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In *PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER'S PRIVATE LAW THEORY* (Haris Psarras & Sandy Steel eds., Oxford University Press, forthcoming)

Distributing Corrective Justice

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Forthcoming in *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory* (Haris Psarras & Sandy Steel eds., Oxford University Press, 2022 forthcoming)

When we create a system of tort law that gives wronged persons a legal right to corrective justice, John Gardner argues, we inevitably confront an important question of distributive justice: does “the system justly distribute access to the corrective justice it dispenses.”¹ It would be distributively unjust were the system to give one person the legal right to corrective justice of some wrong without giving the same to similarly situated others. At the same time, Gardner contends, the good that tort law is distributing here is “irreducibly corrective ... [which] lends a certain explanatory priority to corrective over distributive justice.”²

Gardner might simply be observing that because the creation of private legal relations that have a distinctively corrective flavor affect the distribution of benefits and burdens among members of the polity, tort law inevitably raises distributive questions. But for Gardner a sound legal norm of corrective justice must be grounded in a sound moral norm of corrective justice.³ And so he may be suggesting something more interesting—namely, that access to legal support of morally required corrective justice is directly regulated by norms of distributive justice in much the same way as access to ordinary goods such as food and water is so regulated.

There is something at least *prima facie* puzzling about the idea that corrective justice is regulated by distributive justice as ordinary goods are. The fact that the system has distributed access to water unjustly doesn't call into question the value of water to those who have access to it. It is unjust that some have more access than others, but the value of the water to a given person seems independent of that fact. But if the system has distributed access to corrective justice unjustly, such that only a subset of persons who have been morally wronged are able to seek it, it is less clear that it makes sense to say that the system is doing justice of any kind. Saying that the system doles out justice unjustly has an oxymoronic quality that saying the system doles out a valuable good like water unjustly does not.

* Thanks very much to Jonathan Quong for helpful comments.

¹ John Gardner, *Torts and Other Wrongs* (OUP 2019) 87.

² *ibid* 91.

³ *ibid* 51-53.

Is it in fact puzzling to understand corrective justice in the way Gardner suggests? Do Gardner's observations support the idea that corrective justice enjoys some kind of "explanatory priority" over distributive justice? Can corrective justice be conceptualized prior to and independent of questions of distributive justice? I don't think we can get a full answer to these questions without delving more deeply into the nature of private legal rights. I therefore explore them by examining the conception of private legal rights that Gardner adheres to alongside the Kantian conception that Gardner rejects. I then propose and defend an intermediate conception. On my conception, there is a singular question of justice at the fundamental moral level that entails corrective and distributive principles whose prescriptions depend on the circumstances. There is no fundamental norm of corrective justice that is distinct from some other fundamental norm of distributive justice. On the contrary, the moral soundness of any corrective legal norm depends inescapably on distributive considerations.

I.

On the Kantian conception of corrective justice as it has been developed by Ernest Weinrib and Arthur Ripstein, considerations of corrective justice and distributive justice operate independently of one another and cannot be combined in a single relationship. Corrective justice in the Kantian sense can be conceptualized without reference to distributive considerations and vice versa.⁴ At the same time, it seems that Kantian corrective justice is not something that can be the object of distributive justice in a straightforward way. This is because Kantian principles imply that there cannot be corrective justice unless it is available to all.

To see why we need to look to the principles that underpin the Kantian scheme. The master principle is the universal principle of right, a principle of reciprocity that requires each to respect the like freedom of all. It implies the principle of independence: each must be free to set

⁴ On Weinrib's view, the two forms of justice "connote categorically different structures of justification. Neither of them can integrate the other within it." Weinrib, *Corrective Justice* (OUP 2012) 270. "For purposes of justifying a determination of liability, corrective justice is independent of distributive justice." *ibid* 19. Thus, "considerations of poverty have no effect on the definition and application of property rights." *ibid* 297. On Ripstein's view, the moral idea that no-one is in charge of any other entails that "I cannot take or use your property without authorization" or "act in ways that are inconsistent with your being in charge," but "is silent on the further question of what citizens, acting as a collective body through their governments, should do about the distribution of property." Ripstein, *Private Wrongs* (HUP 2016) 44.

her own purposes independently of the will of particular others.⁵ The principle of independence in turn implies that persons' rights against one another must be defined and coercively enforced by an appropriately constituted state that represents the will of all. Unless private rights are omnilaterally defined, particular persons may impose their conceptions of private rights on everyone else. Unless they are omnilaterally enforced, each will lack assurance that their rights are secure from interference by particular others.⁶ In short, publicly-minded construction and enforcement mechanisms are constitutive of a system of private rights that secures everyone's independence—a system of private rights that ensures that “no person is in charge of another.”⁷

The contours of private rights, moreover, cannot depend on any persons' purposes. In the terminology of the common law, private rights are rights against misfeasance, not rights against nonfeasance.⁸ There can't be privately enforceable relational duties that require private persons to serve other private persons' needs and purposes.

The equal freedom that is instantiated by the Kantian scheme is therefore a thin, formal kind. Each has a right to do as they wish with their rightful means unencumbered by duties to serve the purposes of others, even when they could do so with minimal impact on the pursuit of their own ends. It doesn't matter, from the standpoint of Kantian corrective justice, that some have a greater ability to pursue their ends than others so long as each person's rights to his means are exercisable without reference to anyone else's purposes.

In this way, the Kantian scheme erects a firewall between corrective justice and justice in the distribution of the means. A system of corrective justice honors each person's ability to use the means that she has free from interference by particular others. Ensuring that those means are fairly distributed such that each has the ability to successfully pursue her ends is another matter entirely. This is not to say that distributive considerations are irrelevant, only that they are irrelevant from the standpoint of corrective justice. Distributive justice is a matter of what the

⁵ Arthur Ripstein, *Force and Freedom* (HUP 2009) 13-15.

⁶ The principle of right requires “a state that will render the demands of right determinate, through legislation and adjudication, and will render the enforceability of those demands reciprocal through an enforcement mechanism.” Arthur Ripstein, ‘Authority and Coercion’ [2004] 32 *Phil & Pub Affairs* 27. See also Ernest Weinrib, *The Idea of Private Law* (HUP 1995) 107 (“Since the vindication of right includes the prevention or reversal of violations of right, the freedom of all is immediately joined with a reciprocal universal coercion.”); Weinrib, *Corrective Justice* (n 4) 111 (“a claim of right implies a judicial role in interpreting and enforcing the claim”).

⁷ Ripstein, *Private Wrongs* (n 4) 12.

⁸ Ripstein, *Private Wrongs* (n 4) 53-55. See also Weinrib, *Corrective Justice* (n 4) 11 (“as participants in a regime liability, the parties are viewed as purposive beings who are not under duties to act for any purposes in particular, no matter how meritorious”).

community as a whole owes to each, not what particular private persons owe to particular others. It is a matter of public not private right

It should now be clear why on the Kantian conception it doesn't make sense to say that corrective justice is a good that can be distributed in the same way that we might distribute the ordinary means that persons use to pursue their ends. Everyone's private rights must be omnilaterally defined and coercively enforced in order for those rights to instantiate the equal freedom of all. Imperfect access to tort law institutions of corrective justice, even if equally distributed, violates this condition leaving persons' independence in peril. Therefore, unless everyone has full access to corrective justice for any and all infringements of their private rights, there can be no corrective justice at all. In other words, a distributive imperative of an absolute nature *is* part and parcel of the system of corrective justice itself: everyone's rights must be omnilaterally defined and enforced for there to be justice of the corrective kind at all. At the same time, the distributive imperative requiring that each has full access to corrective justice doesn't have implications for run-of-the-mill questions about the distribution of means. The way in which the polity decides to resolve distributive questions of the latter kind has no impact on the justice of the corrective scheme.

Insofar as we agree with the Kantians that independence is an important value, their conception is an appealing one when both public and private institutions are doing what they are supposed to be doing—discharging distributive and corrective justice respectively. It becomes less appealing when one or other is not. Suppose that public institutions fail to implement a plausible principle of distributive justice such that the means of some to pursue their ends unjustly exceed those of others. Why think that a system that protects the means of each against interference by particular others is doing any kind of justice at all? The system may be securing each person's independence to use their legally rightful means as they wish. But it is doing so by entrenching injustice in the distribution of means. Why give priority to the former over the latter?

A response might be to say that navigating trade-offs between corrective and distributive justice is just a question that the theory doesn't speak to. But if it is possible to navigate such trade-offs in a principled fashion, then there must exist a more fundamental principle of justice that tells us how to do so. Otherwise, all we have is either an ideal theory that has little bearing

on our actual, non-ideal world or two conceptions of different types of justice—corrective and distributive—that don’t generate all-things-considered prescriptions.⁹

II.

Let’s now drop the Kantian assumption that private rights are constituted by their omnilateral definition and enforcement and suppose with Gardner that rights can exist at the moral level independently of such state action. It remains true that the state will be involved in the definition and enforcement of private rights insofar as it creates legal rights that institutionalize moral rights. But the underlying moral rights exist—they are the source of binding moral obligations—prior to their legal institutionalization. The process of institutionalization may modify the rights to some extent by resolving indeterminacy about their content and transforming them into meaningful legal rights. But the state’s actions in creating those legal rights are justified insofar as they reflect and protect underlying moral rights that exist in a robust sense prior to being elaborated and enforced by legal institutions.

Gardner will say that the underlying moral rights and associated moral obligations exist because of the set of moral reasons that give rise to them.¹⁰ Once a right has been infringed, the associated primary obligation can no longer be performed, but the reasons that gave rise to it persist generating a moral duty to do the next best thing, such as paying the right-holder compensation. This is the moral duty of corrective justice that follows from Gardner’s continuity thesis.¹¹ And it points to a way of justifying a system of tort law that creates a system of primary and secondary legal duties that track underlying primary moral rights and associated corrective moral duties.

The substantive claim that private legal rights derive their normative force from pre-existing moral rights that they instantiate and enforce is a plausible and familiar one. But Gardner conceptualizes the relationship between private rights and justice in a way that may obscure some of what the Kantian conception illuminates. On both conceptions, duties of repair owed by the wrongdoer to the right-holder arise when primary private rights are infringed. But

⁹ We have a theory that calls out for a “resolution principle” but hasn’t supplied it. Dan Priel, ‘The Impossibility of Independent Corrective Justice’ (unpublished manuscript 2018).

¹⁰ Gardner, *Torts and Other Wrongs* (n 1) 57-58.

¹¹ *ibid* 57-58.

whereas the Kantians view the infringements themselves—the prior wrongs that give rise to the duty to correct—as violations of norms of (corrective) justice, Gardner contends that: “Most torts are not injustices at all, let alone corrective injustices. They are violations of norms of honesty, considerateness, trustworthiness, loyalty, humanity, and so on.”¹²

This picture of the relationship between rights and justice emerges from particular features of the conceptual scheme that Gardner endorses. On Gardner’s picture, moral rights are rights that arise from moral norms that are grounded in the interests of the right-holder and impose upon the duty-bearer a duty to take a particular action.¹³ Norms of justice, in turn, are moral norms for “tackling *allocative* moral questions,” narrowly defined as questions about who is to get how much of morally significant assignable goods.¹⁴ Moral rights therefore count as rights of justice only if they arise from moral norms that tackle allocative questions of this kind. In this way, a duty of justice in the form of a duty of repair can arise from the breach of a moral right that is not a right of justice. This is because the reasons underpinning the moral right persist after it is violated giving rise to a duty on the part of the wrongdoer to do the next best thing for the right-holder, and the resulting obligation to do the next best thing responds to an allocative moral question. The right-holder has not received the performance she was owed. The duty-bearer cannot go back in time and render that performance. Thus, the duty-bearer must give her something as close as possible to the original performance to make up for her loss. Thus, a duty of justice can arise from the infringement of a primary duty that was not itself an answer to an allocative problem of justice—and thus not a norm of justice within Gardner’s scheme.

Gardner’s concept of justice is thus a deflationary one. Justice is not part of the normative landscape at the fundamental moral level. The fundamental building blocks are moral reasons that are themselves not understood as entailments of justice. Rights of justice are simply those that arise from moral norms that handle particular kinds of allocative moral question. Moral rights and duties of all kinds, whether they are norms of justice or not, exist in virtue of the reasons that justify them and so their existence isn’t a matter of justice. They “come and go with the reasons for and against their existence, and irrespective of their use, observance, recognition, or adoption,” and so are “incapable of being distributed.”¹⁵

¹² *ibid* 50.

¹³ *ibid* 74.

¹⁴ *ibid* 31-32.

¹⁵ *ibid* 84.

This way of carving up the moral universe leads to the jarring conclusion that the moral right not to be tortured is not a right of justice.¹⁶ It qualifies as a right because “the interests of the person who is not to be tortured suffice to justify the obligation not to torture.”¹⁷ But it doesn’t qualify as a right of justice, because it is an obligation of humanity not an allocative right. It gives rise to a right of corrective justice when it is infringed, because the claim of a tortured person for reparation from her torturer is a claim that the losses she has suffered at the hands of the torturer be reallocated between them.¹⁸ But this is a feature of the secondary right not the primary right.

On this picture of justice, it is clear why the institutionalization of norms of corrective justice raises questions of distributive justice. In determining which moral norms will count as torts, the system determines which wronged persons will have their claims for corrective justice legally recognized and publicly supported, which is an allocative problem of the right kind.¹⁹ But the Gardnerian scheme doesn’t tell us much about the nature of the allocative problem and how it should be solved beyond the observation that it concerns the allocation of something that alters the overall distribution of benefits and burdens.

Perhaps it is enough to categorize the problem as an allocative one. Some prescriptions straightforwardly follow. It would be obviously problematic, for example, if the system defined torts with reference to arbitrary characteristics of the right-holder and/or duty-bearer such as their race or gender.

Yet much remains underdetermined. We could eliminate problems of arbitrariness by getting rid of the tort entirely instead of eliminating the discriminatory limitations. When we set aside such problems and the question we ask instead is “should we recognize a type of wrong against all relevant right-holders by all relevant duty-holders?” the answer will, on Gardner’s conception, be driven in significant part by the reasons that underpin the moral norms themselves. Observing that the problem is an allocative one doesn’t offer much in the way of guidance. The institutionalization of moral norms raises an additional set of difficulties that aren’t reducible to questions about the significance of the norms being institutionalized. Some norms may be costlier to define and adjudicate than others. But holding such considerations

¹⁶ *ibid* 31-32, 74.

¹⁷ *ibid* 74.

¹⁸ *ibid* 74.

¹⁹ *ibid* 85-87.

constant, decisions to legally recognize one set of moral norms at the expense of another will be regulated by the reasons that lie behind the two sets of moral norms. If a choice must be made, norms that are supported by weightier reasons should be recognized at the expense of others.

It's also not clear in what sense this picture vindicates the notion that "corrective justice in tort law enjoys some kind of explanatory priority."²⁰ Suppose that the system distributes access to corrective justice unjustly by recognizing some torts instead of others that were more worthy of recognition. Suppose, for example, tort law recognizes a set of wrongs that are disproportionately suffered by the rich while failing to recognize another set that are disproportionately suffered by the poor. The system's failure and the injustice that ensues from lack of recognition and enforcement of the latter, it is plausible to suppose, will alter the set of reasons that lie behind the underlying moral norms. Perhaps certain minimal infringements of the legal property rights of the rich by the poor no longer count as morally wrongful when the poor may not rely on tort law to vindicate their own more significant claims. But if that is so, then when the system gives the rich a remedy in the face of such infringements of their legal rights, it cannot be doing corrective justice of any kind.

Gardner might respond that this misses the point. Precisely because the legal right isn't supported by moral reasons that would give rise to a duty of repair pursuant to the continuity thesis, any corrective legal norm that would provide the rich person with a remedy in these circumstances must be unsound. Conceding this is compatible with maintaining that moral duties of repair continue to arise from infringements of primary moral norms that reflect the full set of reasons that arise under these distributively unjust conditions. In this sense, corrective justice has a kind of explanatory priority.

But if this is the explanatory priority corrective justice retains, it is a thin, formal kind of priority. For it is compatible with injustice in the distribution of access to corrective justice altering the content of the very norms that any institution of corrective justice should support. In short, access to corrective justice doesn't look like an ordinary good that can straightforwardly be distributed, because the substantive content of sound corrective norms will be affected by the way in which it is distributed.

²⁰ *ibid* 82.

III.

While both offer rights-based justifications of private law, there are at least two significant respects in which the Kantian and Gardnerian conceptions diverge. The first concerns the relationship between substance and procedure. The second concerns the extent to which rights necessarily confer freedom of choice on the right-holder or simply serve the interests of the right-holder.

Consider the relationship between substance and procedure first. On the Kantian conception, private rights must instantiate the independence of all, a requirement that entails only procedural constraints on the particular content of those rights. The cardinal sin is unilateralism—the unilateral imposition of particular persons' wills on particular others. Thus, private rights are necessarily constituted by omnilateral state action that resolves indeterminacy about their content and coercively enforces the omnilaterally defined rights. On the Gardnerian conception, by contrast, private rights are a function of the underlying substantive moral reasons and can exist whether or not they are legally institutionalized.

As we have seen, it is the resolute proceduralism of the Kantian account that creates the firewall between corrective and distributive justice. The substantive concerns that may require a more egalitarian distribution of means are simply not relevant to the question whether each is free to use his means independently of the purposes of others. And since independence is the master principle as far as corrective justice is concerned, corrective justice doesn't depend on such substantive concerns. Gardner's conception erects no such firewall, but at the expense of diminishing the significance of corrective duties, as the content of primary and secondary duties are entirely determined by the full set of underlying moral reasons including those that arise from the prevailing distribution of means.

As for the role of freedom in the two accounts, Kantian private rights establish domains in which persons are free to do as they wish with their rightful means, whereas the hallmark of a right on the Gardnerian conception is whether it has as part of its rationale the interests of the right-holder. Thus, on the Gardnerian conception, moral rights necessarily serve the interests of the right-holder but they don't necessarily confer on her any protected domain of freedom of choice. In other words, whereas the Kantians offer a will-based theory of the function of rights, Gardner's is an interest-based account.

Despite these differences, sound private legal rights are closely connected to their moral counterparts on both conceptions. On the Kantian conception, the two come into existence together: full-fledged private rights must be legally institutionalized to count as genuine rights. On the Gardnerian conception, moral rights provide a justification for their legal counterparts, which must therefore closely mirror those moral rights.

In the remainder of this paper, I'll sketch an alternative conception of private rights that is in various respects intermediate between the Kantian and Gardnerian conceptions on both dimensions while retaining what I consider to be the most normatively plausible features of each. The account also departs from both accounts in detaching justified legal rights from their moral counterparts while retaining a significant role for the latter in the justification of the former.

IV.

Like Gardner, I begin with the idea that reasons are morally fundamental and underpin our rights against one another. Persons ought to make choices that reflect the balance of moral and prudential reasons that apply to them. A plausible conception of rights should reflect that fact.

This cannot be the entire story, however, if, as it is plausible to suppose, rationality requires each of us to give special weight to our own interests and those with whom we stand in particular relationships—family, friends, and members of the larger communities of which we are part. For then some of the reasons each of us should rationally weigh are partial reasons that can make it the case that what it is rational for me to do when faced with a particular choice won't correspond with what another would rationally want me to do. Partial reasons, in other words, entail that rationality will be indexed to a particular person's standpoint. And if persons' standpoints conflict, they will need a way of rationally navigating those conflicts. Appealing only to the reasons that define persons' standpoints will result in an impasse whenever standpoints conflict. This suggests that there exists a further set of rational considerations orthogonal to those reasons that tell persons whose standpoint governs a choice in the event of a conflict.

This last point may not seem immediately obvious. Why aren't the choices that a particular person faces necessarily governed by her standpoint? She is the one who must choose. Surely rationality requires that she should choose the option that is prescribed by her standpoint.

Though superficially plausible, such an allocation of standpoints to choices doesn't withstand scrutiny. Without more the non-normative fact that I am the one doing the choosing can't entail the normative conclusion that the partial reasons that define my standpoint prevail over those that define others' standpoints. This point is most obvious when it comes to choices made by those who stand in certain relationships of trust with others. The teacher's choice of learning material for her students, for example, should clearly be informed by her students' standpoint not her own. But the point applies more generally. The significance of the set of choices the rich get to make is much greater than that of the poor. It can't be that their standpoint controls those choices just because they happen to be the ones making them. We are, of course, morally responsible for our choices, which might make it seem that we must always do what we rationally think is best. But the set of choices we face is in significant part a function of circumstances that are out of our control. It surely isn't fair for the standpoint of one whose life by good luck presents him with many significant choices—significant not just for himself but also for many others—to govern all those choices when many other persons have lives that because of misfortune present them with fewer such significant choices. Fairness seems to dictate a more equitable allocation of standpoints to choices.

Is a more equitable allocation best understood as a requirement of justice? I think it is, though within Gardner's scheme it wouldn't be. In Gardner's scheme, recall, justice solves problems about the allocation of assignable goods. The fairness considerations that I have just identified help to solve an allocative problem. But the allocative problem is deeper than the type of problem that Gardner identifies as a problem of justice, because while it may have implications for problems of allocating assignable goods, it isn't fundamentally a problem about allocating goods. Rather, it is an allocative problem that is built into the fabric of moral reality at the fundamental level. Just as there are reasons that define particular persons' rational standpoints, there are considerations of justice that tell us how rational standpoints should be allocated among choices and thus how conflicts among standpoints should be resolved.

If we view justice in this way—as allocating standpoints among choices—we are naturally led to a conceptualization of persons' rights, according to which there is an intimate connection between rights and justice. To have a right over a particular choice means that the all-things-considered balance of considerations of justice require that that one's standpoint be allocated to that choice. A right to have one's standpoint determine how that choice is to be made

is thus a right of justice. On my conception, therefore, unlike on Gardner's, it isn't a mistake to view a question of rights as necessarily involving a question of justice. If justice would assign a torturer's victim's standpoint to the torturer's choice whether or not to torture him, then the torturer's victim's right not to be tortured is a right of justice.

My conception is compatible with an interest-based conception of rights insofar as reasons and considerations of justice—rather than the right-holder's will—control what agents are duty-bound to do. The right-holder's standpoint controls the choices that are governed by it, whether these be her own choices or the choices of others, and considerations of justice determine which choices the standpoint governs. The prescriptive content of the standpoint and the just allocation of standpoints to choices are in turn determined by reasons and considerations of justice, not by anyone's will.

If, however, there is metaphysical or epistemic uncertainty about the content of persons' standpoints or the just allocation of standpoints to choices, persons will need mechanisms for settling that normative uncertainty—mechanisms that necessarily aren't reducible to the underlying reasons and considerations of justice given that the latter don't yield certain prescriptions. This means that we must answer a further question: how is moral authority to settle normative uncertainty allocated among persons? Given the allocative nature of the question, it also makes sense to view it as a problem of justice.

What is the just solution to this second-order problem of justice—that of allocating moral authority to settle normative uncertainty about first-order justice (the allocation of standpoints to choices) and the content of persons' rational standpoints? Liberal-egalitarian principles suggest that considerations of autonomy and equal respect for persons will figure in the just solution, such that the just allocation of authority will ensure that persons whose rights are or may be affected by the resolution of the uncertainty must (presumptively at least) have an equal say in how it is to be resolved. Each person's autonomy is furthered by an allocation that gives her authority to settle uncertainty about her own standpoint and a say in resolving uncertainty about how her standpoint is to be justly allocated among possible choices. The value of equal respect for persons is advanced by an allocation of authority that ensures that each person has an equal say in the selection among plausibly just allocations that may affect her rights.

As I argue in detail elsewhere, this is where normative powers of decision-making, consent, promise and agreement enter into the picture.²¹ Such acts are normatively significant, I argue, precisely because they settle normative uncertainty about the content of persons' rational standpoints and the just allocation thereof by the persons or groups of persons who are authorized by justice to resolve it. When an agent makes a decision about what she should do or consents to an action by another where her own standpoint is allocated to her own or the other's choices, she settles normative uncertainty about the content of her standpoint as it pertains to her own or another's choices respectively. When agents make promises or agreements, they resolve normative uncertainty about justice by together settling uncertainty about how their rational standpoints should be justly allocated among possible choices they may face. As an example of the former, suppose that an agent's standpoint controls whether another person may perform a surgery on her. According to my conception, her morally valid consent to it involves her settling normative uncertainty about her standpoint in favor of her undergoing the procedure. As an example of the latter, suppose that two persons enter into a morally valid agreement to exchange widgets for money. According to my conception, the parties thereby settle normative uncertainty about what justice between them demands in favor of the buyer's standpoint controlling who gets the widgets and seller's standpoint who gets the money.

When the rights of many agents would be implicated by the resolution of normative uncertainty, mechanisms of promise and agreement may not work because a requirement of unanimity may not be achievable or desirable. Thus, agents may have to resort to legal institutions to settle uncertainty about background rights. But those legal institutions should answer to a similar set of considerations of justice. They should be designed to allocate settling authority among persons in a way that is compatible with liberal egalitarian principles.

V.

Much more needs to be done to fill in and defend the picture sketched here, some of which I attempt to do elsewhere.²² The important point for present purposes is that agents simultaneously

²¹ Rebecca Stone, Normative Uncertainty, Normative Powers, and Limits on Freedom of Contract (unpublished manuscript 2020).

²² *ibid*; Rebecca Stone, Putting Freedom of Contract in its Place (unpublished manuscript 2021).

face (i) substantive problems of reason and justice, and (ii) procedural questions about who is authorized to settle normative uncertainty about agents' standpoints and the just allocation of those standpoints to choices. Thus, the framework admits of injustice on two dimensions: there is substantive injustice when someone acts contrary to the just assignment of standpoints to choices; and there is procedural injustice when someone acts contrary to a valid settlement of normative uncertainty about (substantive) injustice—that is, when someone fails to respect the settlement that reflects the just assignment of authority to settle normative uncertainty, even if the result imposed by ignoring those determinations might accord with substantive justice. To illustrate, return to the simple doctor-patient example. The doctor engages in substantive injustice if he operates on the patient when undergoing such an operation is proscribed by the patient's standpoint. The doctor engages in procedural injustice when he operates on the patient in the face of normative uncertainty about what the patient's standpoint prescribes where the patient has validly exercised her settling authority to determine that she not undergo the procedure. Some amount of substantive injustice is inevitable in a world of imperfectly rational beings for whom the demands of justice are epistemically opaque. Procedural injustice, by contrast, is eliminable even for such beings, at least in principle.

Injustice of the procedural sort is analogous to the injustice that the Kantians associate with the infringement of private rights, if, as I suggest, authority to settle normative uncertainty is justly assigned to those who are most implicated by it: the possessor of the standpoint when it comes to normative uncertainty about a standpoint; and those whose first-order rights are implicated by the resolution of normative uncertainty about justice. Contra the Kantian conception, however, procedural rights ultimately serve a substantive conception of justice and so are substantively constrained. The assignment of authority is an assignment of authority to settle normative uncertainty and valid resolutions of the uncertainty must plausibly do exactly that. Agents must consider in good faith the substantive problem at hand and their settlement must be substantively plausible. Valid exercises of settling authority are therefore not pure acts of will. They are valid only insofar as they respect and are consistent with the underlying reasons and considerations of justice, uncertainty about which they purport to settle.

Both types of injustice arise from a departure from a just allocation—an allocation of standpoints and an allocation of authority respectively. In this sense, we can view them as different forms of distributive injustice (though what I'm referring to as substantive justice likely

tracks more closely what people usually have in mind when they speak of distributive justice). We might then define two notions of corrective justice corresponding to any secondary duties of repair that arise from injustices of each type. Such corrective duties are clearly derivative of allocative considerations, and so we may be tempted to conclude that corrective justice is wholly dependent on distributive justice.

This conclusion is too quick, however, because a substantive injustice doesn't always generate a duty of repair that could be knowable and so action guiding given normative uncertainty about justice. If an action is transparently an injustice—because it would count as such under any plausible settlement of the uncertainty about justice—then a duty to repair capable of guiding action clearly arises. It doesn't matter how applicable normative uncertainty about justice has been resolved, because any attempt to resolve it in a way that yields the conclusion that the conduct is not unjust would be invalid regardless of the validity of the procedure. But in other cases—where, given the prevailing normative uncertainty, it isn't clear whether or not an action is unjust—it matters how the applicable normative uncertainty has been resolved as agents can't be sure whether or not the action was unjust. And so procedural considerations come to the fore. An action that runs contrary to the procedurally valid resolution of the uncertainty about justice would count as a procedural injustice, even if we cannot say that it is also a substantive injustice, giving rise to a duty of repair on that dimension. The following table sets out the possibilities.

Table: When do corrective duties capable of guiding action arise?

	No Procedural Injustice (no infringement of valid legal right)	Procedural Injustice (infringement of valid legal right)
Transparent Substantive Justice	Known absence of a corrective duty of any kind	Known absence of a corrective duty of any kind
Contestable Substantive Justice	Unknown absence of a corrective duty	Known duty to correct infringement of legal rights
Contestable Substantive Injustice	Unknown duty to correct substantive injustice	Known duty to correct infringement of legal rights
Transparent Substantive Injustice	Known duty to correct substantive injustice	Known duty to correct substantive injustice

In contending that all that matters from the standpoint of private right is the omnilateral definition and enforcement of private rights, the Kantian conception focuses our attention exclusively on the middle two rows of the table. It ignores the substantive dimension of justice entirely, using the term corrective justice to denote both the primary legal duties that emerge alongside secondary duties to correct infringements of them. Mapping their framework onto this one, the Kantians contend in effect that the substantive considerations of justice that regulate the allocation of standpoints to choices are irrelevant as far as the content of persons' private rights and duties are concerned. Hence, corrective justice is independent of questions of distributive justice.

This picture is normatively plausible if normative uncertainty is pervasive and purely metaphysical—that is, if it is always present and all-encompassing and there aren't better or worse ways of resolving it. Under these assumptions the rows at the top and bottom of the table can be ignored, and all private duties have content that is entirely procedurally defined.

The Kantian picture is less plausible if normative uncertainty has an epistemic component, such that there can be substantively better or worse ways of assigning standpoints to choices and a procedurally impeccable process may be transparently substantively flawed. Under these conditions it is unclear why procedure must always trump substance, given that the point of the procedure is to resolve a substantive epistemic problem. Yet insisting that substance should always take precedence over procedure also seems to go too far in the face of significant epistemic normative uncertainty about justice and associated reasonable disagreement about its content.

Thus, we need to strike a balance between these two extremes. The requirement that epistemic uncertainty about justice be resolved reasonably rather than perfectly justly looks like a promising way to do so. On such a conception, procedurally valid legal rights are the end of the story only when reasonable people would disagree about what substantive justice has to say about its content. In the absence of such reasonable disagreement, substantive considerations determine the content of persons' private rights directly. If we follow the Kantians in associating corrective justice with what I am calling procedural justice and distributive justice with what I am calling substantive justice, the zone of the reasonable will limit the extent to which corrective justice can operate independently of distributive considerations.

A skeptic might object at this point that introducing a reasonableness requirement is simply serving as a placeholder—identifying a trade-off without giving us tools to resolve it. Thus, the conception leaves us no better off than the Kantian conception does in navigating tensions between corrective and distributive justice.

A full response to this objection is beyond the scope of this chapter. But it is clear that any such response will have to build more content into the idea of the reasonable. An extremely thin conception of the reasonable—for instance, one requiring nothing more than internal consistency—will leave corrective justice effectively unconstrained by considerations of substantive justice. A more robust conception will render it highly constrained.

How should we choose among the range of possibilities? We aren't seriously settling normative uncertainty about justice if the only desiderata of such a settlement is internal consistency. Such a thin constraint would leave persons vulnerable to legal action by another based on conduct that is transparently not an infringement of the latter's rights. To settle normative uncertainty about justice we must seriously engage with a substantive normative problem and arrive at a resolution that is normatively plausible given the nature of the problem sufficient to justify enforcement of a plaintiff's legal rights against the defendant. At the same time, it is important that our conception of the reasonable not require persons to arrive at the truth or something too close to it, given the epistemic complexity of the substantive problem of justice. Such a demanding conception will make a conscientious plaintiff reluctant to stand on her rights in situations where it is likely that her rights have been infringed. An intermediate solution is therefore required. Exactly what this entails is difficult to specify with precision, but it must tolerate disagreement among those who reasonably engage with the problem of resolving normative uncertainty about justice—that is among those who are committed to a solution that instantiates substantive principles of fairness and flourishing.²³

A response of this form concedes that there is uncertainty about the criterion that we use to distinguish acceptable and unacceptable resolutions of the uncertainty—that the reasonable can't be specified with precision. But this isn't a fatal problem. Many of our moral concepts

²³ This suggestion has a Rawlsian flavor though Rawls suggests that private law may not be subject to the exacting demands of justice to which the basic structure are subject to, or at least that the principles that do apply are distinct from and independent of the principles that regulate the basic structure. See John Rawls, *Justice as Fairness: A Restatement* (Erin I Kelly ed, 2nd edition, HUP 20021) 11. For further argument that something more than internal consistency but considerably less than the truth is the correct constraint, see Rebecca Stone, *Private Liability without Wrongdoing*, *University of Toronto Law Journal* (forthcoming).

require us to exercise judgment in the face of vagueness about their range of application, but that doesn't render those concepts practically inert. The idea of the reasonable is such a concept. There will be a range of settlements of normative uncertainty about justice that are close to the line and so difficult to classify as reasonable or unreasonable. But there will also be a much greater range of possible settlements that are easy for us to classify because they clearly fall above or below it.

VI.

Instead of starting by conceptualizing a corrective form of justice distinct from a distributive form, I've proposed a unitary conception of justice within which we can locate distributive and corrective concerns. In a world of normative determinacy, justice entails an allocation of standpoints to choices that is responsive to distributive considerations. This entails a system of private rights pursuant to which each has the duty to act in accordance with another's standpoint whenever justice has assigned the latter's standpoint to his choice. Private persons will have primary duties to so act alongside secondary corrective duties to do the next best thing should they infringe another's rights. But both types of duties are ultimately derivative of the assignment of standpoints to choices that is given by substantive justice.

If we were to follow Gardner here, we would say that duties of corrective justice are just the secondary duties of repair that arise when these primary duties are infringed. Alternatively, if we were to follow the Kantians by viewing corrective justice as demarcating the set of rights and duties that define private parties' relationships with one another including but not confined to associated duties of repair, we might label the entire domain as one of corrective justice, albeit one whose content is, contra the Kantian conception, distributively determined.

Normative uncertainty adds an additional layer of complexity by forcing us to reckon with the procedural dimension of injustice with which the Kantian corrective justice theorists are exclusively concerned. Agents must continue to honor the substantive constraints imposed by the reasons that define controlling standpoints and by considerations of justice insofar as they are certain. But insofar as there is uncertainty about their content, agents must now also honor the just assignment of authority to reasonably settle that normative uncertainty. Thus, a duty-bearer can infringe a presumptive right-holder's rights by acting as if his own standpoint controls the

choice even if such an allocation of standpoints is compatible with some plausible resolution of extant normative uncertainty about justice, when those authorized to resolve normative uncertainty about the just assignment of standpoints to choices have plausibly settled the uncertainty differently by assigning the presumptive right-holder's standpoint to the choice instead.

Does corrective justice enjoy any kind of “explanatory priority” once normative uncertainty is in the picture? I’ve argued that corrective duties depend on the basic assignment of standpoints to choices being reasonably just. If normative uncertainty about the just assignment has been settled unreasonably, then the primary and secondary duties that are entailed by the settlement are not morally binding. In other words, the outer limit of persons’ moral authority to settle normative uncertainty about justice is distributively determined.

On the other hand, if reasonableness captures the correct tradeoff between procedural and substantive considerations, corrective justice also achieves a modicum of independence from substantive justice. This is because agents will be required to respect substantively unjust settlements of normative uncertainty about justice in their interactions with other private parties when those settlements are reasonable. In these cases, distributive considerations governing how authority to resolve normative uncertainty about justice are important determinants of corrective duties, but so are the determinations of those thereby authorized to settle the applicable normative uncertainty about justice—determinations that are content-independent within substantively constrained bounds.

The framework can vindicate Gardner’s claim that the occasion of a tort dispute can confront us with “questions of distributive justice that are already pre-localized, that already assume the context of a bilateral zero-sum conflict.”²⁴ If the polity’s assignment of standpoints to choices is reasonable but not perfectly just, then the occasion of a tort dispute could provide the parties to the dispute with an opportunity for refining that assignment as between them in the light of what has transpired. In other words, the tort dispute would provide them with an opportunity to refine the allocation of standpoints to choices to better approximate what justice between them requires. In my framework, though, in contrast to Gardner’s, corrective justice is not thereby enjoying “explanatory priority.”²⁵ The refinement is justified by the relationship-

²⁴ *ibid* 97.

²⁵ *ibid* 97.

specific questions of substantive justice that come to the fore—questions that the parties are morally authorized to settle when the answers are normatively uncertain. Indeed, the parties could use the tort dispute to reshape their vision of their primary rights and duties against one another in which case any resulting refinements of their corrective duties would be derivative of their reconfiguration of their primary rights.²⁶

Does it make sense to think of corrective justice as a good to be distributed in accordance with considerations of justice—something we can characterize prior to and independently of how it is in fact distributed by the polity? As Gardner’s observations make clear, there is more to assigning standpoints to choices than defining private parties’ rights against one another. This is because the polity must also confront the question what resources are to be devoted to the enforcement of such rights and duties. This, of course, is a question of non-ideal theory, for it wouldn’t arise if everyone always did what justice required of them—if every private actor discharged his primary duties of corrective justice. But once people are imperfectly motivated to conform to justice, we face a question of non-ideal justice: how should the polity organize itself in order to respond to such non-compliance?

Given that resources are scarce, it won’t be possible for the polity to confront this second question without it having an impact on the first question—the question how to allocate standpoints to choices in the first place. Indeed, the decision to allocate some resources to enforcement is such a determination itself. The state is deciding, in effect, to allocate a public standpoint to control of those resources. But for precisely this reason, I don’t see how corrective justice can be characterized as a simple good or resource to be distributed, as Gardner seems to suggest that it can. Corrective duties arise from infringements of the primary rights, which are themselves given by the basic assignment of standpoints to choices, which must be responsive to the problem of ensuring that rights are respected when some are imperfectly motivated to conform to justice.

To be more concrete, consider the reasonable person standard in torts. With a few exceptions, the law evaluates the reasonableness of a defendant’s conduct by comparing it to the reasonable behavior of a person of “ordinary prudence”—a standard that is thus invariant to

²⁶ For further development of this idea see Rebecca Stone, ‘Who Has the Power to Enforce Private Rights’ in Paul Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory Vol. II* (OUP forthcoming).

many of the actual capabilities of the defendant.²⁷ Such a standard is more burdensome for those who are less capable of meeting the standard than others (say because they are naturally slower, clumsier, or less perceptive than the ordinary person).²⁸ Ideal justice, it is plausible to suppose, would require that the standard be perfectly tailored to the actual capabilities of the defendant at least where the defendant can't be held responsible for failing to develop capabilities comparable to those of the ordinary person. But greater tailoring would, of course, increase litigation and administration costs and burdens on potential victims trying to protect themselves from the carelessness of others in the face of imperfect compliance and enforcement. And so, it may make sense from the standpoint of non-ideal justice to compromise. But notice that in doing so, the legal system doesn't simply make a decision to allocate resources to enforcement in a particular way. It alters the substantive content of the primary duties that the tort system imposes on private parties. They are duty-bound to adhere to this capability-invariant standard even though ideal justice would seemingly require something more fine-grained. In short, the system reduces enforcement costs and increases the general level of conformity with the primary assignment to the benefit of all especially potential victims, but this comes at the costs of increasing inequities in the distribution of the burdens of conforming to the standard on the defendant side and increasing some inequities across potential plaintiffs by recognizing some but not others of their true (ideal) rights. It might seem that in doing so, the legal system has simply chosen to recognize some wrongs as such instead of others, such that the *moral* corrective duties remain unchanged despite the legal system's decision not to recognize them. But an objective standard may also create legal duties where none exists at the moral level. More importantly, if in formulating the non-ideal standard the polity is doing so in a way that honors underlying considerations of non-ideal justice, the resulting legal duties, though they inevitably depart from the ideal, might reflect what the parties (non-ideally) owe to each other.²⁹

²⁷ Restatement (Second) of Torts (1965) § 283 cmt. c.

²⁸ As Oliver Wendell Holmes explained: "If . . . a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account." Oliver W. Holmes, Jr. *The Common Law* (The Lawbook Exch., Ltd. 2009) 108.

²⁹ For further elaboration of this argument, see Jonathan Quong and Rebecca Stone, 'Rules and Rights' in David Sobel, Peter Vallentyne, and Stephen Wall (eds), *Oxford Studies in Political Philosophy Vol. 1* (OUP 2015).

Thus, in confronting what looks like a simple distributive problem—the problem of distributing access to corrective justice—the system may end up changing the contours of the primary rights at the (non-ideal) moral level. But this means that it is the ultimate assignment of standpoints to choices in the particular non-ideal circumstances in which the polity finds itself that has explanatory priority. Again, the fact that the assignment needs only to be reasonable will give the polity some scope to make decisions about enforcement without altering the contours of the primary and secondary rights entailed by the basic assignment. But that only allows for a qualified kind of independence between the rights themselves and the decision to enforce. And, of course, what counts as reasonable—the content of the constraint that allows for such a modicum of independence—will depend on the underlying considerations of justice.