What is Tort Law For? Part 2.
the Place of Distributive Justice (2014)

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What is Tort Law For?
Part 2. The Place of Distributive Justice

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1. Distributive justice in a corrective context

[P]rinciples of distributive justice designed to cover the distribution of the benefits and burdens of economic activity among individuals in a society ... have been the dominant source of Anglo-American debate about distributive justice over the last four decades.[1]

So they have. It is hardly surprising, then, that when we think about distributive justice and the law of torts, the issues that first spring to mind concern tort law's impact on, and sensitivity to, the distribution of resources (or wherewithal) across the wider population. Should tort damages be calculated on the basis of the plaintiff's lost earnings even where those earnings were obscenely high or obscenely low? Shouldn't there be a ceiling and a floor?

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[1] Julian Lamont and Christi Favor, 'Distributive Justice' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2008, fall edition) <http://plato.stanford.edu/archives/fall2008/entries/justice-distributive/>.

Even with a ceiling and a floor, doesn't tort law create incentives to divert risks onto the disadvantaged, thereby compounding their disadvantage? Moving our attention from disparities among plaintiffs to disparities among defendants, shouldn't the precautions against accidents expected of the well-heeled be greater than those expected of humbler folk? At any rate, shouldn't the relative burden of meeting the costs of safety, in the defendant's particular circumstances, be relevant to the stringency of the defendant's tort-law duties? In general, shouldn't the choices of those with more limited options be treated differently by the law of torts, and by the law generally, from the choices of those better furnished with alternatives?

Putting such questions of (what we might call) 'socio-economic justice' centre stage, notes Tsachi Keren-Paz, are at least 'two streams of scholarship' about the law of torts:

> The first stream attempts to defend the relevance and legitimacy of using private law for (limited) redistributive purposes. The other ... is the one trying to employ tort law progressively, with an ambition to be sensitive to ... the interests of disadvantaged groups in society.[2]

In his excellent book on distributive justice in tort law, Keren-Paz assesses and augments both streams of scholarship. In this essay, by contrast, I will not assess or augment either of them. That is not because I disagree with them. On the contrary: I believe that the questions listed in the previous paragraph are pressing. If it turns out to be true that the law of torts has what Keren-Paz calls a 'regressive bias',[3] i.e. that it has worse impacts on the less well-off, we ought to be striving to put that right, subject to the obvious imperative to make sure that we don't end up doing more harm than good in the attempt.

[2] Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate 2007), 2.
[3] Ibid, 67.

I mention this imperative, even though it is obvious, because it is easily forgotten by those with a zeal for reform. Eliminating one set of regressive allocations does not always help the cause of securing progressive allocations across the board. The temptation to phase out regressive non-means-tested distributions of public money, such as universal childcare benefits, higher education and transport subsidies, and blanket legal aid for criminal defendants, has already done great harm to the political sustainability of the (generally progressive) welfare state in Europe. Denying the middle classes a direct return on the welfare benefit system weakens the broad consensus in its favour and hence opens the way to dismantling it, as today's right-wing politicians have gleefully come to realize. That is one reason why they like to brand non-means-tested benefits and subsidies as 'regressive': so that they can dupe unsuspecting progressive voters, and even progressive politicians, into an unholy alliance that will not have progressive consequences in the longer run. Before we support overhauling or abolishing a regressive law of torts, we had better be sure that we are not likewise playing into the hands of those who would like to see less protection for the vulnerable.

But that, to repeat, will not be my topic here. I will not be concerned with the desirability of changing the law of torts to cure or alleviate, or otherwise to respond to, distributive injustices that could equally exist quite apart from the law of torts, such as those that concern Keren-Paz. I will be concerned, rather, with problems of distributive justice that come into being only because the law of torts exists. And I will be less interested in working out how these problems should be solved than in establishing *that they are there*: that tort law creates, and cannot avoid dealing with, distributive problems of its own.

This may have incidental implications for Keren-Paz's project. One of the possible ways in which we may do more harm than good in reforming tort law, if I am right, is in rushing to mitigate tort law's 'regressive bias' without regard to the more specialized distributive tasks that are thrown up by tort law itself.

Again, I leave it to others to assess how much importance to attach to these more specialized distributive tasks. My role will be limited to sketching out what they (or some of them) are.

In carving out this role for myself I am reacting mainly to those, led by Ernest Weinrib, who regard all considerations of distributive justice as 'extrinsic' or 'alien' to the law of torts. 'Corrective justice is the form of the private law relationship,'[4] claims Weinrib, and there can be no 'combining [of] distributive and corrective considerations within a single relationship.'[5]

In an earlier essay,[6] of which this is the promised sequel, I offered some support to the first of these two claims. I argued that 'any complete explanation of tort law – whatever other considerations it may invoke – cannot but invoke considerations of corrective justice.'[7] The reason I gave was this. Some legal norms central to the law of torts are themselves norms of corrective justice, and it follows, I argued, that they can be assessed only in the light of their contribution to the doing of corrective justice. This was, in outline, my argument:

> [T]he law of torts cannot include a sound norm of corrective justice without there also being a moral norm of corrective justice that the legal norm of corrective justice helps to constitute. And once there is such a moral norm of corrective justice, the law of torts cannot be justified without pointing to the role that the law of torts plays in securing conformity with that very same moral norm.[8]

'Cannot be fully justified without' does not, however, entail 'can be fully justified by'. So there is nothing here to lend credence to

[4] Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press 1995), 75.
[5] Ibid, 163.
[6] Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice', *Law and Philosophy* 30 (2011), 1.
[7] Ibid, 6.
[8] Ibid, 25.

Weinrib's second claim, the claim that the 'immanence of corrective justice in tort law'[9] tells against 'the introduction of distributive considerations' into tort-law thinking.[10]

In what follows I will resist this second claim. Indeed I will defend an almost diametrically opposed claim: that certain questions of distributive justice are central to the law of torts, and cannot but be faced by those who administer and develop it, *precisely because* the law of torts is a site of corrective justice.

Those with pigeonholing instincts may be tempted to label this a 'mixed' or 'pluralistic' explanation of tort law. Since I think that every pro and every con of every action or practice counts in its assessment, and that no amount of theorizing can properly eradicate the ultimate diversity of pros and cons, I am hardly in a position to object to these as designations of my wider outlook on life.[11] At the same time, the interplay of corrective and distributive concerns that I will be investigating here is not well described as a mere mixture, or a mere plurality. I endorse (and regard what follows as helping to develop and finesse) Peter Cane's thesis that 'corrective justice provides the structure of tort law within which distributive justice operates.'[12] In my version of this thesis,[13] as we will see, the place of corrective justice in

[9] Weinrib, *The Idea of Private Law*, above note 4, 171.

[10] Ibid, 74

[11] Even for Gardner, '[p]resumably, coherence would count towards soundness,' hopes Weinrib in the conclusion of his *Corrective Justice* (Oxford: Oxford University Press 2012), 336. Not so. Any justification has to be coherent in the thin sense of intelligible. But Weinribian unity (or Dworkinian integrity) is not, in my eyes, any kind of plus. Reality, including moral reality, is fragmentary.

[12] Cane, 'Distributive Justice in Tort Law', *New Zealand Law Review* [2001], 401 at 413.

[13] Which may well differ from Cane's. For him 'corrective justice is a "formal" principle whereas distributive justice is a "material" principle' (ibid, 416). I have argued that there are no formal principles of justice: Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press 2012), ch 10.

tort law enjoys some kind of explanatory priority. So 'What is Tort Law For? Part 2' will presuppose and rely on the main findings of 'What is Tort Law For? Part 1' (hereinafter simply 'Part 1'). Yet the implication is not that the pursuit of distributive justice is the pursuit of a goal extrinsic to tort law in the sense given to that expression by Weinrib. The specialized distributive goals for tort law that we will be studying here are not goals 'independent of ... the law that they [help to] justify.'[14] Nor are they goals the achievement of which is 'socially desirable quite apart from tort law'.[15] They are distributive goals that the specifically corrective context of tort law brings into being, and the pursuit of which apart from that context (or something very like it) would be unimaginable, perhaps even unintelligible.

2. The distribution of correction

As I emphasized at the end of Part 1, there are rights to and duties of corrective justice that exist independently of the law, and independently of any other kind of use, observance, recognition, or adoption by anyone. They exist (as I put it) 'in the raw morality of trips to the beach, students in trouble, and disappointed children.'[16] In the situations I had in mind, a moral duty owed to another person, a rightholder, goes unperformed. Even though the time for performing the duty is past, the reasons why that ('primary') duty to the rightholder existed (as well as the reason constituted by the fact that it was a duty) still exert their force as reasons for some fallback action, which is the subject of a new ('secondary') duty to the same rightholder. By performing the secondary duty – say, providing a new treat in substitution for a missed outing – one reduces the deficit in one's

[14] Weinrib, *The Idea of Private Law*, above note 4, 4.
[15] Ibid.
[16] 'What is Tort Law For? Part 1', above note 6, 50.

reason-conformity that was left by one's nonperformance. I called this thesis, the thesis that the secondary duty exists for the reasons that were left unsatsified by the nonperformance of the primary duty, the 'continuity thesis'.

By their nature, raw moral rights and duties are not allocated by anybody. They exist, as I said, irrespective of their use, observance, recognition, or adoption. There is therefore no question of anyone's having such rights and duties either justly or unjustly. Even when they are raw duties of justice it is neither just nor unjust that they are the duties of justice one happens to have. So there is in the context of morality in the raw nothing analogous to the problem that, in the context of legal decision-making, Guido Calabresi and Douglas Melamed call 'the problem of entitlement', the problem of how rights and duties are to be distributed as between 'two or more people, or two or more groups of people' with 'conflicting interests.'[17] It makes no sense to ask what distribution of raw moral rights and duties would be just, even when the interests that they serve conflict, because raw moral rights and duties are incapable of being distributed. They come and go with the reasons for and against their existence, and irrespective (to repeat one more time) of their use, observance, recognition, or adoption. In this context, and to this extent, Weinrib is quite right to say that 'corrective justice operates on entitlements without addressing the justice of the underlying distribution.'[18] With morality in the raw, there is no such thing as the justice of the underlying distribution, because nothing relevant has been distributed.[19]

[17] 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', *Harvard Law Review* 85 (1972), 1089 at 1090.

[18] *The Idea of Private Law*, above note 4, 80.

[19] Which should not be mistaken for the proposition that there are no raw moral rights and duties of distributive justice. There most certainly are. They bear on the distribution of things other than raw moral rights and duties. For a compelling defence of their existence against 'constructivist' doubters, see

Things are, however, very different with the law. Legal rights and legal duties, as Calabresi and Melamed rightly assume, are respectively *conferred* and *imposed* by someone. Calabresi and Melamed focus on 'decisions' to confer and impose them. This is too narrow. There are also many accidental conferrals and impositions of legal rights and duties, notably by custom *in foro* and in the tacit premises of judicial argument.[20] Nevertheless, Calabresi and Melamed are right to think that conferral and imposition (whether intentional or accidental) is how legal rights and duties respectively come into existence. Rights and duties must be used, observed, recognized, or adopted by someone in order to be part of the law. I will call the process of making them part of the law, intentionally or accidentally, their 'institutionalization'. In Part 1 I concentrated on the role that institutionalization can play, when it is done well, in augmenting and refining the raw morality of corrective justice, in particular by 'determining at least some of its applications.'[21] (The implication being: the raw moral position is no longer the whole moral position.) Here I want to focus, instead, on one sub-question that arises when we ask whether the institutionalization of corrective justice has been 'done well', namely whether it has been done *justly*. Unlike some people I know,[22] I don't think this is the only sub-question that arises. The institutionalization of corrective justice also needs to be done prudently, sensitively, humanely, efficiently, honestly, and so forth, sometimes at the expense of its justice. For present purposes, however, it is the question of justice that interests us. And this question of justice, it seems to me, is not a question of corrective justice. The relevant

G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass: Harvard University Press 2008).

[20] See my *Law as a Leap of Faith*, above note 13, especially ch 3.

[21] 'What is Tort Law For? Part 1', above note 6, 18

[22] eg John Finnis, in *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980), ch 7.

question of corrective justice has *ex hypothesi* already been answered. There is a moral duty of corrective justice in the neighbourhood, and it is now a candidate for institutionalization. The relevant question of justice now is: How do we allocate the institutionalization? How do we distribute, across the vast range of candidate wrongdoers and candidate persons wronged, the numerous possible sets of legal arrangements to support the doing of corrective justice as between them?

Here is how the question arises, more specifically, in the law of torts. It is part of the nature of a tort that designating some wrong as a tort – classifying it as a legal wrong under the 'tort' heading – entails creating a legal right to corrective justice in favour of those who are wronged.[23] This legal right is a complex one. Its incidents include not only the wrongdoer's legal duty to repair, but also a largely undirected[24] legal power for the person wronged to determine whether that legal duty is concretized and enforced through the courts, with a consequent duty on the courts to assist, when that power is validly exercised by the issue of proceedings.[25] When this right is conferred, public authority (the authority of the court) is put at the disposal of the wronged person. When the rule of law prevails, moreover, the authority is laid on partly at public expense (in that the court does not recoup its full running costs from its users, and may also arrange for other user costs to be subsidized). The wronged person, in short, is given a right not only against the wrongdoer but also against the

[23] This is a point of law. I defended it as a valid one in 'Torts and Other Wrongs', *Florida State University Law Review* 39 (2011), 43.

[24] An undirected legal power is a legal power that is not coupled with legal duties regulating its exercise. See Joseph Raz, 'The Inner Logic of the Law' in his *Ethics in the Public Domain* (pbk ed, Oxford: Oxford University Press 1994), 238 at 241ff.

[25] This complex legal power is rightly emphasised (although sometimes wrongly overemphasised) by John Goldberg and Ben Zipursky in their joint and solo writings on tort law, a mature conspectus of which is their 'Torts as Wrongs', *Texas Law Review* 88 (2010), 917.

court, a right to conscript the court (and its officers) in his or her quest for corrective justice against the wrongdoer.

In deciding whether something should be a tort, then, it is never enough to conclude that it is a wrong calling for repair. It is not even enough to conclude that it should be *recognized by the law* as a wrong calling for repair. The question that must be confronted, in addition, is whether the law should give it *this kind of recognition* – the tort-law kind of recognition – complete with its generous terms for power-sharing and cost-sharing as between the aggrieved party and the legal system. That question is a question of distributive justice. The law is selecting some people for a measure of official support in their personal affairs that most other clients of the welfare state can only dream of. Even among those who have been wronged, not all can possibly enjoy this level of support in putting things right, and the question is always live of who should be the privileged ones who qualify for it. That mirrors the question we ask when we ask who should get the latest cancer drugs, or who should get sent on the most effective offender-rehabilitation courses. Even for those who say that 'user pays' is the best (most just) solution, there is no doubt that such problems of how to allocate scarce medical and social services fall under the heading of distributive justice.[26] Why doubt that the same is true regarding the allocation of scarce judicial services? The difference lies not in the character of the allocation. The difference lies in what is being allocated. What is being allocated, when we allocate rights to issue proceedings in torts, is access to a special apparatus for the doing of justice in another form, viz. corrective justice. It is one

[26] Occasionally talk of 'distributive justice' is taken to conceal a leaning towards *re*distribution. But it is better to follow Nozick in treating redistributive and non-redistributive norms as competing within the space of distributive justice: *Anarchy, State, and Utopia* (New York: Basic Books 1974), 153ff. See my discussion in 'What is Tort Law For? Part 1', above note 6, at 11-13.

question whether corrective justice is being dispensed in the courts. It is a further question whether the system justly distributes access to the corrective justice it dispenses.

My locating the courts among the diverse public services of the welfare state may be taken to suggest that I have come back round, in spite of myself, to focusing on the overall 'distribution of the benefits and burdens of economic activity among individuals in a society'.[27] You may think, in particular, that I am assuming a scarcity of publicly provided legal services that arises only from the cost of supplying them in competition with other calls on public funds. But that is a simplification. The potential economic strain of funding the courts and access to them clearly cannot be ignored. But even if money were no object, we should still be sparing in handing out legal rights because of the cultural costs of excessive juridification, i.e. of turning too much of our lives over to the law.[28] The rule of law favours access to justice, but it also favours the existence of non-juridified space in which people can readily steer clear of the law.[29] So even if there were plentiful funding, we would still be forced by the rule of law to confront the question of how to distribute legal rights and duties as between many potential plaintiffs and defendants, respect for whose moral rights and duties could potentially be well-served by their institutionalization, and the institutionalization of which would not be ruled out on other grounds,[30] but not all of whose

[27] Lamont and Favor, 'Distributive Justice', above note 1.

[28] For valuable critical reflections on juridification, see the essays in Gunther Teubner (ed), *Juridification of Social Spheres* (Berlin: de Gruyter 1987).

[29] I discuss other implications for the law of torts of this desideratum of the rule of law in Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law', in Lisa Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (forthcoming).

[30] I am thinking of the harm principle (a norm of toleration, not of justice) and similar moral norms that place independent restrictions on the use of law as an instrument for improving moral conformity. See Joseph Raz,

moral rights and duties it would be advisable, even if it were humanly possible, to institutionalize simultaneously.

It might be thought that such a distributive question can properly be live for legislators, but not for judges. Judges in tort cases should only do 'justice between the parties'. But where the rule of law prevails, doing justice between the parties, in the relevant sense, cannot but entail consideration of whether the plaintiff belongs to a class of people who should enjoy a right to proceed in tort against the defendant. Under the rule of law judges must decide cases according to law, which means (minimally) that they must not separate the rule from the ruling, either by declaring what the rule is or will henceforth be while declining to apply it to the case in hand, or by denying that there is a rule.[31] It follows that no judge may rule in favour of any plaintiff except by locating the plaintiff within a class of imaginable plaintiffs who would, according to the judge, be entitled to the same ruling. To determine which class this is, it is not enough for judges to settle whether the plaintiff has been wronged by the defendant and whether corrective justice could now be done. They must also confront the question of whether corrective justice should be done with the aid of tort law, which is only one possible mechanism among many (indeed, among many found in the law). And that cannot but be confronted as a distributive question: How do we dole out the right to proceed in tort among various candidate classes? Do we ask which class deserves the right most, which has most to gain from it, which is least likely to abuse the right, which is best-placed to make use of it for the public good, which needs it most, which can have it at least cost to the upholding of legal certainty, or what?

'Autonomy, Toleration, and the Harm Principle' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press 1987).

[31] I discuss this requirement further in Gardner, *Law as a Leap of Faith*, above note 12, ch 8.

In England, to be sure, it took primary legislation to confer adequate tort-law rights on trespassers injured by the negligence of the occupiers of land.[32] But there would have been nothing improper or even unusual about such rights having been developed at common law by the following line of thought: the fact that trespassers are themselves tortfeasors has been disproportionately visited upon them by too often denying them causes of action in tort for wrongs committed against them by occupiers; so some of the cases denying them such causes of action should be overruled or distinguished, reining in an over-harsh version of the *ex turpi causa non oritur actio* defence. Notice that it was a closely analogous line of thought by which the modern law of negligence came of age in *Donoghue* v *Stevenson*:[33] the fact that retail consumers are not in privity of contract with manufacturers and wholesalers (argued the majority in the House of Lords) has been disproportionately visited upon them by too often denying them causes of action in tort for wrongs committed against them by manufacturers and wholesalers; some of the cases denying them such causes of action should thus be overruled or distinguished, reining in an over-harsh version of the doctrine of privity of contract. The 'disproportion' in both examples is clearly a distributive one. It means something like 'comparatively undeserved'. Plaintiffs of a certain class (trespassers and strangers to contracts) have been given undeservedly little in the distribution of causes of action in tort as compared with plaintiffs of other classes (lawful visitors and parties to contracts respectively). This shows how, in attempting corrective justice between the parties in a tort case, judges may also (often inexplicitly) be attempting distributive justice between classes of parties in the allocation of access to tort law's apparatus for doing corrective justice. It shows, indeed, that whenever there is a

[32] Occupiers' Liability Act 1984.
[33] [1932] AC 562.

question before them of which acts ought to be classed as torts, judges cannot avoid attempting such distributive justice.

This reveals that the scarcity of law as a public resource is not the only reason, and may not even be the most important reason, why attempts at distributive justice are inevitable in the law of torts. Attempts at distributive justice are also inevitable because the law of torts is part of the common law, and in the common law the standard way for judges to develop the law is by making comparisons between different classes of plaintiffs, and between different classes of defendants. 'People of class P have an established cause of action against people of class D,' argues a plaintiff. 'Is the difference between people of class P and people like me, call us class P′, really so great that we should have no cause of action against people of class D at all?' Or: 'People like me, in class P, have an established cause of action against people of class D. Is the difference between people of class D and people of class D′ really so great that we should have no cause of action against people of class D′ at all?' It may have been the pervasiveness of this kind of argument in the common law that led H.L.A. Hart to the famous but mistaken thesis that 'we have, in the bare notion of applying a general rule of law, the germ at least of justice.'[34] In the cases I am thinking of, the judges are certainly generalising, but they are not merely applying a rule. They are forging a new rule by generalising from an existing one, and doing so on the ground that, in their view, it would be unjust for one class of persons to enjoy recourse to tort law (recourse taken to be justified) that is denied to a neighbouring class. Legislatures, unlike judges, are not constrained to work in this way. They may create new causes of action without building on existing ones. But that does not show that they are not

[34] Hart, *The Concept of Law* (Oxford: Clarendon Press 1961), 202. For a thorough critique of this remark, see Lyons, 'On Formal Justice', *Cornell Law Review* (1972), 58 (1973), 833. See also my *Law as a Leap of Faith*, above note 13, ch 10.

attempting a just distribution of tort law rights and duties. It only shows that not all distributors proceed by comparing what they are asked to bestow with what has already been bestowed.

When courts or legislatures recognize new causes of action in tort, or extend existing causes of action, they are distributing legal rights and duties to new classes of potential plaintiffs and potential defendants. In the first place they are distributing new primary legal duties, breaches of which will count not just as legally recognized wrongs but more specifically as *torts*, violating not just any legal rights but legal rights *in the law of torts*. In placing these legal rights in the law of torts – in making the breaches of primary duty tortious – courts and legislatures also unavoidably distribute associated secondary duties. These are legal duties of corrective justice – to be more exact, duties of repair – that arise from breach of the primary legal duties and are owed to the same rightholder. As already noted, these duties are bundled with generous powers on the part of the rightholder to concretize and enforce them through the courts. Nevertheless, what is distributed remains something irreducibly corrective. And that lends a certain explanatory priority to corrective over distributive justice in what Weinrib might call the 'immanent rationality' of tort law.[35] We need to grasp the essentially corrective ingredient in tort law in order to grasp the whole package deal, the structured normative arrangement, that tort law is in the distinctive business of distributing – a deal, indeed, that would not even be up for distribution without tort law.

Calabresi and Melamed are sometimes remembered as having denied this. They are remembered as having assigned to the law the task of distributing only 'the set of initial entitlements',[36] understood (in the context and idiom of tort law) as the set of primary duties, breach of which constitutes a tort. The secondary

[35] *The Idea of Private Law*, above note 4, at eg 206.
[36] 'Property Rules, Liability Rules, and Inalienability', above note 17, 1097.

(corrective) duties of tort law are sometimes imagined to have been, for Calabresi and Melamed, automatic implications of the initial entitlements. In other words, Calabresi and Melamed are often associated with something like my 'continuity thesis'. Doing corrective justice is responding belatedly to the reasons that one should have responded to in the first place, in not committing the tort. In combination with the Calabresi and Melamed view that these first-place reasons are reasons for the allocation of 'initial entitlements', this lures one into what might be called the 'deflationary view' of corrective justice. Corrective justice is revealed not to be a distinct form of justice, but merely distributive justice redone following a disruptive intervention (that was not itself licensed by distributive justice). And from here it is a short step to what, in Part 1, I called 'a perennial student objection to tort law',[37] namely that it cannot be just to restore a distribution that was not itself just.

We should not be so quick to sign up to this perennial student objection to tort law, for the deflationary view of corrective justice is false. It is false in raw morality, as we already saw, because in raw morality there is no question of distributing initial entitlements and so no question of restoring their initial distribution. And it is also false, we can now add, in the law. In the law, quite apart from the question of which primary duties (=which 'initial entitlements') to recognize, there is the further question of how to deal with the breach of those legally recognized primary duties, and in particular whether to institutionalize a secondary duty of corrective justice. If one locates the primary duties in the law of torts, as we saw, one inevitably includes a secondary duty of corrective justice as a part of the 'tort law' package. But one need not use the law of torts, and more generally one need not grant a secondary duty of

[37] 'What is Tort Law For? Part 1', above note 6, 15. For a properly worked-out version of the objection, see James Nickel, 'Justice in Compensation', *William and Mary Law Review* 18 (1976), 379 at 381ff.

corrective justice. One may choose a different (non-corrective) legal response to some legal wrongs, or indeed no legal response at all. So there are always two questions for the court or legislature: which 'initial entitlements' to include in the law, and how to respond – correctively or otherwise – to their violation.

It follows that the corrective duties are not mere automatic implications of the initial entitlements, whether by the logic of the continuity thesis or otherwise. They are distinct entitlements that also need to be distributed by the law. And this, indeed, is what Calabresi and Melamed say. They emphasize 'the [twin] problems of selecting the initial entitlements *and the modes of protecting these entitlements*.'[38] Indeed one way to read their famous article is as a critique of the view that corrective remedies are automatically in order, i.e. that they just follow without further ado from the disruption of initial entitlements. There is always the further question, when initial entitlements are disrupted, of whether and how the law should respond to the disruption. As Calabresi and Melamed express the question:

> Why ... cannot society limit itself to the property rule? To do this it would need only to protect and enforce the initial entitlements from all attacks, perhaps through criminal sanctions, and to enforce voluntary contracts for their transfer. Why do we need liability rules at all?[39]

Calabresi and Melamed have their own answer. They see many advantages in choosing the tort-law route for protecting property rights. It follows that they reject the idea that there are no other routes. In protecting property rights by law, they notice, having a tort of trespass is but one option among many. Indeed, even when it comes to recognizing duties of non-trespass in the law, having a tort of trespass is but one option among many. The tort

[38] 'Property Rules, Liability Rules, and Inalienability', above note 17, 1089, emphasis added.
[39] Ibid, 1106.

lawyer's slogan '*ubi ius, ibi remedium*' may serve well as a recommendation but it bespeaks no rational inevitability.[40]

Does all this cast doubt on the relevance to the law of torts of the continuity thesis, which does bespeak a kind of rational inevitability? Are we quietly backing away from the conclusions of Part 1? Not at all. It is one question why, as rational beings, we would want to do corrective justice, and want to see corrective justice done, and the doing of it supported. The continuity thesis helps us to see why. But it is another question when and how, if at all, we should actually support the doing of corrective justice. Here we may have cause to reflect on the desirability of using the law (or other similar institutional systems) as a method of support. And as I have explained, we cannot but encounter that question of desirability as, at least partly, a question of distributive justice. Legal support for the doing of corrective justice is a scarce good. What Rawls calls 'the circumstances of justice' obtain in respect of it.[41] Moreover the courts constantly face the question, in common law systems, of why one class of plaintiffs should have a cause of action while another nearby class does not, or why one class of defendants should be suable while another nearby class is not. Which plaintiff-classes should be supported as against which defendant-classes? Which corrective justice is to be chosen for legal recognition? That is clearly a distributive problem.

[40] On the interpretation of the slogan, see Ted Sampsell-Jones, 'The Myth of *Ashby* v *White*', *University of St Thomas Law Journal* 8 (2010), 40.

[41] Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press 1971), 110ff. The circumstances in question are 'moderate scarcity' and 'conflict of interests'. I should stress that I do not follow Rawls in thinking, if this is what he thinks, that questions of distributive justice are never forced on us outside these circumstances. I agree, however, that they are always forced on us in these circumstances. See my *Law as a Leap of Faith*, above note 13, 264-7.

3. Distributive justice between the parties

Not all questions of justice arising in tort cases are questions of justice between the parties to those cases. As we have seen, there is also the ever-present question of how to distribute, among imaginable classes of potential parties, tort law's special apparatus for doing or helping to do justice between them. That, I have claimed, is a question of distributive justice. This claim still leaves open, however, the possibility that justice between the parties, the justice that tort law's special apparatus is there to facilitate, is always and only corrective. Weinrib argues that it is. As promised in Part 1,[42] I will argue the opposite. Corrective justice is always justice between the parties, but justice between the parties is not always corrective. Some of it is distributive. And such 'localized' distributive justice (as it is known[43]) has a key role to play, I will argue, in the doing of justice between the parties in tort law.

Problems of localized distributive justice arise in raw morality as readily as they do in the law. Here is an example that could be considered under either heading. Having lured Prey to a remote abandoned factory, Hunter engineers a situation such that Prey must blind Hunter if she is to avoid being blinded by Hunter. As Hunter planned, the two of them are now suspended above a tank filled with an eyesight-destroying chemical. The only way Prey has to stop Hunter pushing Prey into the tank is for Prey to push Hunter into the tank instead. Indeed, Hunter's plunge will lift Prey clear, and *vice versa*. Thanks to Hunter there is now, a scarcity of future eyesight as between the two of them. They are competing, winner takes all, for the future capacity to see. Who gets to blind whom and thereby keep her own sight?

The problem has many aspects and morality gives us more than one way to think about it. But one way that morality gives

[42] 'What is Tort Law For? Part 1', above note 6, 12.

[43] Following Stephen Perry, 'The Moral Foundations of Tort Law', *Iowa Law Review* 77 (1991), 449 at 461.

us to think about it is as a problem of justice. Albeit in respect of a single interaction, Hunter has contrived the circumstances of justice as between herself and Prey. There is no escaping the need for allocation as between the two of them. So what *form* of justice is called for? To borrow Weinrib's own criteria of classification, it is clearly not yet a problem about 'what the doer of harm owes to the sufferer of harm'.[44] Nobody has yet been harmed. The problem does not yet have 'the shape of corrective justice.'[45] Rather, it is a problem having 'the shape of distributive justice', a problem about how to 'divid[e] a benefit or burden among a group.'[46] It matters not that the only possible division of the relevant burden (loss of sight) as between Prey and Hunter is an all-or-nothing division (because the burden cannot be shared). Nor does it matter that Prey and Hunter together constitute a group with only two members. Clearly, neither the size of the group nor the shareability of the burden makes a difference to the form of justice that falls to be done.

According to a popular view, justice forbids Hunter from blinding Prey but it does not forbid Prey from blinding Hunter, and that is because it was Hunter who made it the case, by her wrongdoing, that one of them has to be blinded. Here, tweaked to eliminate some distracting specificity, is Jeff McMahan's nice formulation of the relevant distributive norm:

> [I]n cases in which a person's [wrongful] action ... has made it inevitable that someone must suffer harm, it is normally permissible, as a matter of justice, to ensure that it is the [wrongdoer] who is harmed rather than allowing the costs of his wrongful action to be imposed on the [other(s) on whom they might instead have fallen].[47]

[44] *The Idea of Private Law*, above note 4, 73.
[45] Ibid.
[46] Ibid.
[47] 'Self-Defense and the Problem of the Innocent Attacker', *Ethics* 104 (1994) 252 at 259.

Let's call this the 'responsibility' norm of distributive justice, meaning thereby to emphasize the fact that the norm makes a distribution of costs turn on their causal attribution. The causal element of the responsibility norm, like many other elements of it, calls for further elaboration, which I will not offer here. I will also play down some doubts I have about the responsibility norm's soundness, at least as a raw moral norm. All I will do here is treat the norm as sound for the purpose of argument.

The main case for doing so is that, even in its indeterminacy, one can readily see the potential application of the responsibility norm to tort litigation.[48] Like Hunter and Prey, Plaintiff and Defendant are caught up in a zero-sum situation, in which each wins if and only if the other loses. If Plaintiff is in the right, it was Defendant who, by his wrongdoing, put them in that zero-sum situation. By committing the tort, Defendant 'made it inevitable' that one of them must come out of the conflict a loser. So one might well think: that it why it is permissible for Plaintiff to insist on damages, and why the court is required, if Plaintiff insists, to award them. Tort litigation, one might think, is an occasion for doing localized distributive justice, and the responsibility norm regulates it, and (if sound) justifies its characteristic features.

The objection to this view is well-known. Tort litigation is not conducted in an abandoned factory. When Hunter confronts Prey, the two of them are cut off from civilization. There are only two candidates for blinding. But back in ordinary life, there are many other potential loss-bearers around apart from Plaintiff and Defendant. By handing the problem over to litigation, we have taken a preemptive step to localize, as opposed to socializing, the problem. We are turning what might have been a zero-sum interaction among many (played out, say, through general taxation and social insurance) into a zero-sum interaction

[48] As McMahan also notes: ibid, 279. See also Perry, 'The Moral Foundations of Tort Law', above note 43, at 499.

between just two litigants. Why? There is nothing in the relevant distributive norm to explain it. As Stephen Perry says,

> the localized nature of the distributive scheme is arbitrary and unjustified; there is no basis for limiting the group of potential loss-bearers to the injurer and the victim alone.[49]

I hasten to add that Perry does not mean that there is no basis for the localization *full stop*. He only means that there is no basis, in whatever norm we use to do localized distributive justice, to explain why it is only localized distributive justice that we are doing. Perhaps the responsibility norm, applied across the wider population, would still end up casting Defendant as the loser and Plaintiff as the winner. The question is only why we are not applying it across the wider population, but instead applying it as between Plaintiff and Defendant alone. The answer, as Perry notes, can only be some for some 'extraneous reasons',[50] i.e. reasons not provided by the responsibility norm itself.

When we hear talk of 'extraneous reasons', our Weinribian alarm-bells may ring. We may imagine economists queueing up to show that localizing a conflict, even with generous social support through the judicial system, is cheaper than socializing it through the taxation and welfare benefit systems.[51] And maybe it is, and surely that would be relevant to our thinking about institutional arrangements for responding to the conflict. But it is premature to be thinking like that. We are leaping over the most obvious 'extraneous reasons' that would support the localizing of the problem of distributive justice before us, namely: reasons to do (and to support the doing of) corrective justice. These reasons are extraneous, not of course relative to the law of torts, but

[49] 'The Moral Foundations of Tort Law', above note 43, 471.
[50] Ibid, 468.
[51] See e.g. Richard Posner, 'A Theory of Negligence Law', *Journal of Legal Studies* 1 (1972), 29 at 48-9.

relative to the responsibility norm, which is a norm of distributive justice. They are the same reasons why Defendant should not have done what he did to Plaintiff, reasons why his doing it counted as a wrong against Plaintiff. Since the wrong has been done, at least some of these reasons have been left unsatisfied. They now exert their force as reasons for Defendant to do right by Plaintiff in some fallback way, as well as can now be achieved. They are reasons for corrective justice to be done, reasons inter alia to pay reparative damages, and they explain (together with some institutional facts) why Plaintiff and Defendant are caught up in the zero-sum conflict that is tort litigation. So they also explain why we might be confronted with questions of distributive justice that are already pre-localized, that already assume the context of a bilateral zero-sum conflict. To quote Cane again, 'corrective justice provides the structure of tort law within which distributive justice operates.'[52] Once again, it is corrective justice that has the explanatory priority.

The responsibility of wrongdoers is surely already central to corrective justice. So one might wonder why, once we are admittedly doing corrective justice between the parties, we should be drawn into applying the responsibility norm of distributive justice between the parties as well, albeit only as a subsidiary concern. Isn't that just duplicative? Far from it. One important reason why not is that, unlike the zero-sum conflict over the distribution of future eyesight between Hunter and Prey, the zero-sum conflict over the distribution of losses between Plaintiff and Defendant is not necessarily a winner-takes-all conflict. Once we are proposing to deal with the losses by an award of money damages – and we always are in the law of torts – the losses can be shared between Defendant and Plaintiff. Determining how to effect such sharing in particular cases, it seems to me, is the main function of several doctrines of the law

[52] 'Distributive Justice in Tort Law', above note 12.

of torts, notably those of mitigation and remoteness of damage, and the modernized law of contributory negligence. Interpreted as devices to effect loss-sharing, these doctrines lack a corrective-justice rationale. Corrective justice, as Aristotle explains, knows only addition and subtraction. It has no room for division, which is the business of distributive justice.[53] True, our responsibility norm, formulated by McMahan with all-or-nothing conflicts in mind, does not yet attend to cases of shareable loss. Tweaking it to do so would, however, make it even more conspicuously a norm of distributive justice, a norm for 'dividing a benefit or burden among a group.'[54] And it would therefore reveal even more clearly the distinct role that considerations of localized distributive justice have to play in tort adjudication.

You may say that I have not shown that these considerations should be playing any role in tort adjudication. You may say: if mitigation and remoteness of damage and contributory negligence are doctrines that exist to do distributive justice between the parties, so much the worse for them. They are alien doctrines that do not belong in tort law. But it seems to me, on the contrary, that tort law cannot properly abdicate responsibility for tackling the local conflicts that are turned into zero-sum, and hence distributive, conflicts by tort law itself. Tort law offers an apparatus for the doing of corrective justice – litigation – that creates the circumstances of localized distributive justice. The courts may as a consequence be faced with collisions, perhaps endemic collisions, between sound corrective norms and sound distributive norms. Different legal systems, and different judges

[53] EN $1131^{b}12$-15, $1132^{a}1$–6. For discussion see 'What is Tort Law For? Part 1', above note 6, at 9.

[54] What needs to be added, most conspicuously, is some kind of proportionality condition. As stated by McMahan the norm would allow us to dump everything on the wrongdoer, e.g. to ruin him in order to avoid each of us paying a penny. For discussion see McMahan, 'Self-Defense and the Problem of the Innocent Attacker', above note 47, 261-4.

and courts of the same legal system, may reasonably deal with the collisions in different ways. But all must grapple with the fact that the collisions are theirs to deal with, built into the fabric of the law of torts, not imposed upon it from without, and with no other place to go. That is because, as John Finnis explains:

> [W]hether the subject-matter of [an] act of adjudication be a problem of distributive or [corrective] justice, the act of adjudication itself is always a matter for distributive justice. For the submission of an issue to the judge itself creates a kind of *common* subject-matter, the *lis inter partes*, which must be allocated between parties, the gain of one party being the loss of the other.[55]

4. On 'risk-distributive' justice

I have explored two endogenous distributive aspects of tort law. They have both sometimes been treated as raising problems about the distribution of *risk*. Thinking of the problems that I traversed in section 3 above, Tony Honoré writes:

> [T]he person who, in a situation of uncertainty, has a degree of control over how it will turn out, and who stands to gain if it goes in his favour, must bear the risk that it will turn out to harm another.[56]

And thinking of my section 2 topic he says, influentially:[57]

[55] *Natural Law and Natural Rights*, above note 22, 179. Finnis says 'commutative' where I have inserted 'corrective'. See also my *Law as a Leap of Faith*, above note 13, ch 10.

[56] 'The Morality of Tort Law: Questions and Answers' in Honoré, *Responsibility and Fault* (Oxford: Hart Publishing 1999), 67 at 81.

[57] Among those conspicuously influenced by Honoré on this point are Arthur Ripstein, 'Private Law and Private Narratives', in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Oxford: Hart Publishing 1981) and Jenny Steele, *Risks and Legal Theory* (Oxford: Hart Publishing 2004), 87ff.

> To justify [the social or legal upholding of] corrective justice involves appealing at a certain stage to the just *distribution of risk* in a society. Corrective justice is a genuine form of justice only [when and] because the just distribution of risks requires people of full capacity to bear the risk of being held responsible for harming others by their conduct. [58]

I share these thoughts, but I resist the framing of them as thoughts about *risk*. Let me end by explaining why, focusing my attention on the second of the two Honoré quotations above.

There is no doubt that when the law of torts is effective in its role as an apparatus for the doing of corrective justice – as it has to be to if it is to be justified[59] – it has an impact on the social distribution of risks, and that impact itself calls for justification, which inevitably raises questions of distributive justice. But before we just let that statement stand we need to be careful to distinguish various different impacts that might be described as impacts on the 'social distribution of risk.' There is (1) tort law's impact on the way in which people create and avoid risks to themselves and others in their everyday activities, in the light of any legal risk to themselves that they thereby create or avoid. And then there is (2) the legal risk itself. The expression 'the legal risk' in turn can be unpacked in at least two ways. There is (2a) the risk that one will not have the law on one's side and there is (2b) the risk that one will lose in litigation (or litigation-averting negotiation) to someone who has the law on their side.

When judges say that potential tort defendants of some class must 'bear the risk of loss'[60] as against potential tort plaintiffs of some class they are not, one hopes, claiming for themselves the

[58] Ibid, 80. I add the words in the first set of square brackets because Honoré makes clear that he is not thinking of the raw morality of corrective justice so much as its social and legal implementations. I add the words in the second set of square brackets to reduce the length of the quotation, which in the original goes on to endorse a concrete 'when' proposal that need not detain us here.

[59] 'What is Tort Law For? Part 1', above note 6, 17-22.

[60] Honoré, 'The Morality of Tort Law', above note 56, 79.

magical ability to make it the case that, when tortious interactions occur between people of these two classes, the person in the defendant class will henceforth be the only one who ever gets hurt. They are not affecting to neutralize the type (1) risks faced by potential plaintiffs, let alone to turn the same risks back against the potential defendants. Imagine a judge who says: 'The risk is hereby shifted. From now on, people who fall to their deaths down open mineshafts will only ever fall to their deaths down *their own* open mineshafts; and from now on people injured by bad driving will only ever be injured by *their own* bad driving.' That is just plain silly. The courts can undoubtedly have an effect of some kind on the distribution of type (1) risks, both by altering incentives to create them and by arranging redress when they materialize (which can never be quite the same as their not having materialized to begin with).[61] But the only way in which the courts can alter the incentives or arrange the redress, so as to have some impact on the distribution of type (1) risks, is by redistributing type (2) risks. Even the type (2b) legal risks they can only really adjust by redistributing the type (2a) legal risks associated with the activities of the defendant class. They can give a certain class of plaintiffs the legal right to reparative damages in respect of certain losses suffered at the hands of a certain class of defendants, but they can do little to ensure that the right is exercised (more precisely: that the power to seek an award of those damages is exercised in cases in which there is a right to the award). So the only risks of loss which are such that the courts can literally make the potential defendant or potential plaintiff bear them are the type (2a) legal risks, also known (more straightforwardly) as the legal rights and duties of the classes of plaintiffs and defendants involved. Making the plaintiff class bear the risk simply means denying members of that class a legal right to corrective justice, tort-law style, as against

[61] 'What is Tort Law For? Part 1', above note 6, 34–5.

those in the defendant class; making the defendant class bear the legal risk means giving the plaintiff class that legal right.

There is a puzzle about the use of the language of risk here. When judges say that a certain class of people must 'bear the risk of loss' they are usually *determining* the distribution of the relevant legal rights and duties. So you may wonder why they present that distribution as merely a legal risk rather than (now) a legal certainty. The answer is that they are typically thinking of how agents (potential plaintiffs and defendants) will factor the law into their thinking before they engage in the activities that give rise to (or don't give rise to) the relevant legal rights and duties. Let it be as certain as you like, at that point, whether a potential plaintiff will have a right to corrective justice, tort-law style, if a certain loss materializes; there remains the uncertainty as to whether the loss will indeed materialize. That is where the element of legal risk comes in. The distribution of this legal risk as between different classes of people is the same distribution – now viewed *ex ante*, as one factor in thinking about one's choice of future activities – as the distribution of legal rights and duties as between those classes of people. Nothing more, nothing less.

We can now glean quite a few reasons why, outside of judicial rhetoric, it is not revealing, and can be misleading, to classify this as the 'distribution of risk in a society'.

First, replacing talk of the social distribution of legal rights and duties with talk of the social distribution of risks is not perspicuous. It adds an extra layer of complication to an already complicated subject-matter. Eventually, as we just witnessed, the extra complications need to be analyzed out and the more basic discourse of legal rights and duties has to be restored in order to make clear which risks, exactly, we are talking about.

Secondly, attributing to tort law ability to redistribute risks of loss invites a hubristic and almost comical view of the influence of law. Even when tort law is effective enough to have a role in our lives, tort law's distribution of the right to corrective justice has at best a highly contingent connection with the risk of

suffering tortious loss (never mind loss more generally) that we face as we go about our daily lives. The reception of tort law into the thinking of risk-takers is doubtless patchy. And many other risk-affecting mechanisms and forces are also in play. Those who walk home late at night may be at extra risk of a tortious injury; but fortunately there are often insurers or public agencies which are prepared to cover the associated healthcare costs without regard to whether the person can be found who, in tort law, will 'bear the risk of loss'. So tort law is not the only (and in some societies may not even be the main) institutional distributor of the risk of tortious losses, never mind losses more generally.

Thirdly, risk-distributive justice is not easily kept distinct from the rest of distributive justice. Risk, at its most general, is simply the probability of something unwelcome coming to pass. Since the fact that something welcome does not come to pass is itself unwelcome, the scope of 'risk-distributive justice' seems to be, in one natural interpretation, indistinguishable from the scope of distributive justice in its entirety. All welcome and unwelcome things that are capable of being distributed are capable of being justly or unjustly distributed. Presumably we want to work out first ('stage 1') who should be allocated how much of which of these things and by whom. The probabilities of those people actually getting these allocations are presumably to be factored in later ('stage 2'), when we try to implement our stage 1 conclusions. Why begin by foregrounding the probability question by thinking of the thing to be allocated as the probability of some other unwelcome allocation? Why introduce the uncertainty of distributive success in stage 1, when what we are trying to establish at that stage is what would *count as* success? True, the uncertainty of something unwelcome coming to pass might sometimes be unwelcome in itself, an extra curse. But how would one even begin to think about distributing the uncertainty in isolation from the distribution of the things to which it attaches? It is hard to think of risk as such (as distinct

from particular risks) as something that is up for distribution. At any rate it is hard to think that way with any clarity.

Talk of 'risk' may seem to offer a common currency into which we can convert all the various unwelcome possibilities we face in life. In that respect it fosters a dangerous illusion and encourages reductive theorizing. It conceals the irreducible diversity of things we should care about, and therefore of things we should care about the allocation of. Our discussion in this essay of the distribution of rights and duties through the law of torts was intended to bring this out. When a wrong is recognized as a tort, as we saw, the law thereby effects a new distribution of the legal right to corrective justice in its tort-law form. That means a new distribution of the power to commence proceedings, a new distribution of the court's duty to award damages to successful plaintiffs, and a new distribution of the duty to pay such damages on the part of defendants. At least these three valuable things are being distributed in one fell swoop, as incidents of a single legal right. Each is valuable in its own way.

It is arguable that sometimes the three should be split up, and distributed by different mechanisms and to different people. Sometimes indeed they are. But in tort law they are distributed as a package deal, as aspects of a single specialized institutional apparatus for the doing of corrective justice. Thinking of this distribution as a distribution of risk – to come to our fourth and final objection to Honoré's characterization – obscures the moral distinctiveness of what is being distributed. It obscures the fact that what is being distributed is, in Weinrib's words, 'the bipolar link between the parties that characterizes the doctrines and institutions of private law.'[62] And it consequently obscures the fact that, when the distribution of that bipolar link is effected, yet further localized problems of distributive justice between the parties to it are created. Talk of 'risk-distributive justice' obscures

[62] Weinrib, *The Idea of Private Law*, above note 4, 76.

the fact, in short, that tort law, understood as an institution of corrective justice, does not merely meddle in the various subject-matters or 'currencies'[63] of distributive justice, but also, in more than one way, helps to constitute them.

[63] It was G.A. Cohen who coined the apt expression 'the currency of justice', although he also gave succour, alas, to the view that (social) distributive justice has only one currency, into which every distribuand must be converted. See Cohen, 'On the Currency of Egalitarian Justice', *Ethics* 99 (1989), 106.