that were not subjectively foreseen); and 2) misadventures—actions resulting in injuries that are contrary to reasonable expectation (i.e., not objectively foreseeable).³⁹

This classification of injuries and the distinction between the justice of actions and the justice of persons, however, should not be interpreted to mean that corrective justice only rectifies the actions of unjust people. Rather, given that corrective justice is the mean between both “acting unjustly and being unjustly treated,” it should be clear that corrective justice rectifies all three types of unjust injuries, not only unjust injuries stemming from the action of an unjust person.⁴⁰ In fact, note that Aristotle’s specification of these

36. See *id.* at 1109b:35-1111a:24.

37. *Id.* at 1135b:20-21.

38. *Id.* at 1135b:12-13. Note that Aristotle only refers to “three kinds of injury in transactions between man and man.” *Id.* However, he divides mistakes into two categories—mistake in a particular sense and misadventures—which thus result in four kinds of injury rather than three.

39. See *id.* at 1135b:12-19.

40. There is considerable disagreement about whether Aristotle limits corrective justice to rectifying deliberately caused injuries (first and second types) or whether he intends corrective justice to rectify all three types of unjust injuries. Compare Wright, *Substantive Corrective*

three types of injuries roughly correlates with the three traditional categories of tort claims: intentional torts—wrongs by unjust persons; negligence—acts of injustice and mistakes; and strict liability—misadventures. Corrective justice thus requires that judges remedy injuries (gains and losses) resulting both from unjust actions and from unjust treatment.

II. THE VIRTUES AND THE TELOS OF THE GOOD LIFE

As discussed more fully in Part III, many interpreters of corrective justice take this formal description as the end of their inquiry about corrective justice. From this brief discussion in Book V, Chapter 4 of the *Nicomachean Ethics*, they conclude that corrective justice does not have any specific content.⁴¹ They argue that corrective justice fails to provide any substantive definition of the position of equality that determines the legal relationship of parties involved in involuntary transactions. Aristotle is thus assumed to presuppose the existence of legal rights rather than to specify the content of those legal rights.

The content of corrective justice is not evident from this formal statement, however, because the formal statement fails to relate corrective justice to Aristotle's wider project of discussing the moral virtues and their relationship to the intellectual virtues in the good life.⁴² Although Aristotle's notion of corrective justice and its mean of equality are formal, they receive content, as with all moral virtues, through agents (judges) exercising the intellectual virtue of *phronesis*, or practical wisdom. In other words, corrective justice and the position of equality are saved from emptiness by *phronesis*, or practical wisdom, as are the rest of the virtues.⁴³ Thus, by understanding corrective justice in this fuller context, it becomes evident that the content of corrective justice comes from exercising the intellectual virtue of practical wisdom and from the teleology of the good life. This part will develop this context in preparation for

Justice, *supra* note 12, at 697-98 ("Although it is not entirely clear, Aristotle apparently treats each of these injuries in interaction—whether due to acts of injustice, mistakes, or misadventure—as unjust losses, requiring rectification.") with Gordley, *supra* note 12, at 140 ("Aristotle had only intentionally inflicted harm in mind.") and Posner, *supra* note 15, at 201 ("[Aristotle] did not consider negligence the kind of wrongful conduct that triggers a duty of rectification.").

41. See *supra* note 15.

42. Cf. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 103 (1988) ("Expositions of Aristotle on justice characteristically make little or no reference to his account of practical reasoning; and discussions of Aristotle on practical reasoning, or on the theory of action more generally, are apt to say nothing about justice.").

43. See RICHARD KRAUT, *ARISTOTLE ON THE HUMAN GOOD* 327 (1989) ("And to understand the proper place of this virtue of thought [*phronesis*], we must see how Book VI of the *NE* saves Aristotle's earlier statements about the mean from emptiness.").

the more complete description of the content of corrective justice in the third part.

A. Moral Virtue and Practical Wisdom

For Aristotle, corrective justice is a moral virtue and has the same general characteristics as the rest of the moral virtues. Moral virtue “is a state of character concerned with choice, lying in a mean, i.e. the mean relative to us, this being determined by a rational principle, and by that principle by which the man of practical wisdom would determine it.”⁴⁴ A state of character is a disposition or a rational ordering of the soul’s capacity to desire. One becomes virtuous by having the right ordering of the desires or the right disposition and by choosing to do virtuous acts. In other words, we become just by doing just acts, brave by doing brave acts, and so forth. Right desire is the virtuous disposition and the intermediate between excess and deficiency. For example, between rashness and cowardice, courage is the mean, and between self-indulgence and insensibility, temperance is the mean. In this respect, corrective justice is slightly different because equality is a mean between “acting unjustly and being unjustly treated,” both of which are extremes.⁴⁵ Furthermore, that a mean is relative to us means that we should take into consideration “the right person, to the right extent, at the right time, with the right motive, and in the right way.”⁴⁶ In addition, the requirement that virtue involve choice means that the virtuous act requires thought or deliberation and must be voluntary (i.e., with knowledge and not coincidentally or under compulsion). The deliberation involved in choice involves determining the mean (or rational principle) that the practically wise person, possessing the intellectual virtue of practical wisdom or *phronesis*, would use to make the choice. The person of practical wisdom takes pleasure in what he ought to and acts according to the right rule. Thus, moral virtue is a state of character concerned with choice, which is not fully realized without the intellectual virtue of practical wisdom.

Likewise, the intellectual virtue of practical wisdom never exists apart from moral virtue; it is the practical thought of a good person. Moral virtue compels us to aim at the right end while practical wisdom compels us to choose the right means. “Intellect itself,” says Aristotle, “moves nothing, but only the intellect which aims at an end and is practical.”⁴⁷ In the strict sense, neither is it possible to be

44. N.E., *supra* note 20, at 1106b:36-1107a:2.

45. *Id.* at 1133b:32.

46. *Id.* at 1109a:27-28.

47. *Id.* at 1139a:36-37.

good without practical wisdom nor is it possible to be practically wise without moral virtue. Those who are not correctly habituated to act virtuously—Aristotle calls them young in character or lacking experience—cannot become practically wise.⁴⁸ Hence Aristotle asserts that “any one who is to listen intelligently to lectures about what is noble and just and, generally, about the subjects of political science must have been brought up in good habits.”⁴⁹ In other words, one has to have the beginnings of the moral virtues (habituation in the moral virtues) before one can acquire practical wisdom. Practical wisdom must begin with the facts relevant to it—good actions. One who is young in character, however, is inexperienced in good actions. As a result, practical reason does not make bad people (those not habituated in moral virtues) good but makes good people (those already habituated in moral virtues) better. Moreover, it is not an attempt to discover the good for humans but to clarify what was already vaguely known to be good by its students—to clarify the bull’s-eye on the target at which these people already habitually aim.

In addition, to fully understand the nature of practical wisdom requires an understanding of the parts of the soul, because human virtue is a matter of the soul rather than the body.⁵⁰ The soul has an irrational principle and a rational one. The irrational element has a vegetative division that is primarily concerned with nutrition and growth. The activity of this division of the soul seems to be common to humans and animals and, like the state of sleep, does not have a lot to do with goodness and badness. The other irrational element of the soul, however, shares in the rational element and plays a part in the state of moral virtue. This is the desiring element, which can resist and/or obey the rational element. In the continent person, for example, the irrational desires obey the rational element, while in the incontinent person they do not. The rational element also has two divisions: one that tries to control the desiring element of the irrational side (calculative) and the rational element in the strict sense, which is independent of desiring (contemplative). Moral virtue concerns the excellent functioning of the rational element of the soul to the extent that desire obeys it and involves the intellectual virtue of practical wisdom. Moral virtue begins with habit; one becomes morally virtuous by doing virtuous acts. By contrast, the intellectual virtues of philosophical wisdom and theoretical understanding concern the excellent function of the rational element to the extent that it is independent of desire. These

48. See *id.* at 1095a:2-3

49. *Id.* at 1095b:5-7.

50. See generally *id.* at 1102a:15-1103a:4.

intellectual virtues begin and grow by teaching: They are contemplative activities pursuing knowledge. Thus, the virtues are divided into moral virtues (justice, temperance, liberality, continence, etc.) and intellectual virtues (philosophical wisdom, understanding, and practical wisdom), which correspond to the excellent functioning of the two rational parts of the soul.⁵¹

Practical wisdom is the intellectual virtue which implies the excellent functioning of that part of the soul which grasps the rational principle by which we contemplate variable things and by which we discipline the desires. This part of the soul calculates about good action. Calculating about good action requires deliberation not only about universals but also about particulars. Aristotle gives an example about dry food being good for every person, which may be more generally summarized as:

- (1) *X* is good for humans (universal).
- (2) This is *X* (particular).
- (3) This is good for me (conclusion), or I do *X* (action).⁵²

Moreover, practical wisdom “is a true and reasoned state of capacity to act with regard to things that are good or bad for [humans] . . . good action itself is its end.”⁵³ The mark of a person of practical wisdom is that he deliberates well not about what is good and expedient for himself in a particular respect, e.g., for the sake of health or strength, but about what is good and expedient for the good life in general, including health or strength to the extent they are relevant to the good life.⁵⁴ For example, it is good and expedient to exercise because it promotes good health, but it is not practically wise to become an exercise fanatic and thereby eliminate other aspects of a good life like education. Consequently, the good action required by moral virtue depends on the intellectual virtue of practical wisdom.

In the case of the moral virtue of corrective justice, practical wisdom is thus required for good action. Good action requires determining the position of equality, which is the mean between unjust gain and loss. As will be shown below, in easy cases, the position of equality will be obvious even to those judges without practical wisdom. Either the common law or the statutory law already includes the practically wise determination of the position of equality. In hard cases, however, the position of equality will only be known by a virtuous judge—a judge with the intellectual virtue of

51. See *id.* at 1103a:4-10.

52. See *id.* at 1147a:5-7.

53. *Id.* at 1140b:5-7.

54. See *id.* at 1140a:25-28.

practical wisdom. Aristotle's judge must thus be morally virtuous and intellectually virtuous in order to determine the position of equality in all cases. She must have both the proper state of character so that she desires the good of another and practical wisdom so that she has the capacity to decide what is good and expedient for another. As indicated above, Aristotle points to Pericles as an example of a man who exhibits the mark of a person of practical wisdom; he knows the good for himself and for humans in general.⁵⁵ In other words, Pericles knows about the good life in general and its relationship to the position of equality and is capable of determining corrective justice in all cases.

B. The Nature of a Thing and the Telos of the Good Life

In addition, understanding the nature of the position of equality and its relationship to the good life requires an understanding of Aristotle's methodological principles. One of Aristotle's basic methodological principles is to explain the nature of a thing⁵⁶ primarily by its end or telos. For example, Aristotle begins the *Nicomachean Ethics* by stating that "[e]very art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim."⁵⁷ In his fuller account, he explains or gives reasons for things in terms of four causes: 1) the material cause (what is it made of?); 2) the formal cause (what is it?); 3) the efficient cause (by what agent?); and 4) the final cause (for what end?).⁵⁸ However, for Aristotle, the final cause is the most comprehensive.⁵⁹ "For what each thing is when fully developed, we

55. See *id.* at 1140b:8-10.

56. Although the nature of something may be a form, it is not formal (in the sense of being empty) but describes the shape something will become. "[F]or a thing is more properly said to be what it is when it has attained to fulfillment than when it exists potentially. . . . What grows *qua* growing grows from something into something. Into what then does it grow? Not into that from which it arose [i.e., matter] but into that to which it tends. The shape then is nature." ARISTOTLE, PHYSICS 193b:8-10, 17-18 (R.P. Hardie & R.K. Gaye trans.), in 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 20, at 315 [hereinafter PHYSICS].

57. N.E., *supra* note 20, at 1094a:1-3.

58. See PHYSICS, *supra* note 56, at 194b:16-195a:26.

59. Although the final cause is the most comprehensive, both efficient and final causes are of special interest to Aristotle because they explain movement and activity. In modern times, causation has been reduced to efficient causation. Understanding something is a matter of understanding the prior agents producing that thing in accord with law-like regularities. In this respect, Kant tried to explain morality as an act of self-legislation so that morality, the realm of human freedom, would be explained by law-like regularities analogous to those of science, which explain the phenomenal realm of efficient causation. See KANT, *supra* note 19, at 57-58. Contrary to this modern trend, Whitehead speaks of both efficient and final causation. In effect, he argues that Aristotle's material causation can be reduced to efficient causation and that formal causation can be reduced to final causation. See A.N. WHITEHEAD, PROCESS AND REALITY 84 (corrected ed. 1978) ("[Aristotle's] philosophy led to a wild over stressing of the notion of 'final causes' during the Christian middle ages; and thence, by a reaction, to the

call its nature, whether we are speaking of a man, a horse, or a family."⁶⁰ Nature is a principle of inner change and explains things in terms of what they are *for* or *for the sake of*. In other words, each thing, including its motion and activity, is best understood by what it is when it is fully developed, or by its end.

The ends towards which things aim (including the end of corrective justice), however, are different. Each irreducibly different subject matter has an irreducibly different end (for instance, medical art—health; shipbuilding—a vessel; strategy—victory; economics—wealth) and has a science appropriate to it.⁶¹ Each science thus begins with the experience of its distinct irreducible subject matter (i.e., inductively). "[T]he fact is the starting point."⁶² As a result, an examination of the nature of corrective justice in Aristotle's thought must take into consideration the end of corrective justice (restoring the position of equality), the facts particular to corrective justice (just actions of good people), and the science appropriate to it (practical science).

As noted above, the person of practical wisdom, Pericles, is one who has been habituated in the moral virtues and knows the facts relevant to moral virtue including corrective justice. In addition, Pericles uses practical science as his method of determining corrective justice because practical (or political) science is the science appropriate to examining the good for humans, or happiness. Aristotle argues that because "politics uses the rest of the sciences, and . . . legislates as to what we are to do and what we are to abstain from, the end of this science must include those of the others, so that this end must be the good for man."⁶³

In the most inclusive sense, practical science studies all activities and ends that are pursued by humans.⁶⁴ In a more specific sense, it is contrasted with the theoretical sciences. Practical science is concerned with the activities of human action and the end of good action in the political life. Theoretical science is concerned with the activity of contemplation and the end of knowledge in the philosophical life.⁶⁵ Furthermore, as with any moral virtue, Aristotle

correlative overstressing of the notion of 'efficient causes' during the modern scientific period. One task of sound metaphysics is to exhibit final and efficient causes in their proper relation to each other.").

60. ARISTOTLE, THE POLITICS 1252b:32 (B. Jowett trans.), in 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 20, at 1986. [hereinafter POL.].

61. See N.E., *supra* note 20, at 1094a:7-9.

62. *Id.* at 1095b:6. Aristotle, then, can be classified as a specific teleologist and a specific empiricist.

63. *Id.* at 1094b:5-7.

64. See KRAUT, *supra* note 43, at 221. Kraut argues that political science, however, probably does not govern the theoretical sciences. See *id.* at 222 n.19.

65. Further, in the most restricted sense, practical science is concerned with the actions of

maintains that to understand the specific end of corrective justice (restoring the position of equality) requires understanding the more general end for humans (the good life) of which it is a part. Consequently, if the end of practical science is “the good for [humans]” or happiness, the end of corrective justice—which is restoring the correct relationship between the parties to a legal dispute (i.e., the position of equality)—must be determined in relation to that end.

Aristotle claims that for humans, “there is some end to the things we do, which we desire for its own sake” and “this must be the good and the chief good,” which he refers to as *eudaimonia*, or happiness.⁶⁶ The highest good or happiness determines the purpose of human relationships, including the position of equality. This requires knowing “the function of [humans].” “[W]hat is peculiar to [humans],” Aristotle claims, is “a certain kind of life . . . an activity or actions of the soul implying a rational principle, and the function of the good man [is] the good and noble performance of these”⁶⁷ Aristotle points out that there is general verbal agreement that the chief good for humans is happiness and that it is identified with living well and doing well. Substantively, however, there is disagreement about what happiness is (pleasure, honor, etc.). Whatever happiness is, it is something final, desired in and of itself and “never for the sake of something else.”⁶⁸ In addition, it is self-sufficient or deficient in no good thing. Thus, happiness is the end of human action, and it is a first principle.

Aristotle answers the question of what happiness or the good for humans is in two ways, and each way terminates in a single end or first principle.⁶⁹ First, “happiness is an activity of soul in accordance with perfect virtue.”⁷⁰ In this sense, happiness consists in the theoretical activity of contemplation, which is pursued in the life of the philosopher. Through contemplation, humans can attain perfect virtue or the highest virtue, which is “the best thing in us.”⁷¹ Aristotle argues that reason—by which he means theoretical reason or the rational part of the soul that is independent of desire and by which we contemplate invariable things—is “the best thing in us” or

“doing” and pursuing the end of “doing well,” while productive science is concerned with the actions of “making” and pursuing the end of making things well.

66. N.E., *supra* note 20, at 1094a:18-20.

67. *Id.* at 1098a:1-15. See also POL., *supra* note 60, at 1253a:16-18 (“And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.”).

68. N.E., *supra* note 20, at 1097a:33.

69. See generally KRAUT, *supra* note 43, at 3-9.

70. N.E., *supra* note 20, at 1102a:5.

71. *Id.* at 1177a:13.

“something divine present in [us].”⁷² Moreover, the human capacity to contemplate or reason theoretically is what is most akin in us to the activity of God, which is contemplation. “And this activity alone,” Aristotle contends, “would seem to be loved for its own sake; for nothing arises from it apart from the contemplating, while from practical activities we gain more or less apart from the action.”⁷³ Thus, perfect happiness is a contemplative activity and the philosophical life that pursues contemplation is the best kind of life.

Although the philosophical life is the best and most perfect life, Aristotle argues that “in a secondary degree the life in accordance with the other kind of virtue [moral virtue] is happy; for the activities in accordance with this befit our human estate.”⁷⁴ Here, Aristotle refers to a morally virtuous life or the political life as an alternative way of pursuing the good for humans. The good life in its political form is constituted by doing good acts, which requires desiring the good and the practical wisdom to calculate what action will achieve that good. Both the philosophical life and the political life are lives involving excellent functioning of the rational capacities of the soul. The philosophical life involves the excellent functioning of the rational part of the soul that is separate from desire. The political life involves the excellent functioning of the rational part of the soul that disciplines the desires. In addition, the philosophical and political lives both involve the moral virtues. “[T]he philosophical life is life of the good person, that is, someone who has and exercises the ethical virtues” and who also engages in contemplation.⁷⁵ In this respect, the philosophical and political lives both require the goods of the moral virtues such as justice and courage. Further, they both require the intellectual virtue of practical wisdom. These virtues are the most important ends that these two types of lives share and are qualities that every good person must have whether leading a philosophical or political life. Consequently, Aristotle gives them a lot of attention in the *Nicomachean Ethics* even though his major concern is the political life and the intrinsic good for which that life is led.

Furthermore, the highest good for humans is achieved in a state because the state is prior to individuals and humans are by nature political animals:

The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-

72. *Id.* at 1177b:26.

73. *Id.* at 1177b:1-5.

74. *Id.* at 1178a:9-10.

75. KRAUT, *supra* note 43, at 6.

sufficing; and therefore he is like a part in relation to the whole. But he who is unable to live in society, or who has not need because he is sufficient for himself, must be either a beast or a god.⁷⁶

Humans are uniquely suited for living in states, and the state that “exists for the sake of the good life”⁷⁷ is uniquely suited to enable individuals to achieve their highest end—happiness (*eudaimonia*). Contrary to what most liberal notions of the state propose, the state is natural and functions to help citizens to perfect their virtue rather than functioning as a mechanism to resolve conflicting individual pursuits of the good.⁷⁸ “Political society,” Aristotle maintains, “exists for the sake of noble actions, and not of living together.”⁷⁹ The good of the individual is not a private affair but the public life of a citizen is necessary for the individual’s attainment of the highest good.⁸⁰ As a result, there is a correlation between the good of an individual and the good of the community; citizenship is conceived “as a form of action geared toward the good of the whole.”⁸¹ “Neither must we suppose that anyone of the citizens belongs to himself, for they all belong to the state, and each of them a part of the state, and the care of each part is inseparable from the care of the whole.”⁸² The telos of restoring the position of equality is thus defined in relation to the state or political community that aims at the highest good and “embraces all the rest.”⁸³

76. POL., *supra* note 60, at 1253a:25-29.

77. *Id.* at 1280a:33

78. For a discussion of the Aristotelian roots of the revival of republicanism and the notion of civic virtue, see Lawrence B. Solum, *Virtues and Voices*, 66 CHI.-KENT L. REV. 111, 114-22 (1990). See also Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994).

79. POL., *supra* note 60, at 1281a:2-3.

80. Although discussed below, at this point, I am begging the problem of the class- and gender-bound nature of Aristotle’s definition of citizen to include only gentlemen (at the exclusion of women, laborers, slaves, etc.), and speaking in general about the relationship between the good of the community and the good of the individual (as if it included the good of all individuals equally).

81. JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 51 (2d ed. 1993). Further, Elshtain notes that Aristotle also excluded certain categories of persons (e.g., women, slaves, mechanics, and laborers) from politics because he did not think they had the rational capacity required for ruling or citizenship. For example, “Aristotle’s women were *idiots* in the Greek sense of the word, persons who either could not or did not participate in the *polis* or the ‘good’ of public life, individuals without a public voice, condemned to silence as their appointed sphere and condition.” *Id.* at 47. Although most of us would reject Aristotle’s particular evaluations of the nature of these categories of persons, we can adopt Aristotle’s notion of politics as a form of action and his claims about the relationship between the individual good and the good of the state. See *id.* at 53.

82. POL., *supra* note 60, at 1337a:27-31.

83. *Id.* at 1252a:5.

C. The End of Corrective Justice and the Telos of the Good Life

However, the nature of the relationship between specific ends or goods, such as restoring the position of equality, and the highest good, or happiness, has been the subject of much controversy. Some have claimed that Aristotle's highest good is merely a combination of all the other goods—the inclusive doctrine of *eudaimonia*⁸⁴—and others have argued that there is only one supreme end, which is dominant but not inclusive—the dominant doctrine of *eudaimonia*.⁸⁵ By contrast, Richard Kraut argues that highest good “is not identical with or composed out of the other objects [goods] contained within it.”⁸⁶ Rather, the highest good or the “political end is related to the other ends as a surrounding object is related to the objects it surrounds.”⁸⁷ As a result, the highest end embraces or contains the rest of the goods and determines “the proper degree to which any other end is to be pursued.”⁸⁸

Rather than enter into this debate here, I will adopt and briefly set forth Professor Kraut's interpretation, which he elaborates in his book *Aristotle on the Human Good*.⁸⁹ Under this interpretation, practical science calculates how the highest good (the final end or the good life) relates to the position of equality (the end of corrective justice) under the circumstances of the particular case.⁹⁰ In addition, recall that Aristotle argues that corrective justice is a moral virtue and thus a matter of the political life. It is one of the virtues necessary for the good life in the political sense. Corrective justice involves the human action of calculating the mean (the position of equality) between the gain and the loss. Like the other moral virtues, the end of corrective justice or the position of equality is an end in itself, but it is not a perfect end. The position of equality is for the sake of the perfect end of the political life or a component of it.⁹¹ The

84. See, e.g., J.L. ACKRILL, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE'S ETHICS* 15-33 (A. Rorty ed., 1980).

85. See, e.g., W.F.R. HARDIE, *The Final Good in Aristotle's Ethics*, in *ARISTOTLE: A COLLECTION OF CRITICAL ESSAYS* 297-322 (J.M.E. Moravcsik ed. 1967) (noting a certain confusion about ends in Aristotle's thought, but arguing that Aristotle “makes the supreme end not inclusive but dominant, the object of one prime desire, philosophy.”).

86. KRAUT, *supra* note 43, at 224.

87. *Id.* at 223.

88. *Id.* at 224. In other words, Kraut seems to be suggesting here that the highest good is both dominant and inclusive.

89. *Id.*

90. See *id.* at 221-22.

91. Of course, “the best and most perfect” life is the philosophical life of contemplation, but the political life is the perfect life of action. See *id.* at 237-44. The political leader, however, promotes the ultimate end of moral activity rather than contemplation “not because moral activity is better, but because it is the highest good that all citizens can achieve.” *Id.* at 210. Further,

[t]he ideal way to promote the good of others is to help them arrange their lives in such a

political life is desirable for its own sake, for the sake of nothing else, and all other ends of the political life are desirable for its sake. The political life or the cultivation and full exercise of the moral virtues thus provides a standard for evaluating lesser goods such as friendship, physical pleasure, honor, and financial resources. For example, a certain level of external goods (such as food, clothing, shelter, etc.) is morally significant because they are required to lead a good life; they support both theoretical and practical virtuous activity.⁹² Consequently, Kraut maintains that “since Aristotle argues that the ultimate end of every political community and every individual should be some form of virtuous activity, he must say that health, music, and all other goods should be valued and pursued to the extent that they make some contribution to philosophical or moral activity.”⁹³

Kraut further argues that the political life also provides a standard for determining the scope of the moral virtues. In conjunction with practical wisdom, legislators and judges use this standard to promote the good of others by helping to arrange their lives to become as morally virtuous as possible.⁹⁴ In determining the position of equality, they will determine what goods (including moral virtues) are at stake and evaluate their appropriate scope according to the hierarchy of ends. Consequently, Pericles balances the demands of corrective justice in the case at hand with the future implications of that decision (*ex ante*) for the overall impact on promoting moral virtue for the whole community. In other words, Kraut contends that practical science is concerned with balancing all relevant goods for the well-being of the whole community, and sometimes the well-being of the whole community must be put ahead of individual well-being.⁹⁵ As a result, practical wisdom allows judges and legislators to determine the position of equality in terms of the end of the political life for a particular community (ultimate end), which takes into

way that they contemplate as much as possible. But Aristotle assumes that the number of people who are suited to such a life is small, and so in most cases one best promotes the good of others by using virtuous practical activity as a standard.

Id. at 157.

92. See N.E., *supra* note 20, at 1099a:31-b:8, 1101a:14-16.

93. KRAUT, *supra* note 43, at 160.

94. Corrective justice, however, requires that the judge ignore the virtue of the parties in the dispute. For this reason, I will not address the implications of Aristotle's multi-tiered analysis of equality for practical decision making in general. In his discussion of equality, recall that Aristotle develops a hierarchy of the types of citizens (men are higher than women, who are higher than slaves) and a hierarchy of virtue (the virtuous are more desiring of honor and other goods than the non-virtuous). To the contrary, I will presume that the parties to a legal dispute are equal and analyze the distinctive character of the injury as required by corrective justice.

95. See KRAUT, *supra* note 43, at 92-93 (arguing that some individuals may be ostracized for the good of the community).

account all the relevant ends of both the other moral virtues (desirable in themselves and for the sake of the political life) and the other goods like friends and wealth (instrumental goods—desirable not in themselves, but only for the sake of other goods).⁹⁶

III. THE PRIMACY OF PRACTICAL WISDOM

The role of practical wisdom in judicial decision making, however, is not as pronounced in all cases. In easy cases, the common law (prior judicial wisdom) and statutory law (legislative wisdom) will reflect the community's notions of the good life so that even a judge of lesser stature than Pericles could determine what the position of equality entails without much trouble. For example, if *A* hits *B*, the law of most communities and the practically wise position of equality would recognize *B*'s right to recover for battery in most cases. This may partially explain why many interpreters of Aristotle claim that corrective justice is empty and merely presupposes the legal rights of the relevant community. They may be focusing only on the easy cases. By contrast, in hard cases, where the law is indeterminate, conflicting, or ambiguous,⁹⁷ the role of practical wisdom becomes more pronounced. The position of equality is not entirely determined by the relevant legal principles, and only a practically wise judge like Pericles will be able to decide what is the just definition of the position of equality in all cases.

Further, although Aristotle recognizes that the existing laws should be given a strong presumption of validity,⁹⁸ he makes two arguments in support of the primacy of the practically wise definition of the position of equality over the apparently relevant legal principles. First, Aristotle claims that some matters do not lend themselves to "a general principle embracing all the particulars" and must be decided by judicial decree.⁹⁹ His most extensive discussion of this idea is in the *Nicomachean Ethics* with respect to equity, which

96. For a more complete discussion of the three kinds of ends, see *id.* at 228-30.

97. The distinction made here and elsewhere in this Article between easy and hard cases is purposely left quite general and vague. I give indeterminacy, ambiguity, and conflicting principles as examples of situations where the apparently relevant statutes, common law principles, or contracts at issue do not clearly resolve disputes. Many theorists now refer to this broadly as legal indeterminacy. See, e.g., Ken Kress, *Legal Indeterminacy and Legitimacy*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 200 (Gregory Leyh ed., 1992).

98. See POL., *supra* note 60, at 1269a:12-22. Here Aristotle argues that changing the laws should be done with caution because changing the law may decrease the power of the law. The law attains its force through the habit of citizens' obedience and changing it might weaken this habit. Also, citizens are habituated into virtue by the law. If the law changes too often, the habituation loses its impact.

99. *Id.* at 1282b:5; see also *id.* at 1269a:10-11 (noting that "it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars.").

he calls “a corrective of legal justice.” There he states:

the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice, but better than the error that arises from the absoluteness of statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.¹⁰⁰

Thus, in cases where equity requires, the practically wise judge must develop a more specific definition of the position of equality that takes precedence over the more general legal definition.¹⁰¹ In addition, Aristotle suggests at points that a practically unwise law (i.e., a law contrary to the position of equality as determined by Pericles), either absolutely or in a particular application, is not a valid law. Aristotle claims that “[t]he best man, then, must legislate, and laws must be passed, but these laws will have no authority when they miss the mark, though in all other cases retaining their

100. N.E., *supra* note 20, at 1137b:11-32.

101. See also ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 68 (1988). In a chapter entitled “Roots of Casuistry in Antiquity,” the authors focus heavily on Aristotle’s discussion of practical wisdom and note that

[a] prudent, understanding judge or agent can never treat universal laws or principles as absolute or invariable. There is always room for discretion in asking how far general rules, as they stand, apply to particular fresh cases, however marginal and ambiguous, and how far they should be waived or bent (like a builder’s leaden ruler) to respect the exceptional character of novel situations.

Id.

authority.”¹⁰² He further comments that some ancient laws “are quite absurd . . . and it would be ridiculous to rest contented with their notions.”¹⁰³ He gives the example of a Cumae law that would allow someone to be found guilty of murder if the accuser could produce a number of witnesses from the accused’s own kinsmen.¹⁰⁴ Further support for this position comes from Aristotle’s differentiation of political justice into natural and legal justice. Natural justice is “that which everywhere has the same force and does not exist by people’s thinking this or that,” while legal justice is “that which is originally indifferent, but when it has been laid down is not indifferent.”¹⁰⁵ Consequently, by distinguishing between natural and positive law¹⁰⁶ and by denying that all law is merely a matter of convention or positive enactment,¹⁰⁷ Aristotle is proposing a natural law theory. But unlike unchanging Stoic natural law,¹⁰⁸ Aristotle’s theory maintains that “there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature.”¹⁰⁹ Thus, at first blush, these claims suggest that the practically wise judge may invalidate the legal definition of the position of equality, in general

102. POL., *supra* note 60, at 1286a:22-24.

103. *Id.* at 1268b:42, 1269a:8.

104. *See id.* at 1269a:1.

105. N.E., *supra* note 20, at 1134b:18-21.

106. St. Thomas Aquinas set forth the classic natural law position that “unjust laws are necessarily non-laws.” He claimed that “[l]aws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived.” ST. THOMAS AQUINAS, SUMMA THEOLOGICA, in 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS 794 (Anton C. Pegis ed., Random House 1945). Aquinas also cites Augustine for the proposition that “a law that is not just, seems to be no law at all.” *Id.* at 795 (I-II, Q. 96 A. 4).

107. *Cf.* Wright, *supra* note 12, at 686 n.280. Against Heyman’s claim that “the requirements of justice depend on legislation,” Wright reads “Aristotle as recognizing principles of natural justice toward which the political justice of legislation and adjudication aspires, and as equating the ‘common good’ of the community with the good of each and every one of its individual members.” *Id.*

108. Cicero explains:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting . . . there will not be different laws at Rome and at Athens, or different laws now and in the future, but *one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.*

CICERO, DE REPUBLICA, III, xxii, 33 (emphasis added).

109. N.E., *supra* note 20, at 1134b:30. When interpreting Aristotle, Aquinas warns us here that:

we must keep in mind that the essences of changeable things are immutable; hence whatever is natural to us, so that it belongs to the very nature of man, is not changeable in any way, for instance that man is an animal. But things that follow a nature, like dispositions, actions, and movement, are variable in the fewer instances. Likewise those actions belonging to the very nature of justice cannot be changed in any way, for example, theft must not be committed because it is an injustice. But those actions that follow (from the nature of justice) are changeable in a few cases.

ST. THOMAS AQUINAS, 1 COMMENTARY ON THE NICOMACHEAN ETHICS 444 (C.I. Litzinger trans., 1964).

and in a particular application, based on the rational principle of practical wisdom.

However, although articulating a notion of natural justice and “absolute justice,” Aristotle emphasizes limitations on judges and magistrates. For example, even though he often emphasizes that “[t]he goodness or badness, justice or injustice, of laws varies of necessity with the constitutions of states,”¹¹⁰ he continually limits judicial discretion to “those matters only on which the laws are unable to speak with precision owing to the difficulty of any general principle embracing all particulars.”¹¹¹ He further states that

the rule of the law . . . is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. For magistrates there must be—this is admitted; but then men say that to give authority to any one man when all are equal is unjust. There may indeed be cases which the law seems unable to determine, but such cases a man could not determine either. But the law trains officers for this express purpose, and appoints them to determine matters which are left undecided by it, to the best of their judgement. Further, it permits them to make any amendment of the existing laws which experience suggests. Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.¹¹²

Moreover, he emphasizes that “[t]he law ought to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution.”¹¹³

Given these strong statements limiting the role of magistrates and judges, the role of practical wisdom in determining the position of equality in adjudication seems to be limited to situations where the law cannot, because of its generality, sufficiently address the particulars of a dispute (i.e., fails to meet the requirements of equity). In other words, the judge determines whether the law meets

110. POL., *supra* note 60, at 1282b:8-9.

111. *Id.* at 1282b:3-5. Aristotle continues:

And even now there are magistrates, for example judges, who have authority to decide some matters which the law is unable to determine, since no one doubts that the law would command and decide in the best manner whatever it could. But some things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation.

Id. at 1287b:16-23.

112. *Id.* at 1287a:19-33.

113. *Id.* at 1292a:33-34.

the requirements of natural justice *in its application* to the particulars of a legal dispute rather than *in general* (on its face). On this reading, Aristotle is proposing a very limited notion of judicial restraint. Although the judge may not make general proclamations invalidating or creating law in accordance with natural justice, the judge is the one who interprets the facts and the law. Relying on practical wisdom, the judge determines whether the general principles fit the particulars and whether the general principles are indeterminate, ambiguous, conflicting, or require amendment.¹¹⁴

As noted above, Aristotle argues that determinations involving both universals (laws) and particulars (facts) require practical wisdom. He insists that "error in deliberation may be either about the universal or about the particular; we may fail to know either that all water that weighs heavy is bad, or that this particular water weighs heavy."¹¹⁵ Further, he claims that the fact that

practical wisdom is not scientific knowledge is evident; for it is . . . concerned with the ultimate particular fact, which is the object not of scientific knowledge but of perception—not the perception of qualities peculiar to one sense but a perception akin to that by which we perceive that particular figure before us is a triangle; for it in that direction as well there will be a limit. But this is rather perception than practical wisdom, though it is another kind of perception than that of the qualities peculiar to each sense.¹¹⁶

Consequently, judging is not merely a deductive process of going from universals to particulars; it involves a kind of perception (called the "eye of the soul"¹¹⁷) that the particular fact is governed by a

114. When and under what circumstances a judge could determine that an apparently relevant legislative standard is not applicable depends on an evaluation of the "indeterminacy" of the law. Kress notes that "[t]he indeterminacy thesis asserts that law does not constrain judges sufficiently, raising the specter that judicial decision making is often or always illegitimate." Kress, *supra* note 97, at 203. He further indicates that

versions of indeterminacy differ according to whether they claim that the court has complete discretion to achieve any outcome at all (execute the plaintiff who brings suit to quiet title to his cabin and surrounding property in the Rocky Mountains) or rather has a limited choice among a few options (hold for defendant or plaintiff within a limited range of monetary damages or other remedies), or some position in between.

Id. at 201. Aristotle does not provide a theory regarding the amount of indeterminacy in the law. However, he does appear to recognize at least a moderate amount of indeterminacy somewhere in between these two extremes in his comments regarding equity as a corrective of justice. Moreover, his discussion of equity clearly indicates that the judge is the one to determine if the relevant statutory and common law are indeterminate in some sense (e.g., ambiguous, conflicting) in their application to the particulars of the dispute in front of her.

115. N.E., *supra* note 20, at 1142a:20-22.

116. *Id.* at 1142a:23-31.

117. *Id.* at 1144a:29-30. Martha Nussbaum emphasizes that

[a]s Aristotle long ago argued, reasoning in ethics and politics is and ought to be different from the deductive reasoning some seek in the sciences, for it must be concerned in a more fundamental way with historical change, with the complexity of actual practical

particular universal. In this respect, Aristotle further argues that “both the first terms and the last are objects of intuitive reason and not of argument, and the intuitive reason which is presupposed by demonstrations grasps the unchangeable and first terms, while the intuitive reason involved in practical reasoning grasps the last and variable fact, i.e. the minor premise.”¹¹⁸ Therefore, to know that a universal (law) does or does not apply to the particulars (facts) at issue requires practical wisdom, which includes a perception that the general does or does not apply to the particular.

As a result, Aristotle’s claim that corrective justice requires practical wisdom means that the law is always held accountable to natural or absolute justice *in its application*. If Pericles determines that the application of a law would be unjust in a particular situation, then he in effect concludes that the “unjust law is necessarily a non-law” in its application to that particular case. By contrast, Aristotle’s statements regarding the limitations on magistrates and judges to questions correcting for deficiencies in the generality of the law (including amending the law) appear to rule out the possibility of judges invalidating a law *in general* or on its face (i.e., for current and future litigants). That is left for the legislature. Thus, with respect to the application of the law, the position of equality (the law) is always subject to the standard of practical wisdom.

In easy cases, the apparently relevant legislative or common law standard is judged to be applicable, unambiguous, determinate, and in accordance with equity. In other words, the general principle does not undermine the purpose of the law under these particular situations. Even the judge without practical wisdom may achieve the just result in these cases because the apparent legal rights or pre-interaction holdings are the same as the position of equality. However, to really know or determine that this is the just result

contexts, and with the sheer diversity of cases. For all these reasons, though it will certainly seek and use rules as guides, it will also attend to the details of cases and will not simply assume in advance that the rule as stated antecedently will be fully adequate to cover the cases. . . . Aristotle’s norm of practical reason is well exemplified in the characteristic procedures of the common law, with its rich attention to history and circumstance.

MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 86 (1995). Elsewhere, Nussbaum argues that Aristotle attacks

the insistence that rational choice can be captured in a system of general rules or principles which can then simply be applied to each new case. Aristotle’s defense of the priority of ‘perception,’ together with his insistence that practical wisdom cannot be a systematic science concerned throughout with universal and general principles, is evidently a defense of the priority of concrete situational judgments of a more informal and intuitive kind to any such system.

MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 66 (1990).

118. N.E., *supra* note 20, at 1143a:35-b:2.

requires practical wisdom. In addition, in hard cases, the practically wise judge rules that the apparently relevant legal principles fail to meet the requirements of natural justice because the law does not fit the particulars of the case or the law is indeterminate, conflicting, or requires amendment. Practical wisdom is required to determine the position of equality that, under those circumstances, is in accordance with the telos of the good life. Accordingly, in his discussion corrective justice, Aristotle claims that “the nature of the judge is to be a sort of *animate justice*.”¹¹⁹ In both easy and hard cases, the position of equality is finally determined by the judge after the fact by practical wisdom rather than by the apparent legal rights at the time of the alleged injury. The content of the position of equality must be consistent with the position of equality that Pericles would determine in accordance with practical wisdom and the telos of the good life. In some sense, then, all law is subject to the standard of practical wisdom in its application.

IV. THE EMPTINESS OF CORRECTIVE JUSTICE

From the preceding discussion, it becomes evident that in one respect, the critique of corrective justice as empty is accurate. It is empty in the sense of being formal. However, many interpreters of corrective justice have inferred from the formal nature of corrective justice that it lacks any specific content.¹²⁰ For example, Ernest Weinrib argues that “the equality that lies at its heart is unexplained.”¹²¹ This part will set forth and critique Weinrib’s formalistic interpretation of the content of corrective justice along with the principalist and political interpretations proposed by Richard Warner and Steven Heyman. These interpretations of the content of corrective justice have ignored the role of practical wisdom and the telos of the good life in determining the content of corrective justice. In contrast to these positions, I will then argue that Aristotle sets forth a method for determining the content of the position of equality rather than specifying the particular nature of that equality. Corrective justice is not empty in the sense of having no content because the person of practical wisdom provides its content by determining the nature of the position of equality in relation to the particular circumstances and in relation to the good life in that community.¹²² Despite this account of the content of

119. *Id.* at 1132a:20 (emphasis added).

120. *See supra* note 15.

121. WEINRIB, *PRIVATE LAW*, *supra* note 12, at 57.

122. In some cases, however, there may be a tension between what is required by good citizenship and what is required by the good life. Aristotle claims that “perhaps it is not the

corrective justice, however, this part will conclude by identifying an additional sense in which corrective justice is empty. It proposes a hypothetical rather than a categorical content for corrective justice.

A. Alternative Proposals for the Content of Corrective Justice

Weinrib argues that Aristotle's conception of corrective justice provides the formal structure of justification for private law but that it fails to articulate any specific content for corrective justice. Nevertheless, he claims that Aristotle's formal equality is not empty but that "the equality of corrective justice is the abstract equality of free purposive beings under the Kantian concept of right."¹²³ In other words, he proposes a Kantian theory of moral agency as the content for, or exposition of, corrective justice.

Contrary to Aristotle's emphasis on final causation noted above,¹²⁴ Weinrib's formalistic reading of Aristotle reduces the final cause of corrective justice and the position of equality (the good life) to its formal cause. Weinrib claims that

[t]he judge's activity in making the transaction conform to its inherently rational structure operates as an efficient cause that works its matter into its immanently intelligible shape. Corrective justice as the formal cause of private law thereby becomes the dynamic principle that Aristotle termed final cause. In the identity of formal and final cause, the idea that the transactions have an internal ordering that expresses their unity and distinguishes them from distributions becomes decisive in the actualization of a legal reality.¹²⁵

This results in a theory of corrective justice with an internal rationality independent of the telos of the good life. "On this account, private law cannot be understood in terms of further effects which it produces or fails to produce."¹²⁶

However, the reduction of final to formal causation depends upon

same to be a good man and a good citizen of any state taken at random." N.E., *supra* note 20, at 1130b:28. As a result, in a bad state, the judge may promote less virtue by choosing the result warranted in the best possible state. In that case, the practically wise judge would choose the position of equality that promotes the most virtue in that less-than-perfect state. In other words, the nature of corrective justice may be different under different constitutional regimes: "The goodness or badness, justice or injustice, of laws varies of necessity with the constitutions of states." POL., *supra* note 60, at 1282b:9-10. For the purposes of this Article, however, I wish to avoid this thicket of issues and to set forth an outline of Aristotle's method of determining the position of equality. Consequently, I will presume that the position of equality in relation to the good life in the relevant state is the same as the position of equality in relation to the good life in the best possible state. For further discussion of the tension between being a good person and a good citizen, see Solum, *supra* note 78, at 111, 114-22.

123. WEINRIB, *PRIVATE LAW*, *supra* note 12, at 58.

124. See *supra* text accompanying notes 56-68.

125. Weinrib, *Aristotle's Forms*, *supra* note 15, at 223.

126. *Id.* at 224.

a radical reinterpretation of corrective justice that detaches it from practical wisdom and the telos of the good life. This allows Weinrib to interpret Aristotle's teleological notion of corrective justice as consistent with Kant's deontological concept of abstract right. To support the separation of corrective justice and practical wisdom, Weinrib points to Aristotle's claim that corrective justice does not consider the virtue of the parties involved but only the character of the gain and loss in relation to the position of equality.¹²⁷ In this respect, Aristotle argues that

it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it.¹²⁸

On the basis of this quotation, Weinrib claims that "[t]he movement of Aristotle's argument is from virtue to a form of justice congruent with virtue, then to a justice that admits but does not require virtue [distributive justice], and finally to a justice [corrective justice] that completely denies virtue's relevance."¹²⁹ He further argues that "[t]he object of Aristotle's ethics generally is to elucidate the excellences of character that mark proper human functioning" but that corrective justice "obviously stands apart from Aristotle's general concerns."¹³⁰ Consequently, "[b]y ignoring considerations of worthiness, corrective justice abstracts from the considerations that pertain to Aristotle's rich and full notion of the good."¹³¹

From this analysis, Weinrib concludes that "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."¹³² Weinrib argues that "[o]nly Kant's exposition of the concept of right, aside from

127. See WEINRIB, *PRIVATE LAW*, *supra* note 12, at 77-78; Weinrib, *Corrective Justice*, *supra* note 12, at 419; Weinrib, *Aristotle's Forms*, *supra* note 15, at 212-13. See also Posner, *supra* note 15, at 189-91.

128. N.E., *supra* note 20, at 1132a:2-7. See also AQUINAS, *supra* note 106, at 920 (I-II, Q. 104, A. 1) (arguing that judicial precepts do not concern the virtue of men but their relations to one another).

129. Weinrib, *Aristotle's Forms*, *supra* note 15, at 213.

130. WEINRIB, *PRIVATE LAW*, *supra* note 12, at 80; Weinrib, *Corrective Justice*, *supra* note 12, at 421.

131. WEINRIB, *PRIVATE LAW*, *supra* note 12, at 80; Weinrib, *Corrective Justice*, *supra* note 12, at 421.

132. WEINRIB, *PRIVATE LAW*, *supra* note 12, at 81.

subsequent treatments that incorporate its insights,”¹³³ provides an adequate account of the three ideas that come together in corrective justice. “Kant understood right as the juridical manifestation of self-determining agency.”¹³⁴ Consequently, “the equality of corrective justice” becomes “the abstract equality of free purposive beings under the Kantian concept of right.”¹³⁵ In other words, corrective justice can be articulated in terms of a Kantian theory of moral agency without reference to practical wisdom and the telos of the good life. Furthermore, Weinrib maintains that

[t]he 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.¹³⁶

Weinrib thus proposes a deontological interpretation of corrective justice that strips it of its status as a moral virtue and thereby precludes providing content for corrective justice via the exercise of practical wisdom and the telos of the good life. The internal perspective of the law is achieved by eliminating the teleological aspects central to Aristotle’s notion of corrective justice and to his general mode of analysis. Hence, Weinrib’s account precludes providing content for corrective justice because of his radical reinterpretation of corrective justice as detached, unlike any other moral virtue, from practical wisdom and the telos of the good life.

Alternatively, Richard Wright claims that corrective justice is not an empty formalist shell but that “the moral equality of the parties in corrective justice seems to prefigure (through ethical presuppositions rather than formalist conceptual implications) Kant’s foundational assumption of the ‘absolute moral worth’ of each individual.”¹³⁷ Wright claims that the substantive content of corrective justice is the absolute moral equality of the parties. He points out that Aristotle “rejects conceptions of the good that are based on wealth, pleasure, or enjoyment, which are the values that are to be maximized in

133. *Id.*

134. *Id.*

135. *Id.* at 58.

136. *Id.* at 83.

137. Wright, *Substantive Corrective Justice*, *supra* note 12, at 702.

efficiency and utilitarian theories,” but then also argues that this results in “a conception of the good that is intrinsic to the individual herself: full realization of one’s humanity through activity in accord with a rational principle and in accord with complete virtue over one’s life.”¹³⁸ Consequently, for Wright, Aristotle is a “principalist” rather than a formalist or a pragmatist; “[h]e believes that there are fundamental principles of morality and justice, which are reflected imperfectly in existing law despite its appearance of constant change.”¹³⁹

This principalist account, however, disregards the fundamentally teleological nature of Aristotle’s theory of ethics and the function of practical wisdom in the determination of the norm of equality. By following a Kantian or deontological mode of interpretation, Wright appears to be reducing Aristotle’s four-fold notion of causation to efficient causation. Rather than interpreting corrective justice in terms of its final or most comprehensive cause (what it is for the sake of—i.e., the good life), he attempts to explain the content of corrective justice via a form of self-legislation (efficient causation). The conception of the good is defined in terms of the individual’s “activity in accord with a rational principle and in accord with complete virtue over one’s life.”¹⁴⁰ Furthermore, the telos of the good life is not a state of affairs promoting human flourishing that should be pursued but is reduced to “the good for each and every citizen of the state”¹⁴¹ or an absolute moral equality of the parties. This interpretation of corrective justice is similar to Kant’s attempt to explain morality as an act of self-legislation so that morality, the realm of human freedom, would be explained by law-like regularities analogous to those of science that explain the phenomenal realm of efficient causation.

In addition, note that Wright’s interpretation of the content of corrective justice as an abstract moral equality is more akin to the theoretical mathematical theorems (theoretical reason) that Aristotle sharply distinguishes from the practical wisdom (practical reason) that is required for determining the position of equality and the mean of all the moral virtues. In this respect, Aristotle claims that

while young men become geometers and mathematicians and wise in matters like these, it is thought that a young man of practical wisdom cannot be found. The cause is that such

138. *Id.* at 701.

139. *Id.* at 686.

140. *Id.* at 685.

141. *Id.*

wisdom is concerned not only with universals but with particulars, which become familiar from experience, but a young man has no experience, for it is length of time that gives experience.¹⁴²

Also, recall that the “intuitive reason which is presupposed by demonstrations grasps the unchangeable and first terms, while the intuitive reason involved in practical reasoning grasps the last and variable fact, i.e. the minor premise.”¹⁴³ As a result, practical wisdom involves a kind of perception or “animate justice,” rather than merely deduction or demonstration, leading to the just result. By contrast, Wright maintains that practical wisdom does not aid in the determination of the position of equality but merely entails “[t]he proper application of the fundamental principles to a particular situation.”¹⁴⁴ Thus, Wright’s Kantian interpretation of the content of corrective justice does violence not only to Aristotle’s teleological mode of explanation but also to his robust notion of practical wisdom.

By contrast, Steven Heyman concurs with the teleological conception of corrective justice that “only the judge displays the virtue of particular justice [corrective justice].”¹⁴⁵ He argues that Weinrib fails to recognize that Aristotle’s account of corrective justice is simply one part of his account of the nature of virtue in general. However, rather than articulating the content of corrective justice via practical wisdom and the telos of the good life, Heyman claims that “Aristotle’s doctrine of juridical equality reasonably can be understood based on a conception of freedom” developed in Aristotle’s *Politics*.¹⁴⁶ Although basing his view on an Aristotelian, rather than a Kantian, notion of freedom, Heyman agrees with Weinrib that the mean of equality is a “juridical equality” based on a conception of freedom. He criticizes Weinrib’s reliance on an apolitical Kantian notion of freedom as an equality of autonomous individuals in abstraction from their particular characteristics and circumstances. Corrective justice is community-based or political; “relations of justice are always mediated by the law and institutions of the *polis*, which are oriented toward the common good.”¹⁴⁷

142. N.E., *supra* note 20, at 1142a:11-16. Aristotle claims that “a boy [someone young in experience] may become a mathematician, but not a philosopher or a physicist” because “the objects of mathematics exist by abstraction, while the first principles of these other subjects come from experience” and “because young men have no conviction about the latter but merely use the proper language.” *Id.* at 1142a:16-20.

143. *Id.* at 1143a:35-b:2.

144. Wright, *Substantive Corrective Justice*, *supra* note 12, at 687.

145. Heyman, *supra* note 12, at 858.

146. *Id.* at 862.

147. *Id.* at 856.

Consequently, he argues that “[t]he ultimate basis of juridical equality is the equality of citizenship,”¹⁴⁸ which means that free and equal citizens have an “equal share in ruling and being ruled.”¹⁴⁹ The judge then applies the principles of arithmetical equality enacted by those who have equal citizenship in the political community and who ought to be guided by practical wisdom (legislative wisdom). Furthermore, like Wright, Heyman appears to be suggesting that corrective justice in adjudication results for the most part from the application of principles. However, unlike Wright, he claims that these principles are the result of legislation by free and equal citizens (guided by practical wisdom) in a political community rather than natural principles of an absolute moral equality of the parties that equate “the ‘common good’ of the community with the good of each and every one of its individual members.”¹⁵⁰

In addition, Heyman quotes Aristotle’s statement that “‘the laws in their enactments on all subjects aim at the common advantage . . . so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political community . . .’”¹⁵¹ However, although judges do apply legislative enactments that are ideally guided by practical wisdom, the practical wisdom involved in adjudication requires an interpretation of those enactments. Do they apply to this case? Is this case an exception? Does the ambiguity or indeterminacy in the statute require the judge to use practical wisdom to determine the position of equality (i.e., are these hard cases?)? In other words, laws cannot definitively demarcate their application.¹⁵² The judge must interpret: 1) whether the law is applicable factually and legally; 2) whether the law is ambiguous or indeterminate; and 3) whether the law meets the requirements of natural justice in its application (i.e., equity—the corrective of justice).¹⁵³ Contrary to Heyman’s emphasis on the

148. *Id.* at 862.

149. *Id.* at 863.

150. Wright, *Substantive Corrective Justice*, *supra* note 12, at 686 n.280.

151. Heyman, *supra* note 12, at 853 (quoting N.E., *supra* note 20, at 1129b:13-19).

152. Jurgen Habermas notes that “legal hermeneutics has the merit of having revived the Aristotelian insight that no rule is able to regulate its own application.” JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 199 (William Rehg trans., MIT Press 1996) (1992). For further discussion of Habermas’s discourse theory of law, see Mark Modak-Truran, *Habermas’s Discourse Theory of Law and the Relationship Between Law and Religion*, 26 CAP. U. L. REV. 461 (1997).

153. Another way to reinforce the distinction between legislative and judicial reasoning is to remember that one of the judge’s roles is to evaluate whether the legislative enactments meet with the requirements of natural justice, not merely legal justice, in their application to the particulars of the case. In other words, if the position of equality dictated by legislation is merely a matter of legal justice (not in accordance with natural justice), the judge may override that determination based on the practically wise position of equality warranted by particulars of that case (i.e., in accordance with natural justice). Judicial reasoning thus acts as a check on

superiority of legislative wisdom,¹⁵⁴ the legislative or common law definition of the position of equality is further subject to the standard of practical wisdom in its application to the particulars of a case. Therefore, the practically wise judge may invalidate the apparently relevant legislative or common law definition of the position of equality in its application to a particular case based on the rational principle of practical wisdom.

Consequently, legislative wisdom, a type of practical wisdom, is different from the practical wisdom exercised in judicial contexts involving corrective justice.¹⁵⁵ Legislative wisdom involves aiming at the common good in general for the future while judicial practical wisdom involves determining the position of equality applicable to the particular facts of the case before the court. In easy cases, Heyman's emphasis on legislative determination of the position of equality would not be problematic; the position of equality established by judicial practical wisdom would be the same as the legislative determination. However, in hard cases, the role of practical wisdom becomes more evident and pronounced. In that case, Heyman's reliance on Aristotle's political conception of freedom as the content of the position of equality seems to break down. If the political conception of equality is precisely what is indeterminate, ambiguous, or in need of amendment (i.e., inequitable), then the judge must determine that political conception for the case at hand. Although Heyman recognizes that the conception of equity constitutes an exception to the superiority of

legislative reasoning to ensure that statutes meet the requirements of natural justice in their application.

154. See Heyman, *supra* note 12, at 856 n.41. Heyman's emphasis here on the superiority of legislative wisdom appears to be in part due to Aristotle's comments in the *Rhetoric* that enacted laws "should themselves define all the points they possibly can and leave as few as may be to the decision of the judges." ARISTOTLE, RHETORIC 1354a:32-34 (W. Rhys Roberts trans.), in 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 20, at 2152 [hereinafter RHETORIC]. See also Heyman, *supra* note 12, at 856. However, the translator of the *Rhetoric* makes clear that Aristotle's reference to judges here is a broad one that includes "jurymen" and others who judge. In fact, Aristotle's "weightiest reason of all" for this claim is that

members of the assembly and the jury . . . will often have allowed themselves to be so much influenced by feelings of friendship or hatred or self-interest that they lose any clear vision of the truth and have their judgement obscured by considerations of personal pleasure or pain. In general, then, the judge should, we say, be allowed to decide as few things as possible.

RHETORIC, *supra*, at 1354b:6-12. This discussion of judges, however, appears to run contrary to the discussion of "the judge" (usually in the singular) in Aristotle's discussion of corrective justice in the *Nicomachean Ethics*. In the latter context, Aristotle claims that "when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice." N.E., *supra* note 20, at 1132a:20-21. As a result, Heyman's claim that the position of equality is in general determined by legislatively enacted law seems to run counter to Aristotle's understanding of the fuller role of judicial wisdom in the determination of the position of equality as specified in the *Nicomachean Ethics*.

155. See N.E., *supra* note 20, at 1141b:23-33.

legislative reason, he claims that “[t]he exception is only apparent, however, because the role of the judge in this instance is ‘to say what the legislator himself would have said had he been present, and would have put into his law if he had known.’”¹⁵⁶ This recognizes the final unity of the determination of justice via legislative wisdom and the determination of justice via judicial wisdom, but it ignores the importance of the supremacy of practical wisdom with respect to the determination of corrective justice in the application of the law. As Wright argues, “Heyman apparently reads Aristotle as making the requirements of justice depend on legislation.”¹⁵⁷ Conversely, while the legislator and the judge both aim at the telos of the good life, the practically wise judge has the final say regarding the applicability of the apparently relevant legislative provision.

B. Corrective Justice as a Method of Determining the Position of Equality

Contrary to these interpretations, Aristotle’s notion of corrective justice does not receive content from a formal, substantive, or political conception of equality or freedom. Although Aristotle’s notions of corrective justice and its mean of equality are formal, they receive content, as with all moral virtues, through agents (judges) exercising the intellectual virtue of *phronesis* or practical wisdom and in relation to the telos of the good life. The formal statement of corrective justice and the position of equality are thus saved from emptiness by *phronesis*, or practical wisdom.¹⁵⁸ As a result, this means that the practically wise judge determines the position of equality in relation to the telos of the good life and that her determination of the position of equality takes precedence over any formal, substantive, or political (legislative) conceptions of equality in the application of the law to the particulars of a dispute.

This teleological reading of corrective justice rejects the Kantian or deontological readings of corrective justice by Weinrib and Wright. Like Heyman’s, this interpretation of corrective justice emphasizes the contextual nature of the position of equality in its relation to a particular political community. However, on the teleological interpretation, the position of equality is not definitively determined by citizens who have an “equal share in ruling and being ruled” (by legislative enactment) but is finally determined by the judge in

156. Heyman, *supra* note 12, at 856 n.41 (quoting N.E., *supra* note 20, at 1137b:23-24).

157. Wright, *Substantive Corrective Justice*, *supra* note 12, at 686 n.280.

158. See KRAUT, *supra* note 43, at 327 (“And to understand the proper place of this virtue of thought [*phronesis*], we must see how Book VI of the *NE* saves Aristotle’s earlier statements about the mean from emptiness.”).

accordance with practical wisdom and the telos of the good life. In easy cases, the position of equality (the mean in accordance with the understanding of the person of practical wisdom) will be the same as the pre-interaction holdings of the parties (possibly determined by legislative enactment) and will be evident even to judges without practical wisdom. In hard cases, only the judge with practical wisdom will be able to determine the position of equality in accordance with the telos of the good life. Consequently, contra Wright, the position of equality is not a pre-determined or unchanging principle that merely needs to be applied in accordance with the intellectual virtue of practical wisdom. In other words, Aristotle's notion of corrective justice must be related to the fundamentally teleological character of his thought rather than read through a Kantian deontological lens, whether principalist (Wright) or formalist (Weinrib). Thus, Aristotle gives us a method for determining the content of the position of equality that provides a teleological basis for resolving legal disputes.

C. The Hypothetical Content of Corrective Justice

In one additional sense, however, corrective justice may be considered empty in that it proposes a hypothetical, rather than a categorical, norm of equality.¹⁵⁹ Despite Aristotle's formal description of corrective justice, we may ask Aristotle: What is the rational principle or right rule by which the practically wise person chooses to act? To this question, Aristotle only responds that "that which appears to the good man is thought to be so."¹⁶⁰ The person of practical wisdom or the good person is "the measure of each thing."¹⁶¹ Aristotle's inductive approach ends by relying upon the common consensus of the community for a principle of the good and for a definition of the practically wise human (i.e., the person leading the political life). The community can point to practically wise people like Pericles, but Aristotle does not give the principle by which they are thus determined to be so.¹⁶²

According to Aristotle the intellectual virtue of practical wisdom and the moral virtue necessary for it are the result of being trained

159. Hypothetical imperatives dictate actions that are only a means to something else. See KANT, *supra* note 19, at 82. If one assumes a certain state of affairs (ends) should be pursued, then certain actions (means) follow. For example, if we assume the good life is living like Pericles, then certain actions follow. However, Kant argues that the "supreme principle of morality" must be categorical; it must be necessary for all rational beings. *Id.* at 56-60.

160. N.E., *supra* note 20, at 1176a:15-17; see also ACKRILL, *supra* note 84, at 31 (arguing that Aristotle does "not begin to reveal any principle or test whereby the man of practical wisdom can decide what is the noble or the right thing to do").

161. N.E., *supra* note 20, at 1176a:17.

162. See GAMWELL, *supra* note 19, at 26 (arguing that, in Aristotle's ethics, "[v]irtuous activity is identified through appeal to the activity of virtuous people").

by good laws and good people. They depend upon the right upbringing and a good state. In this respect, Alasdair MacIntyre points out that

[t]he list of virtues in the *Ethics* is not a list resting on Aristotle's own personal choices and evaluations. It reflects what Aristotle takes to be "the code of a gentleman" in contemporary Greek society. Aristotle himself endorses this code. Just as in analyzing political constitutions he treats Greek society as normative, so in explaining the virtues he treats upper-class Greek life as normative.¹⁶³

In other words, authority and not reason is the basis of Aristotle's definition of the good life and the mean of each moral virtue like the position of equality. In summarizing his discussion of judgment and "sympathetic judges" (those able to discriminate the equitable correctly), Aristotle even states that "we ought to attend to the undemonstrated sayings and opinions of experienced and older people or people of practical wisdom not less than to demonstrations; for because experience had given them an eye they see aright."¹⁶⁴ Thus, Aristotle assumes or points to what is good and proposes a hypothetical rather than a categorical imperative.

This analysis appears to set up a tension between Aristotle's claims about natural justice as something universally applicable and the contextual and authoritarian definition of the position of equality (rational principle) required for determining corrective justice. Recall that moral virtue "is a state of character concerned with choice, lying in a mean, i.e. the mean relative to us, this being determined by a rational principle, and by that principle by which the man of practical wisdom would determine it."¹⁶⁵ Moral virtue compels us to aim at the right end while practical wisdom (intellectual virtue or the practical thought of a good person) compels us to choose the right means. Why would Aristotle say that the mean is "determined by a rational principle" if this were not the case? However, if the mean is a rational principle, why did he qualify his notion of rational principle by stating it was "that principle by which the man of practical wisdom would determine it"? If this principle can be known by reason alone, his last phrase would be redundant. But if it is redundant, why doesn't Aristotle tell us what that rational principle is? Instead he uses this phrase and relies on

163. ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS* 67 (1966).

164. N.E., *supra* note 20, at 1143b:10-13. See also JONSEN & TOULMIN, *supra* note 101, at 66 (arguing that "people of experience 'know them [paradigmatic cases] when they see them'").

165. N.E., *supra* note 20, at 1106b:36-1107a:2.

practical wisdom to determine the mean in the particular circumstances of human action and in relation to the good life. For example, in Aristotle's discussion of the relationship between pleasure and the good, he claims that whether "the perfect and supremely happy man has one or more activities, the pleasures that perfect these will be said in the strict sense to be pleasures proper to man."¹⁶⁶

Although resolving this debate is beyond the scope of this Article, one could argue that the rational principle informing corrective justice (i.e., the position of equality) is a form of natural justice, universally true but changing, and known or perceived by persons with practical wisdom in the context of a particular dispute. The content of the rational principle changes because natural justice changes. Thus, the person of practical wisdom will be able to identify the position of equality that is in accordance with natural justice for the particular circumstances of the case, but the content of corrective justice and the position of equality cannot be definitively identified by a substantive rational principle beforehand.

This conclusion, however, still leaves us with the question of how the person of practical wisdom identifies this rational principle. As indicated above, Aristotle does refer to practical wisdom as a kind of perception of ultimate fact and the judge as "animate justice." Those with practical wisdom have an "eye" that enables them to see that the particular facts should be governed by a particular law. However, what if two perceptions of the rational principle by "people of experience" differ? Both people of experience "know" what they see is true, but how can their perceptions be debated or evaluated if they are "objects of intuitive reason and not of argument"?¹⁶⁷ It is thus in this sense that Aristotle identifies the content of the moral virtues only hypothetically. He would resolve this dispute by pointing to the practically wise result, but he could resolve the dispute this way only if we presume that he is practically wise himself. Aristotle thus fails to provide us with a way of identifying who is practically wise or with a way of knowing the rational principle in and of itself. Rather, he points to the person of practical wisdom in Greek society—Pericles—without categorically specifying the nature or principle that identifies him.

V. THE ROLE OF PRACTICAL WISDOM IN HARD CASES

Finally, to better understand Aristotle's method of determining

166. *Id.* at 1176a:27-29.

167. *Id.* at 1143a:36.

the content of the position of equality, this part explores how Pericles would evaluate certain hard cases involving nuisance law.¹⁶⁸ As emphasized above, practical wisdom plays a role in judging both easy and hard cases. The role of practical wisdom in easy cases is not as pronounced as in hard cases because the position of equality in those cases correlates with the parties' apparent legal rights.¹⁶⁹ For example, the law of battery in most jurisdictions provides that you can recover from someone who intentionally hits you, which is the same result dictated by practical wisdom. These cases include those where the apparently relevant statutes, common law principles, contracts, or constitutional law provisions at issue do not clearly resolve the dispute. Many theorists now refer to this broadly as legal indeterminacy.¹⁷⁰ Further, in some cases, the legal definition of the position of equality conflicts with the practically wise definition. In all these cases, Pericles must define or redefine the legal definition of the position of equality as part of his adjudication of the case.

A. General Issues

Before discussing actual cases, there are several general issues to address. First, I am not attempting to show that the teleological conception of corrective justice describes the actual reasoning of judges in the following cases or private law adjudication in general. The purpose of this part is not descriptive but demonstrative. It attempts to further aid in explaining how Pericles, the practically wise judge, would reason about these particular disputes. I thus chose the cases that I discuss because their outcomes were practically wise but not necessarily because the judges in these cases were practically wise. For example, in some of these hard cases, the judge may have arrived at the practically wise result but by a different

168. Any reference to rights in this Article is not meant to imply that Aristotle had or would adopt a modern liberal theory of rights. In other words, Aristotle would not agree with Hobbes, the founder of modern liberalism, who claimed that the state could only be explained scientifically or in non-teleological terms. In that respect, Hobbes claimed that the strongest human passion was the fear of violent death, which translated into the right of self-preservation. See THOMAS HOBBS, *LEVIATHAN* 91-92 (Richard Tuck ed., Cambridge Univ. Press 1991). Given this most basic human passion, the only reason humans would create a state would be to enhance their self-preservation, which is the purpose for all rights. See generally LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 120-251 (1953). Strauss argues that "[d]eath takes the place of the *telos*." *Id.* at 181. To the contrary, the discussion here is merely trying to explain modern cases, which adopt rights language (and probably to some extent the theory), in terms of Aristotle's notion of corrective justice. Thus, on occasion, I make analogies between the position of equality and legal rights. However, this is for explanatory purposes and not to suggest that Aristotle is advocating a modern liberal theory of rights.

169. Cf. Weinrib, *Corrective Justice*, *supra* note 12, at 408 (arguing that "the holdings of the parties immediately prior to their interaction provide the baseline from which the gain and losses are computed").

170. For a more thorough discussion of the issue of legal indeterminacy, see Kress, *supra* note 97, at 200-15.

method and for different reasons. For instance, when the primary goods involved are economic goods, the practically wise result may be similar to the result dictated by the economic analysis of law. This does not mean that corrective justice is reducible to the economic analysis of law. Rather, it shows that in the absence of other overriding non-economic goods (e.g., aesthetic use and enjoyment of property) or that all else being equal, practical wisdom and the telos of the good life dictate the efficient allocation of economic goods.

In addition, despite the similar outcomes, these different approaches can reach the same conclusion for different reasons.¹⁷¹ Recall that Pericles aims at the right end or the good life because he is morally virtuous, and he chooses the right means to that end or the position of equality because he is practically wise. Further recall that practical wisdom is like perception rather than scientific demonstration so that the judge's decision would not have the technical character of a cost-benefit analysis. In other words, Pericles determines the position of equality in relation to the particulars of the case and the telos of the good life, which is the highest good surrounding all other goods. He must determine how the proposed position of equality contributes to the good life. For instance, one position of equality may maximize the efficient allocation of resources but minimally aid in promoting the moral virtue of citizens. Another position of equality may maximally aid in promoting the moral virtue of citizens but may lead to the inefficient allocation of resources. Pericles would then have to determine which of these positions of equality contributes most to the good life, which surrounds the good of efficiency and the good of a morally virtuous citizenry. By contrast, the economic analysis of law aims at maximizing efficiency, rather than the good life, and uses technical reason, rather than perception, to calculate which outcome achieves this objective. According to Aristotle, the judge aiming mainly at efficiency would be revealing a deficiency of character or moral virtue by failing to aim at the good life, which is the highest good compelled by moral virtue. Moreover, even though a judge employing economic analysis may happen to arrive at the just result in some cases, Aristotle claims that moral virtue is required to arrive at the just result in *all* cases. Without moral virtue, the judge will not

171. See CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 37 (1996). Sunstein argues that law is basically comprised of "incompletely theorized agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them." *Id.* This allows for substantial disagreement on more general theoretical principles that attempt to explain and legitimize the law. Consequently, "people may agree on a *correct* outcome even though they do not have a theory to account for their judgments." *Id.* at 7.

be aiming at the right end so that at least in some cases, the judge will inevitably err. Also, even if aiming at the right end, this judge will lack practical wisdom to choose the proper means to achieve that end. Arriving at the same result by a different process of reasoning, therefore, does not prove that judicial decision making does not require moral virtue. It merely shows that in some cases, judges may arrive at the just result even if they take a different approach and even if they are not morally virtuous. Finally, this cursory treatment of a few nuisance cases cannot empirically demonstrate Aristotle's claim that sound judicial decision making requires moral virtue. These examples merely serve to help demonstrate the more theoretical discussion above.

In addition, in order to bracket the issue of how the judge knows the rational principle informing practical wisdom, the following discussion will presume that we have some knowledge of who is practically wise and that we can describe how a practically wise judge would decide these cases. This presumption will allow us to see how the practically wise judge functions in concrete cases even though we still have not resolved precisely how the changing content of the position of equality (the rational principle) is determined by the judge. Furthermore, in concrete cases, the number of relevant goods to be evaluated is often much more limited than the fuller description of practical decision making presented above. As a result, Aristotle's insights into the formal process or framework of legal adjudication are somewhat easier to conceptualize.

B. Nuisance Law

Black's Law Dictionary defines nuisance as "that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage."¹⁷² In other words, a nuisance results from property owners using their property in a way to harm other property owners. For example, in *Boomer v. Atlantic Cement Co.*,¹⁷³ the dirt, smoke and vibrations emanating from a cement plant were held to constitute a nuisance to the surrounding property owners. Determining whether a property owner is harmed, however, depends on the judge's determination that the position of equality entails that the property owner has a right to the use and enjoyment of his property free from the invasion in question. The judge must then adjudicate these

172. BLACK'S LAW DICTIONARY 1065 (6th ed. 1990).

173. 257 N.E.2d 870 (N.Y. 1970).

incompatible property uses by determining what the position of equality ought to be in that case. For example, if *A* buys a house near an airport or a pig farm, the judge must determine whether *A* has the right to claim that he is injured by *B*'s use of her land for an airport (noise and air pollution) or a pig farm (air pollution and aesthetic concerns). In this respect, the common law recognizes the live and let live rule¹⁷⁴ and the locality rule.¹⁷⁵ Also, the common law recognizes that as a city expands, its boundaries will naturally impinge upon areas once reserved for other purposes like farming and animal husbandry. At some point, these users will no longer be entitled to use their land for the same purposes because the residential use becomes a higher valued use to the community.¹⁷⁶ However, the law does not or cannot specify precisely when these principles should be applied and is unable to specify rules that will cover all situations. In other words, when one good (property right) outweighs another (property right) is a matter of judicial discretion. There is no scientific formula or computer program for deciding cases. Thus, in the case of incompatible land uses in changing societies, the judge, as a representative of the community, must decide after the fact what the appropriate equal position should have been. Only then can she assess any gains or losses. As a result, only the practically wise judge (Pericles) will be able to calculate what the just use of the land is with respect to the changing nature of the society and with respect to the good of the society (i.e., the good life) in all cases.

For example, in *Spur Industries v. Del E. Webb Development Co.*,¹⁷⁷ a retirement community was built on cheap land in the country near a cattle feed lot. At first, the feed lot did not present a problem. As the retirement community grew, the feed lot became offensive to the new portions of the retirement community and interfered with continued development desired by other retirees.

174. See *Bamford v. Turnley*, 122 Eng. Rep. 27, 32-33 (1862) (holding that "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action . . . [which is] a rule of give and take, live and let live").

175. See *Campbell v. Seaman*, 63 N.Y. 568, 577 (1876) (noting that "use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance"); see also *Sturges v. Bridgman*, 11 Ch. D. 852, 865 (1879) (finding that "it would result in the most serious practical inconveniences, for a man might go—say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether").

176. See, e.g., *Pendoley v. Ferreira*, 187 N.E.2d 142 (Mass. 1963) (enjoining a piggery because the rural community had become predominantly residential); *Ensign v. Walls*, 34 N.W.2d 549 (Mich. 1948) (enjoining a business of raising St. Bernard dogs because city expansion converted the area to residential use).

177. 494 P.2d 700 (Ariz. 1972).

The developer sued to enjoin the feed lot operations. The court issued an injunction against the cattle feed lot but forced the plaintiff to indemnify the defendant for reasonable moving or shutting down costs.¹⁷⁸

However, the court required Spur “to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.”¹⁷⁹ The court noted that Spur’s predecessors in interest had started the feedlot several years before the retirement community development started and that they could not have foreseen that “a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city.”¹⁸⁰ Further, the court noted that the developers attempted to develop additional areas up to five hundred feet from the Spur feedlot until the sales resistance and complaints by the purchasers made further development unfeasible. Consequently, the court found that the developer, Del Webb, was “entitled to relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City.”¹⁸¹ In other words, the continued operation of the Spur feedlot would have decreased the ability of those who had purchased homes in the retirement community to use and enjoy their land. Thus, the effect on these third parties justified enjoining the feedlot as a public nuisance.

Despite this injunction (the usual outcome of a successful nuisance action), the court would have overlooked the harm to Spur and rewarded immoral behavior by the developers if it did not indemnify Spur. The developers could have easily chosen another rural location without a feedlot or chosen to develop the community away from, rather than towards, the feedlot. The developers intentionally developed land closer to the feedlot. They thought they could take advantage of the cheap land near the feedlot and then use the legal system to improve the land. In addition, merely enjoining Spur would also have encouraged others in the future to engage in activity for their own economic benefit without regard to the good of the

178. *See id.* at 708. *But cf.* *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (reasoning that a residential community was substantially harmed by cement making operations but granting permanent damages to compensate for the total economic loss to the residents’ property rather than an injunction because the total damage to plaintiffs’ properties was relatively small in comparison with the deleterious economic consequences of shutting down the cement making operations).

179. *Spur*, 494 P.2d at 708.

180. *Id.* at 707.

181. *Id.* at 708.

community. Developers of a new city should not be able to force out those using rural land for purposes that are usually considered beneficial to the community. If the city had naturally grown to the location of the feedlot, the good of the community would be to use the land for residential purposes. By contrast, if someone creates a city in a rural area where a feedlot already exists, she would be imposing a harm on the feedlot owner if she could enjoin the feedlot activity. In other words, even though the feedlot operations harmed those living in the retirement community, Webb also harmed Spur by developing land that would foreseeably interfere with Spur's feedlot activities. Therefore, the court's remedy rectified both harms. First, the court rectified the harm to residents of the retirement community by enjoining the feedlot. In addition, the court rectified the harm to Spur by requiring Webb to indemnify Spur for the cost of moving or shutting down. Thus, by rectifying both of these harms, the court determined the practically wise position of equality, which was not evident from the existing law.

A new rural revolution has similarly resulted in conflicting land uses between massive corporate factory hog farms and other rural residents and presents another situation that helps illustrate how Pericles would use practical wisdom to determine the position of equality in a hard case. These massive factory farms concentrate hog production in an unprecedented manner.¹⁸² For example, one family in Minnesota had to cease running a daycare operation, keep their doors and windows shut in the summer, and spend some nights in a motel when the noxious fumes became too overwhelming.¹⁸³ In addition to overpowering and prolonged noxious fumes that often cause people to stay indoors, these corporate hog farms have resulted in: 1) detrimental health effects (increased tension and depression, headaches, nausea, dizziness, fatigue, sore throats, vomiting, shallow breathing, sleep disturbances, and loss of appetite); 2) poisoning of wells and surface water with parasites, bacteria, and viruses; 3) considerable death of aquatic life from feces and urine floods escaping waste lagoons; 4) huge concentrations of flies swarming and breeding around waste lagoons; and 5) increased illegal dumping of thousands of gallons of waste into public waters.¹⁸⁴ By contrast, the smaller traditional hog farm operations spread hog

182. See Michael Satchell, *Hog Heaven—and Hell*, U.S. NEWS & WORLD REP., Jan. 22, 1996, at 55; see also Nancy Millman, *Livestock Law Could Be Hogtied*, CHI. TRIB., July 7, 1997, sec. 4, at 1; Nancy Millman, *Going Hog Wild Down on the Farm*, CHI. TRIB., July 6, 1997, sec. 5, at 1; Wes Smith, *Huge Hog Farms Drawing Squeals from Neighbors*, CHI. TRIB., Aug. 22, 1996, sec. 1, at 1.

183. See Satchell, *supra* note 182, at 59.

184. See *id.* at 55-59.

waste relatively evenly and thinly over the landscape, allowing it to absorb gradually. Although traditional hog farms emit some fumes that invade their neighbors' property, their intensity and magnitude are substantially lower than those emitted by factory farms. These factory farms thus dramatically change the type and magnitude of interference with competing land uses and substantially decrease the value of surrounding properties.

States booming with new corporate factory farms such as North Carolina, however, often have only minimal environmental and zoning regulations for big hog operations.¹⁸⁵ For example, North Carolina statutory law only provides for minimal setback requirements.¹⁸⁶ However, it also limits the common law right to bring nuisance suits against agricultural or forestry operations¹⁸⁷ and strives to minimize the regulatory burden on animal waste systems.¹⁸⁸ The current statutory law in these states thus apparently sets forth land use regulations that allow these factory farms to operate in close proximity to non-farm residences and other agricultural operations. Consequently, the apparent legal rights allow factory farms to impose substantial amounts of air and water pollution burdens on their neighbors, which diminish, and in some cases destroy, the use and enjoyment of their land.

However, although compliance with land use regulations arguably provides a defense against nuisance claims, it does not preempt these

185. For an overview of the current regulation of hog farming, see Matt M. Dummermuth, Note, *A Summary and Analysis of Laws Regulating the Production of Iowa's and Other Major Pork Producing States*, 2 DRAKE J. AGRIC. L. 447 (1997); John D. Burns, Comment, *The Eight Million Little Pigs—A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 WAKE FOREST L. REV. 851 (1996).

186. N.C. GEN. STAT. §106-803 (1998) (North Carolina's "Swine Farm Siting Act" provides that "[a] swine house or a lagoon that is a component of a swine farm shall be located: (1) At least 1,500 feet from any occupied residence. (2) At least 2,500 feet from any school; hospital; church . . . (3) At least 500 feet from any property boundary. (4) At least 500 feet from any well supplying water to a public water system . . . (5) At least 500 feet from any other well that supplies water for human consumption."). Cf. 510 ILL. COMP. STAT. 77/35 (1996) (providing for minimal setback requirements for livestock management facilities or waste handling facilities serving between 50 and 1,000 animal units ("¼ mile from the nearest occupied non-farm residence and ½ mile from the nearest populated area"), but increasing these setback requirements depending on the size and location of these facilities).

187. See N.C. GEN. STAT. §106-701 (1998) ("right to farm" law providing that "[n]o agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one year, when such operation was not a nuisance at the time the operation began"). However, this provision does not allow an agricultural or forestry operation to make fundamental changes to the nature of their operations after one year and then to argue that nuisance claims are barred without giving potential claimants one year from that change in activity to bring a nuisance claim. See *Durham v. Britt*, 451 S.E.2d 1 (N.C. 1994).

188. See N.C. GEN. STAT. §143-215.10A (1998) (establishing for farms with 250 or more swine "a permitting program for animal waste management systems that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden").

claims.¹⁸⁹ If a nuisance suit were filed, a practically wise judge would not consider compliance with land use regulations as a complete defense against nuisance claims.¹⁹⁰ She would have to determine whether these land use regulations adequately protected others from the factory farm's air and water pollution in their application to a particular case. In other words, she would determine if these regulations were sufficient to protect others from a nuisance under the particular circumstances of the case. If not, there would be a conflict between the permitted use allowed by these land use regulations and the common law nuisance standard, which she could resolve by holding that the factory farm constituted a public or private nuisance. In accordance with this holding, she could remedy this situation in several ways. First, she could simply enjoin the factory farm operations (the usual remedy for a nuisance claim). A practically wise judge, however, could determine a more nuanced position of equality to accommodate these competing land uses. As in *Spur*,¹⁹¹ the court could enjoin the factory farm operations if the land owners deleteriously affected by the factory hog farm indemnified the factory for the costs of shutting down and relocating. Alternatively, if as in *Boomer*¹⁹² the total damage to plaintiffs' properties was relatively small in comparison with the deleterious economic consequences of shutting down the factory farm, the judge could allow the factory farm to continue its operations but require the factory farm to pay permanent damages equal to the total

189. In general, permissive regulation has been held not to bar a plaintiff's suit for a nuisance. See ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS: CASES AND MATERIALS* 588 (1981); see also, e.g., *Morgan County Concrete Co. v. Tanner*, 374 So. 2d 1344 (Ala. 1979) (ruling that the operation of a concrete plant in compliance with zoning and environmental regulations did not preclude finding liability for a nuisance). Some states, including California, have adopted specific statutes providing that nothing done under statutory authority can be deemed a nuisance. See, e.g., CAL. CIV. CODE § 3482 (West 1999). However, in California, judges have narrowly construed this statute and thus have preserved the viability of nuisance suits. See, e.g., *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 603 Pa. 2d 1329 (Cal. 1979) (awarding damages to neighbors of an airport because the particularized inquiry into the statute did not reveal a legislative intent to sanction a nuisance); *Suzuki v. City of Los Angeles*, 51 Cal. Rptr. 2d 880 (Cal. App. 1996) (ruling that a valid use permit expressly allowing use does not prevent a nuisance abatement action if business operations are injurious to persons working and living in the area).

190. See, e.g., *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998) (holding that a statutory provision exempting an area designated as an "agricultural area" from nuisance suits constituted "a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution"); *Parker v. Barefoot*, 502 S.E.2d 42, 48 (N.C. Ct. App. 1998) (granting a new trial because jury instructions failed to instruct "the jury that they could still find defendants liable for substantially and unreasonably interfering with plaintiffs' use and enjoyment of their property even if they concluded that defendants' hog farm was designed and operated in conformance with federal regulations and that it was the most technologically advanced, state-of-the-art hog farm that defendants could have constructed").

191. See *supra* text accompanying notes 177-78.

192. See *supra* note 178.

damage to the land owners affected by the nuisance. Moreover, any of these three remedies would equalize the burdens imposed by factory farms on surrounding property owners and would discourage future factory farms from strategically buying small parcels of land and imposing the burdens described above on surrounding property owners.

Furthermore, note that these remedies would entail reliance upon the Aristotelian method, which provides for the primacy of judicial practical wisdom over legislative practical wisdom. In other words, these remedies result from Pericles's determination that the land use regulations are not sufficient to protect property owners in this particular case. Although not claiming that natural justice invalidates these land use regulations in general, Pericles would maintain that these regulations did not meet the requirements of natural justice in their application to the particulars of this case. Thus, as in all hard cases, the position of equality would be determined by practical wisdom in adjudication, and Pericles's judicial practical wisdom would take precedence over legislative practical wisdom with respect to the final determination of the position of equality in relation to the telos of the good life.

CONCLUSION

According to the teleological account of corrective justice, corrective justice is a moral virtue of the judge that allows the judge to know what the position of equality (legal rights) should be in every case. Aristotle's conception of corrective justice specifies a method of judicial decision making whereby only the practically wise (i.e., morally virtuous) judge can know the content of corrective justice and its relation to the telos of the good life in all cases. Contrary to interpretations of corrective justice as a formal (Weinrib), substantive (Wright), or political (Heyman) conception of equality or freedom, the teleological conception maintains that judging requires moral virtue rather than technical, philosophical, or legal expertise. Corrective justice and its mean of equality receive content, as all moral virtues do, through judges' exercise of the intellectual virtue of practical wisdom. Pericles, the ideal Aristotelian judge, determines the position of equality in terms of the telos of the good life, and he considers the relevant ends of the competing moral virtues and of the other goods in relation to the particular circumstances of the injury. In easy cases, Pericles finds that the apparently relevant legal principles are in accordance with the position of equality. Even judges without practical wisdom will be able to achieve the just result in these cases. However, in hard cases,

Pericles determines that the apparently relevant legal principles do not fit the particular facts or that the law is indeterminate, ambiguous, or conflicting (i.e., the law fails to meet the requirements of natural justice in its application). In these cases, the just result depends on the practical wisdom of the judge. Pericles, the practically wise judge, relies on the position of equality dictated by the telos of the good life to resolve the dispute. As a result, Aristotle's claim that corrective justice requires practical wisdom means that the law is always held accountable to what he refers to as "natural or absolute justice" *in its application*. If Pericles determines that the application of a law would be not be just (i.e., not practically wise) in a particular situation, then he in effect concludes that the "unjust law is necessarily a non-law" in its application to that particular case. Consequently, all laws are subjected to the standard of practical wisdom in the process of their application, and the legal definition of the position of equality must be consistent with the position of equality that Pericles would determine in accordance with the telos of the good life and the particular facts of the case. Thus, all legal principles are subjected to the standard of practical wisdom in the process of their application, and the content of the position of equality must be consistent with the position of equality that Pericles would determine in accordance with practical wisdom and the telos of the good life.

Aristotle's account of corrective justice, however, may be considered empty in one sense. Aristotle proposes a hypothetical, rather than a categorical, norm of equality. When pushed to explain how the person of practical wisdom determines the position of equality, Aristotle only points to the person of practical wisdom in Greek society (Pericles) as normative. He does not categorically specify the nature or principle that identifies such person. Despite Aristotle's hypothetical definition of the good life and the moral virtues, his account of corrective justice gives us great insight into the method of judicial determination of the position of equality. It enlightens us by stressing the necessity of moral virtue for judges to be able to determine the just outcome in all cases. Moral virtue is necessary because it compels the judge to aim at the right end (the good life) and practical wisdom is necessary because it compels the judge to choose the proper means for achieving that end. This account also indicates that the judicial determination of the position of equality or the process of judicial interpretation should always occur in relation to the particulars of the dispute and the telos of the good life. Thus, we may readily challenge Aristotle's aristocratic definition of the good life and the moral virtues (including corrective justice), but his theory of corrective justice still makes a valuable

contribution to our understanding of the process of legal adjudication and supports a "Revival of Judicial Virtue."

Finally, with some extrapolation from the preceding discussion, the teleological conception of Aristotle's theory of corrective justice can reconcile the allegedly incompatible *ex post* analysis of most corrective justice theories with the *ex ante* economic analysis of law. If one understands how corrective justice gets its content, then corrective justice does initially have an *ex post* focus by taking the apparent legal rights as a starting point. However, judges must then evaluate these apparent legal rights. This evaluation is a matter of practical wisdom that requires judges to evaluate the apparent legal rights from the standpoint of the position of equality that promotes the *telos* of the good life, *ex ante*. In other words, rather than providing a deontological alternative to a utilitarian economic analysis, the teleological conception of corrective justice unifies a deontological (*ex post*) and teleological (*ex ante*) focus. In easy cases, the law operates in only an *ex post* manner. The practically wise judge determines that the apparent legal rights are in accordance with the position of equality dictated by the *telos* of the good life. By contrast, in hard cases, the practically wise judge determines that the apparent legal rights are contrary to the position of equality required by the *telos* of the good life for the particular circumstances of that case. Thus, in accordance with the *telos* of the good life (natural justice), corrective justice requires that the apparent legal rights be modified in their application to particulars of the case. Further, while promoting the good life is an *ex ante*, teleological analysis, it is not synonymous with economic analysis. Economic factors are certainly relevant to understanding the good life, but so are promoting friendship, prudence, magnanimity, and the other virtues. Consequently, the teleological conception of corrective justice provides for a possible reconciliation of the *ex post* perspective of most theories of corrective justice and the *ex ante* perspective of the economic analysis of law without reducing the human good to the norm of efficiency.