***Ernest J. Weinrib, Reciprocal Freedom and Private Law***

***Chapter 5: Distributive Justice***

***1. The Pluralism of Justice***

So far this book has been concerned with the theoretical implications of understanding private law as corrective justice. Starting with the notion that liability in private law corrects an injustice inflicted by one person on another, the preceding chapters have inquired into the structure of the private law relationship and into the content that is adequate to that structure. Chapter 1 argued that the structure refers to the correlative normative positions of the potential parties to a finding of liability. Chapter 2 claimed that the content for this structure is found in the correlativity of right and obligation within a Kantian conception of equal reciprocal freedom. Illustrating the contention that the Kantian idea of a right comprehends and unifies different Hohfeldian categories, Chapter 3 set out the normative argument for understanding ownership as integrating the liberty to use and the claim-right to exclude in a way that is expressive of the equal reciprocal freedom of all. Chapter 4 then explored, again from the standpoint of equal reciprocal freedom, the effect on private law of a regime of authoritative institutions with its dimensions of publicness and systematicity.

In this chapter I address the question of how corrective justice fits more broadly into the legal order. This involves moving beyond private law to the wider legal world, where private law’s grounds of liability coexist with other arrangements (workers’ compensation is an example) that submit particular areas of social life to state regulation. Whereas private law actualizes corrective justice, these other arrangements are instances of distributive justice. The issue for this chapter is: how are these two kinds of justice related?

As Aristotle noted long ago,[[1]](#footnote-1) distributive justice, like corrective justice, is a structural idea. Whereas corrective justice refers to the structure of relationships in which one party can be held liable to the other, distributive justice refers to the structure of relationships in which a benefit or burden is divided among several recipients. For instance, workers’ compensation in many jurisdictions is a double exercise in distributive justice: employers are subject to the burden of paying into a fund in accordance with an industry’s accident history, and employees receive benefits from that fund in accordance with their workplace injuries. Structurally, any particular distribution involves the conjunction of three elements: a benefit (or burden) to be distributed, a set of the persons to whom that benefit is to be distributed, and the criterion that is to govern the distribution. The criterion acts as a unifying principle for linking the benefit to the persons, thus relating every participant in the distribution to every other participant in an ordered way. The tighter the connection between the criterion, on the one hand, and the persons and benefits that it governs, on the other, the more coherent is the distributive arrangement. Conversely, a distribution is incoherent to the extent that it operates under-inclusively or over-inclusively, giving participants either more or less than they merit under the criterion of distribution, or dividing among the participants a benefit that fails to fulfill the criterion’s purpose, or employing a criterion that does not felicitously link the benefit being distributed and the persons among whom it is being divided. Distributive justice is thus a structure through which persons can coherently be related to one another with respect to whatever is being distributed in accordance with its governing criterion.

As with corrective justice, a conception of coherence and fairness is implicit in distributive justice. The coherence consists in the ordering that the distributive criterion imparts to the relationship among the participants in the distribution. The fairness refers to each person’s equal standing within the distribution in terms of that criterion. Because both coherence and fairness in the distributive context are functions of the interconnection between the distributive criterion, the benefit and the participants, it is the case for distributive justice no less than for corrective justice[[2]](#footnote-2) that no incoherence can be fair and no fairness can be incoherent.

Thus, as structural ideas, corrective justice and distributive justice are contrasting ways in which legal relations between persons can be fair and coherent. Whereas corrective justice pertains to the immediate interaction of two persons as the doer and sufferer of the same injustice, distributive justice mediates an interaction among persons by relating them through a distributive criterion. Corrective justice focusses on whether an inconsistency with the plaintiff’s right can be attributed to the defendant; distributive justice, in contrast, marks out a benefit or burden to be distributed and has recourse to a criterion that determines each person’s share of that benefit or burden. Corrective justice governs the interaction between plaintiff and defendant by the motto “To each his own;” distributive justice governs the interaction between participants by the motto “To (or from) each according to the criterion of distribution.” In justifying the particular legal arrangements that fall under them, corrective justice and distributive justice employ different internal logics. Corrective justice features the logic of correlativity, under which the law elaborates and applies concepts that place the parties in normative positions that are the mirror images of each other. Distributive justice employs the logic of comparison, in which burdens or benefits are determined by how persons stand to one another with respect to the features that the distributive criterion makes relevant. Consequently, the corrective justice links only two persons, because correlativity is a pair-wise operation; distributive justice, in contrast, can link an indefinite number of persons because comparison implies no numerical limit on who is compared.

These interconnected contrasts show that corrective justice and distributive justice are categorically different and mutually irreducible. The immediacy of an interaction cannot be understood in terms of mediation by a distributive criterion, nor is what one has as one’s own the same as what should be received through a distribution, nor is the logic of correlativity intelligible as a comparison, nor can a relationship limited to two persons be open to an indefinite number. Corrective justice and distributive justice each give shape to legal justifications that can operate fairly and coherently in the relationships that instantiate them, but they do so in completely dissimilar ways.

From this an important implication follows. If one thinks of justice in terms of justificatory structure, that is, in terms of the fairness and coherence of the justifications for particular legal arrangements, there is no justice *tout court*. Rather, justice is a pluralism of different kinds of justificatory structure. Aristotle himself affirmed this when he originally introduced the distinction between corrective and distributive justice. “It seems,” he remarks, “that justice and injustice are spoken of in many senses.”[[3]](#footnote-3) In Aristotle’s account, justice is an omnibus term referring to the norms that govern one person’s relation toward another, but the categorical distinction between corrective justice and distributive justice indicates that the preposition “toward” has radically different meanings.

Given this categorical distinction, how are we to understand the relationship between corrective and distributive justice? In particular, is there any way of nonetheless conceiving of them as forming a juridical unity within the state as a whole? By “juridical unity” I mean this: As mentioned earlier,[[4]](#footnote-4) the positive and the juridical are two aspects of legality, the positive pertaining to the validity of law, the juridical pertaining to the fairness and coherence implicit in the structure of particular legal relationships. In its positive aspect, the unity of a legal system comes from the connection of all its legal norms to a single source of validity.[[5]](#footnote-5) In its juridical aspect, the unity of a legal system reflects the singleness of the justificatory grounding for all legal relationships. The positive aspect deals with the form of legal norms as valid, whereas the juridical aspect deals with the content of legal relationships as justified by reference to their fairness and coherence. I have been contending that corrective justice has its distinctive conception of the juridical, under which the correlatively structured relationships of private law participate in a public system of rights grounded in the reciprocal freedom of all. I now ask: Can the state’s exercises of distributive justice also be understood as expressive of reciprocal freedom, and are the two forms of justice normatively connected within a system of rights? The juridical unity of the legal order presupposes an affirmative answer to these questions.

At first sight, the pluralism of justice evidently challenges the notion that the legal order has a juridical unity. Given the different structures of justification at play in different kinds of legal relationship, juridical unity cannot consist in the uniformity of justifications across the entire range of legal phenomena. In this respect, the operation of a system of rights that incorporates both corrective and distributive justice differs from utilitarianism or the economic analysis of law, where a single decision criterion is applied to every situation. Nor can it be supposed that one of the structural ideas must be illegitimate, so that the other should be regarded as occupying the entire space of justification under law. A proponent of corrective justice would then be a libertarian for whom corrective justice is the only justice there is, whereas a proponent of distributive justice would be a collectivist for whom every legal operation without exception instantiates some pattern of distribution. Aside from being inconsistent with the legal praxis of modern states, the supposition that only one form of justice is legitimate is theoretically unwarranted. Because they are categorically different structural ideas, neither corrective justice nor distributive justice refers to the other. Consequently, neither offers a reason to eliminate the other.

In this chapter I suggest that there is nonetheless a conception of juridical unity that incorporates corrective and distributive justice and establishes the normative connection between them. This is the unity of a conceptual sequence.[[6]](#footnote-6) Viewed as the components of a system of rights, corrective justice and distributive justice participate in a progression, the stages of which are tied together by the idea that inherent in equal reciprocal freedom is the mutual independence of persons. This conceptual sequence moves from its starting point in the equal reciprocal freedom of innate right to the laws and institutions that actualize corrective and distributive justice. Each stage presupposes and complements the previous one, so that the equal reciprocal freedom with which the sequence begins remains thematic throughout the entire progression.

By focussing on the idea of a conceptual sequence, this chapter elucidates a feature of the Kantian approach that has already been mentioned in previous chapters. The discussion of ownership in Chapter 3, for instance, emphasized the importance of considering ownership and acquisition sequentially. Ownership, it was contended, had to be conceivable as a viable legal category under the principle of right before one addressed the problem of how its acquisition was compatible with the reciprocal freedom of all. In Chapter 4 the sequence evident in the treatment of ownership was presented more broadly as a movement from the state of nature to the civil condition, and thus from the bilateral logic of the private law rights to the omnilateral institutional context in which those rights operate publicly and systematically. In those chapters, the idea of a conceptual sequence was invoked to deal with different aspects of private law. The present chapter has more radical ambitions: to show the relevance of conceptual sequence for the pluralism of justice, and thus for bridging the divide between private law and public law.

On the methodological plane, the unity of a system of rights can be explicated only through a conceptual sequence. The root idea of a system of rights is the equal reciprocal freedom of all. Such freedom is an abstraction that is rendered determinate through concepts of greater and lesser generality until it can be actualized in a legal order and applied to the specific actions of specific persons. Unlike consequentialist principles such as the principle of utility, it does not in its own terms directly bear on the conduct of individuals and officials, but rather becomes intelligible only through the elucidation of the various rights that are expressive of it and of the various legal institutions that make those rights effective. Thus, between the axiomatic status of equal reciprocal freedom and the possibility of applying it to the particularities of social life lie a series of intermediary concepts.[[7]](#footnote-7) Moreover, the very abstractness of equal reciprocal freedom means that, given the variety of these concepts—some of which are substantive and some of which are institutional, some of which pertain to private law and some of which pertain to public law—they cannot be developed directly out of equal reciprocal freedom but must be developed out of one another. Hence, the sequence in which the intermediary concepts are elucidated is crucial to our understanding of the system of rights that they generate. If, then, both corrective justice and distributive justice are present within this conceptual sequence, the unity that binds them together cannot be either of the diverse kinds of justifications whose structure they respectively represent. Rather, the unity must reside in the internal integration of the sequence itself as it comprehensively realizes the equal reciprocal freedom of all. The operation of this sequence is the subject of this chapter.

***2. From Pluralism to Sequence***

Given, then, that corrective justice and distributive justice are diverse normative ideas, how can their combination form a unity while maintaining their distinctness?

One possibility is to regard corrective justice and distributive justice as *indirect* expressions of the same principle, so that despite their apparent differences when compared directly, they simultaneously manifest a single uniform normative idea. They might, for instance, refer to circumstances in which different kinds of factors are relevant under the principle of utility, with the result that, although determinations of liability and decisions about distribution seem dissimilar, both are situated within a suitably capacious utilitarian calculation. As Bruce Chapman puts it in his illuminating treatment of pluralism in tort law, “Different values or choice criteria might in some direct sense be independent of one another, but nevertheless be indirectly related and, therefore, systematizable under some more comprehensive justificatory purpose.”[[8]](#footnote-8) After noting that this has always been the promise of utilitarianism, Chapman goes on to observe:

Of course, this suggests that the pluralism with which we began is more apparent than real, for now the many criteria so systematized, while not immediately related to one another, are construed as mere aspects of some overarching super-value, such as utility or welfare, which provides a common measure, or commensurability, for them all.[[9]](#footnote-9)

However, the possibility of thus transforming a pluralism into an all-encompassing monism—a possibility that Chapman rightly dismisses—does not plausibly apply to the difference between corrective justice and distributive justice. Justice is a pluralism not of values but of justificatory structures. Although different values may possibly be subsumable under a more inclusive super-value, no analogous operation can be performed on justificatory structures, because these already present the different kinds of justification in their most abstract, and therefore their most inclusive, forms.

Chapman mentions a second possibility that is more promising. He proposes that one can combine genuinely plural ideas into a single understanding of tort law if they are ordered according to a conceptually sequenced argument.[[10]](#footnote-10) In a sequence ideas of different kinds can be connected because they enter the argument at different points rather than all at once. Accordingly, even within tort law, he suggests, the sequence taken as a whole may allow for moral considerations additional to those of corrective justice and yet not be arbitrary. It may be the case that corrective justice, as the first member of this sequence, establishes the priority of the relationship between the parties, and then is followed by a different idea that operates within the bipolar framework thus established. Thus, a conceptually sequenced argument may allow for a pluralism that combines diverse appealing ideas in a non-arbitrary way.[[11]](#footnote-11)

Chapman draws on George Fletcher's famous discussion of excuses in tort law to illustrate how the conceptually sequenced argument works.[[12]](#footnote-12) For Fletcher, excuse is the legal concept through which the law expresses the compassion that flows from realizing that any reasonable person in the defendant's situation would have acted as the defendant did. From the standpoint of corrective justice, this conception of excuse is problematic, because it considers the situation of the defendant—that is, the relationship between the defendant's act and the excusing condition—independently of the wrong suffered by the plaintiff.[[13]](#footnote-13) Chapman replies that this difficulty disappears once one notices that excuse functions within a conceptually ordered sequence. It is a conceptual feature of excuse that it presupposes the existence of the wrong that is being excused and thus necessarily occupies the second stage of a multistaged argument.[[14]](#footnote-14) Because the existence of a wrong is a matter of corrective justice, the excuse supervenes upon an already established relationship between the parties and therefore cannot operate outside that relationship. Accordingly, one cannot conclude from the fact that the excuse itself does not reflect the correlativity of corrective justice that excuse has no role to play in a sequence in which corrective justice is prior to it. To be within that sequence while giving voice to a value that is genuinely different from corrective justice is merely what being an excuse means. In this way, excuse exemplifies the conceptually sequenced argument that non-arbitrarily accommodates different normative ideas.

Does Chapman’s version of a conceptually ordered sequence help elucidate the connection between corrective justice and distributive justice? Chapman’s suggestion faces two difficulties. First, it is not obvious how corrective justice and distributive justice form a conceptual sequence similar to one that connects wrong and excuse. In the case of excuse, the conceptual sequence is clear: Part of the meaning of excuse is that it excuses something that is wrong, so that the determination of wrong is prior to the application of the excuse. No similar relationship appears to exist between corrective justice and distributive justice.

Moreover, even on its own terms Chapman’s sequence about excuses does not, after all, succeed in avoiding arbitrariness. In his account corrective justice comes first to establish the defendant’s wrongdoing within the bipolar relationship and then a compassion-based excuse nonetheless relieves the defendant of liability. Even if one grants that excuse constitutes a paradigmatic instance of conceptual sequencing,[[15]](#footnote-15) the question remains why considerations of compassion trump the liability to which the defendant is otherwise subject. If compassion for the defendant's situation is normatively significant within the relationship of the doer and the sufferer of a supposed wrong, why does it come in only at the second stage after the wrong has been established rather than go to the definition of what constitutes a wrong in the first place? And if the reply is that compassion, as a notion oriented to the predicament of the defendant, is inconsistent with bipolar wrong-defining notions such as the objective standard of negligence, why are these wrong-defining notions overridden at the second stage by what was excluded at the first? That compassion comes in at the second stage because excuse does is no answer: The questions are not about the sequencing of wrong and excuse but rather about the sequencing of wrong and compassion. This difficulty is concealed in Chapman's account only because he has accepted a particular explanation of excuse as given and then used excuse's place in the sequence to repel the corrective justice challenge to that explanation.

Chapman's exposition of the notion of a conceptually sequenced argument valuably connects pluralism to a structure of sequenced thinking. However, he does not indicate how the components of the sequence are normatively interconnected to form the single sequence that they do. In other words, he does not treat the sequence as truly conceptual.

This difficulty points the way forward. A sequenced argument that is truly conceptual would indicate not only the sequence of concepts but also why the concepts belong together, why they refer to certain normative considerations rather than others, why these different sets of normative considerations should be kept separate and in the sequenced order, and why the sequence cannot stop at the first stage but must go on to the second one. For example, a sequenced argument about excuses should not only note that wrong is conceptually prior to excuse. It should also elucidate why the excusing conditions relieve the wrongdoer but yet cannot be included in the prior wrong-defining stage.[[16]](#footnote-16) Similarly, in connection with distributive justice, a sequenced argument should set out why the system of rights is not limited to corrective justice, what considerations of distributive justice have a sequenced position within the system of rights, and how those considerations nonetheless leave corrective justice intact at the sequence’s earlier stage.

***3. Reciprocal Independence***

In this section I elucidate the conceptually ordered sequence within which the transition from corrective justice to distributive justice is situated. In this sequence, distributive justice supplements private law while leaving it intact. The point of this supplementation is to enable the system of rights as a whole to realize a thematic aspect of equal reciprocal freedom: the independence of each person in his or her relations with others. Independence from others underlies distributive justice no less than corrective justice, because the point of a legal order based on rights is to have the reciprocal independence of persons inform all legal relationships.

Kant makes independence as against others the defining characteristic of equal reciprocal freedom. The subjective right that is immediately implicit in equal reciprocal freedom is the innate right; Kant describes the freedom of the innate right as “independence from being constrained by another’s choice.”[[17]](#footnote-17) The integrity of one’s body from invasion by another is the hallmark of such independence, because for us humans no freedom is possible to the extent that our bodies, the organs through which we act, are directly controlled by, or subject to the control of, others. The innate right, however, is not the right to one’s body considered on its own. It is a relational term that refers to the coexistence of one’s freedom with everyone else’s.

From its semantic composition one might think that independence (“Unabhängigkeit” in German) is just the negation of dependence. However, Kant’s exposition of the various entitlements under innate right[[18]](#footnote-18) makes it clear that independence has both a negative and a positive side. On the negative side is the freedom from being constrained by another’s will or from being non-reciprocally bound by another. The negative side precludes others from doing with you what they wish. The corresponding positive side is having one’s fate in one’s own hands by being possessed of a power to act in accordance with one’s own will so far as one’s relations with others are concerned. Put in the terminology of Roman law, the positive side of independence is that everyone is *sui iuris*, that is, everyone counts juridically as one’s own person, and therefore, in interacting with others, can assert oneself both in word and in deed. Asserting oneself in word means that everyone can say whatever he or she wishes, whether true or untrue, so long as the utterance does not injure another’s rights. Asserting oneself in deed means that wrong is a matter of one’s conduct and not of one’s existence, of what one has done rather than of than of who one is. Persons who are reciprocally independent in these ways carry on their lives on their own initiative and responsibility, being both unconstrained in their rightful conduct by others’ wills and answerable for their wrongful interferences with others’ rights. The negative side of independence, accordingly, precludes one from being a means for others, whereas the positive side requires being an end for them, so that the actions of all are consistent with everyone’s freedom to make one’s way in the world on one’s own terms.[[19]](#footnote-19) Thus, the positive and negative sides of independence are not distinct from each other, but form the mutually constituting aspects of the innate right as a single unified right.

In the state of nature the idea of independence has a circumscribed range of application for two interlocking reasons. First, the state of nature is a condition in which juridical relationships are always and only bipolar, because the omnilateral relationships of the civil condition have not yet arisen. The sole juridical issue is whether one person has infringed another’s innate right; this issue can be framed only as between two persons. Although each person’s innate right is binding on every other person, its validity is not “against the whole world”—there is as yet no legal world that can be regarded as a totality—but against each and every individual person in turn. Second, acquired rights (including property rights) that are conclusively and not merely provisionally binding do not exist in the state of nature, because such rights are consistent with the innate right only through the omnilaterality of the civil condition.[[20]](#footnote-20) The consequence of the combination of these two circumstances is that independence is violated only when one person invades or threatens to invade another’s bodily integrity.

In the civil condition the situation changes dramatically on both counts. While the innate right remains intact, other rights have been added; and relationships can be omnilateral as well as bipolar. In addition to a right to bodily integrity, persons can now acquire rights to property, to contractual performance, and to domestic right. They are now related to each other not only through the constraint that they apply or do not apply to another’s body, but through the rights and obligations that are consequent on their acquisitions. And because their rights are entrenched in the positive law of their civil condition, juridical relationships are not merely bipolar but are publicly and systemically omnilateral.

This transformation has two effects on the idea of independence. First, the addition of acquired rights to the catalogue of subjective rights extends the range within which right-holders can carry on their lives on their own responsibility and initiative; concomitantly, it increases the possible wrongs that a person can suffer at another’s hand. Independence is now actualized not only through each person’s right of bodily integrity but also through a new set of bipolar relationships that center on the rights one has acquired and on the wrong that would be done to a right-holder by damage to or unconsented use of the objects of those rights. In particular, the conception of ownership as an unlimited submission of a thing exclusively to the owner’s will[[21]](#footnote-21) endows the right to one’s person and the right to one’s property with a similar bipolar significance for the relationship between the right-holder and every other person in the world. For rights both innate and acquired, their bipolar operation is the realm of corrective justice.

Second, however, this expansion of the range of independence both by adding rights and by allowing them to be omnilateral creates a new problem of dependence. This problem becomes evident when the state of nature is compared to the civil condition.

In the state of nature for all its limitations, the innate right represents a rigorous norm of mutual independence. As a juridical idea, independence reflects the range of action to which our reciprocal freedom entitles us, whereas dependence is the condition of being subjected to the wrongful actions of another. The only form of dependence pertinent to the state of nature is the wrong that consists in one person’s body being subject to another’s constraining will. In all other interaction, however unsatisfactory their lives may be in other respects, the interacting parties fully enjoy their independence from one another.

This independence is unaffected by the availability or unavailability of material goods. Such goods are equally open to all. In the absence of interference with anyone’s body, everyone’s use of the things of the world in pursuit of one’s self-determined end is an exercise of reciprocal independence. For example, although the apple in your hand is not accessible to me because my seizing it would affect the disposition of your fingers around it and therefore violate your innate right, the apple in the tree remains available. And although I may starve if the apple in the tree is beyond my reach, that is simply a misfortune of life rather than a violation by anyone of our reciprocal freedom. Nor could I compel you to use your greater height to secure the apple for me, because that would constrain you to my will and thus wrongfully trench on your independence.

The transition from the state of nature to the civil condition, however, presents a new challenge to the independence of persons. Ownership, which was conceivable but not actual in the state of nature, is now ensconced in the legal order, so that the owner has the right to exclude others even from things to which the owner is not physically attached. Although I may be in danger of starving to death unless I get an apple, you may be the owner of the apple and therefore have exclusive right to it even when you put it down or add it to your pile of apples, and you may also have exclusive right to the tree itself and to the apples in it. The existence of property in the civil condition creates the possibility of accumulation, and with it the possibility of dependence for those whose sphere of action is confined to what is left over. For some of them, what is left over may be too exiguous for them to make their way in the world on their own. Indeed, their very survival may be dependent on the compassion or generosity of others, or they may be able to purchase their survival only by subordinating themselves to others as their bondsmen.[[22]](#footnote-22) And even if no wrong is committed against their persons and such property as they have, their condition may be so desperate that they are nonetheless at the mercy of another’s will, subjected to the practical domination of others even in a legal system that forbids anyone from being their legal owner or *dominus*. Thus, a point of contrast between the state of nature and the civil condition is that whereas the state of nature is a world of pure independence in which dependence is exemplified by wrong, the civil condition is a world of more extensive but adulterated independence, in which dependence can be created by the systemic operation of rights .

This form of dependence is unconnected to the kind of injustice that pertains to the bipolar relationships of private law. The gist of dependence in this context is not that someone has wronged the bodily integrity or the acquired rights of others as a matter of corrective justice, but that the entire system of rights has resulted in some persons’ being dependent on others. Such dependence may be consistent with the most scrupulous observance of the dependent’s rights of contract, property, and bodily integrity. Indeed, private law itself—as in the case of contracting between parties who stand on a grossly unequal footing—may be the instrumentality that reflects and then further entrenches the practical constraint exercised by the stronger party on the weaker one.[[23]](#footnote-23) Dependence may thus emerge from transactions that are unimpeachable from the standpoint of corrective justice and from injuries that are suffered without anyone else being at fault or civilly liable.

The system of rights cannot be indifferent to the form of dependence that it itself has made possible. Under a system of rights, the reciprocal independence of persons has to inform every juridical relationship. This includes not only the bipolar relationships of corrective justice, but also the omnilateral relationships in the civil condition that run between each person and the totality of all other persons. Although in creating the possibility of dependence the system of rights does not wrong persons from the standpoint of corrective justice, it nonetheless fails them from the broader standpoint of its own systemic rights-protecting function if it does not anticipate or alleviate the dependences that actually come into being. In an implicit criticism of Hobbes, Kant insisted that the legitimacy of the state requires that there be no sacrifice of one’s innate freedom in the transition from the state of nature to the civil condition; one merely gives up one’s wild lawless freedom to find freedom undiminished under law.[[24]](#footnote-24) Because freedom pertains to relations between persons, it is not a concept that is frozen in the state of nature or restricted to the bilateral legal relationships within which a corrective justice wrong can occur. Rather, freedom adjusts itself to the new form of relationship—omnilateral rather than bilateral—that characterizes the civil condition. If it were otherwise, then the civil condition would, after all, entail a diminishment of freedom, that is, of one’s independence relative to others: a person entering the civil condition would find that he or she had moved from independence to potential dependence, from a condition in which no dependence was rightful to one in which dependence was a rightfully created possibility.

Systemically, the idea of independence includes more than freedom from interference with rights in one’s body and one’s property. If independence is to remain exhaustive of all juridical relationships, including the omnilateral ones of the civil condition, the system of rights requires a conception of independence that goes beyond the one that was present in the state of nature. Contemporary constitutional law calls this more capacious idea of independence “human dignity,”[[25]](#footnote-25) a term that refers in the most abstract way to the normative idea that governs the relationship between an individual and the commonwealth of right-holders that constitutes the civil condition. In this enlarged conception of independence, the positive side of innate right, that one is entitled to be one’s own master (*sui iuris*) and therefore to assert oneself in one’s relations with others, refers to having the power to make one’s way in life in at least a minimally decent and satisfactory manner.[[26]](#footnote-26) In some jurisdictions this enlarged conception is treated as including a constitutional right to a “dignified human existence.”[[27]](#footnote-27) In others, it has historically been reflected in the state’s police power, regarded as a “necessity growing out of the fundamental conditions of civil society” to protect “the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.”[[28]](#footnote-28) Regardless, however, of its legal formulation or its constitutional status, the underlying idea is that in actualizing the system of rights the civil condition protects the independence of the individual not only by securing the rights of private law but also by mitigating the various dependencies to which the civil condition may give rise, so that each person can take charge of his or her own life in at least a minimally satisfactory way.

In mitigating those dependencies, the state is required to deal with the extreme deprivations that might lead persons to subordinate themselves to the power of others. Although within the correlatively structured relationships of *corrective* justice, basic material needs have no normative standing—after all, the needs of one particular person are not correlative to the resources of another particular person— they nonetheless are relevant to the dependencies that a system of rights is tasked with alleviating as a matter of *distributive* justice. In the distributive context the significance of basic material needs is not that their fulfillment makes a person’s life go well in its own terms, but rather that deprivation leads one person to become dependent on another. As is always the case for a system of rights, what matters is the relationship among persons if they are to interact on the basis of their reciprocal freedom, not the welfare or happiness of any person considered on its own. Accordingly, so far as distributive justice is concerned, the reason for attending to basic material needs is not that such needs are inconsistent with persons’ welfare, but that under the conditions of human existence equal reciprocal freedom cannot be realized in the absence of their satisfaction.

In the civil condition the system of rights, through its protection of acquired rights under private law, creates the systemic possibility of dependence that must then be systemically addressed. Arrangements of distributive justice are among the measures through which the state systemically preserves the independence of individuals. The various schemes of distributive justice focus on the different kinds of activities (workplace injuries, automobile accidents, labour relations and so on) in which this independence is threatened.[[29]](#footnote-29) In the modern industrial state, these activities are so large and complex and the legal possibilities for addressing them so varied, that the exercise of distributive justice has to be articulated through detailed legislation and regulation, executed through administrative rather than judicial procedures, and applied to persons who fall within carefully crafted standards of eligibility.

Now one should not suppose that the state’s role in protecting independence entails merely the transfer of a person’s dependence from other individuals to the state.[[30]](#footnote-30) The relations of individuals with the state stand on a different normative footing than do relations among individuals. Because the obligations that are correlative to the rights of private law are negative only and impose no duties of philanthropy, a person in circumstances of exigency can only be a supplicant for the charity of others; dependence reflects the contingency that such charity might, without any violation of private law, be withheld or withdrawn at will. The state, in contrast, is under an obligation to mitigate the dependencies that systemically flow from the operation of the rights of private law. It fulfills this obligation by enacting the appropriate legislation and by creating the appropriate administrative institutions. The measures that mitigate cannot be withheld at will, because within a framework of rights the sole will that the state has is to act for a public purpose, and the sole relevant public purpose is that of preventing dependence. The state’s role in eliminating dependence is thus not a matter of charity but a normative requirement intrinsic to the rightful exercise of its power. Nor can the administrative organs of the state act at will to withdraw benefits that the state has enacted. These organs are bound by the rule of law and by norms of administrative fairness that reflect the human dignity of every applicant. In making a claim for these benefits an individual does not beseech the administrator’s grace but asserts an entitlement. Accordingly, the dependence that can rightfully arise among individuals in the relations governed by private law has, as matter of right, no place in the relations between individuals and the state in the civil condition. And if in its activity and processes a state does in fact treat those subject to it as its dependents, it lies under an obligation, again as a matter of right, to change its practice in order to eliminate the dependencies in question.

Independence from the constraining will of others thus serves as the unifying theme for the conceptually ordered sequence that goes from corrective justice to distributive justice. The sequence begins with the innate right, for which independence from the constraint of another’s will is the defining characteristic. Because external things are usable by persons (and thus not independent of their wills) acquired rights are consistent with the equal reciprocal freedom of all persons. Acquired rights in turn require a civil condition, because in a civil condition the systematic availability of acquisition prevents acquisition from being the unilateral imposition of the acquirer’s will on the independence of everyone else. Corrective justice is the kind of justice that is regulative of the bipolar relations that arise from this ensemble of rights and their correlative obligations. Acquired rights, however, create the possibility of a form of dependence that is systemic in nature and that must be addressed systemically by arrangements of distributive justice. Each stage of this sequence presupposes the stage that preceded it; similarly, none of these stages completes a fully adequate system of rights unless followed by the subsequent ones.

The positioning of distributive justice within this sequence conforms to the requirements for sequenced argument described at the end of section 2 of this chapter. It was there pointed out that a sequenced argument about distributive justice should set out why the system of rights is not limited to corrective justice, what normative idea allows corrective justice and distributive justice to participate in the same sequence, and why distributive considerations cannot be included in the earlier stage of the sequence. The account presented here answers these questions as follows: The system of rights goes beyond corrective justice, because private law, although grounded in the idea of each party’s independence from of the constraint of the other’s will, creates the possibility of a systemic problem of dependence that only distributive justice can address. Distributive justice is posterior to corrective justice, because that kind of dependence arises from a functioning system of private law, even if corrective justice is fully observed. The distributive considerations cannot be backed up into the corrective justice stage, because those considerations are not correlatively structured and therefore cannot fairly and coherently figure within private law.

Thus, the argument about distributive justice indicates why corrective and distributive justice belong together despite the categorical distinction between them, how they are each organized around their respective notions of independence, why they are to be kept separate and in sequenced order, and why the sequence cannot stop at corrective justice. Taken as a whole, the entire sequence, with its multi-staged elaboration of the idea of reciprocal independence, presents the juridical unity of a legal order that incorporates both corrective justice and distributive justice. Despite the pluralism of these two forms of justice, they come together in the unity of a conceptually ordered sequence.[[31]](#footnote-31)

***4. Determining Distributive Justice***

Like corrective justice, distributive justice is an abstract structural idea that is made determinate through the positive law. As befits the differences between them, however, the process of determination for each of these forms of justice follows a different institutional path.

Corrective justice is the structure for the diverse grounds on which an inconsistency with a particular plaintiff’s right can be ascribed to a particular defendant. The correlativity internal to the structure means that the point of corrective justice is not to promote some goal that is attractive independently of the relationship between the parties, but rather to hold the parties to the normative implications of justice as between them. To this end the positive law works out and applies the various correlatively structured concepts, standards, principles, and rules that make up to the grounds for holding one person liable to another. The task of specifying these concepts, standards, principles and rules is interpretive and adjudicative. It is interpretive in that it seeks to elaborate the series of ideas operating at different levels of generality that discloses how the correlativity internal to the structure of liability figures in the juridical relationship between two particular parties.[[32]](#footnote-32) It is adjudicative in that such interpretation is within the province of judges, who directly or in reliance on the work of expert jurists engage in the public reason that authoritatively and systematically works out the meaning of corrective justice for particular transactions and for classes of transactions. [[33]](#footnote-33) In comparison with the significance of adjudication, the role played by legislation in corrective justice is relatively minor, either supplementing the stock of private law determinations by, for instance, establishing statutory duties that are relevant to one’s legal obligations to another, or codifying those determinations by setting them out summarily and definitively.

In contrast to the unmediated interaction of corrective justice, distributive justice mediates the relation between the participants in a distribution through a criterion of distribution. This criterion indicates the purpose that the distribution seeks to achieve. Distributions can be directed towards different purposes and can vary in scope. For example, a distributive scheme that is concerned with alleviating adverse bodily conditions may deal with medical problems generally as in the case of publicly organized medical insurance, or more narrowly with accidentally suffered injuries as in the case of the New Zealand accident compensation program, or even more narrowly with injuries that result from a particular kind of activity as in the case of workers’ compensation or compensation for injuries suffered by the victims of crime. Thus, whereas corrective justice involves not the selection of any purpose but rather the explication of the internal normative dynamics of parties’ correlative positions, distributive justice deals with particular distributions that have their particular purposes.

This contrast reflects the categorical difference between corrective and distributive justice. Though both forms of justice are abstractions from the particular arrangements that fall under them, they abstract in different ways. The instantiations of corrective justice are the constituents in a totality organized around the idea that the law authorizes the appropriate correction when an inconsistency with one person’s rights can be imputed to another. A single and unified conception of corrective justice exhibits the normative structure immanent to and homogeneously present in the interactions of persons acting for self-chosen ends. The various grounds of liability are systematically demarcated with reference to one another through the normative considerations intrinsic to each of them. Grounds of liability are thus the articulations of corrective justice as the single unified conception at play in the various circumstances in which an inconsistency with another’s right can occur. In contrast, the instantiations of distributive justice evince the heterogeneity of the different specific purposes and the varying scopes of different distributions. Even if distributions share the general goal of mitigating dependencies (as they would on the Kantian picture being presented here), they pursue that goal through discreet programs that have no intrinsic mutual connection or alignment. Accordingly, distributions do not articulate a single unified conception, but rather form an aggregate of arrangements that have a certain structure. Whereas corrective justice is the abstraction representing the totality of private law relationships as an articulated whole, distributive justice is the abstraction representing the multiplicity of possible distributions, each of which has its specific purpose and particular scope.

Corresponding to this contrast in their character as abstractions is another that pertains to their respective modes of determination. In the case of corrective justice, determination involves specifying the meaning of corrective justice with respect to a given legal relationship. Because specification is a response to corrective justice’s regulative function in treating the parties as the correlatively situated with respect to an injustice as between them, the exercise of specification involves working out at various levels of generality and particularity the most adequate and plausible understanding of what is normatively implicit in the correlative situation of plaintiff and defendant.[[34]](#footnote-34) In the case of distributive justice, in contrast, determination consists not in specifying meaning in particular circumstances but in choosing a particular distribution from all the possible distributions. Because distributive justice, conceived in terms of addressing conditions of dependence, has a regulative function that bears systemically on the state as a whole, the state is required to actualize it. This requirement can, however, be fulfilled in different ways or combinations of ways. One aspect of choosing a particular distribution is to settle upon a particular purpose that is to be collectively recognized. Concomitant to this is the definition of the scope of the distribution and the qualifications for participating in it. Also to be decided are the mechanisms for financing and administering the distributive scheme. Decisions on these matters do not specify what is implicit in a certain kind of relationship but rather posit a set of legal arrangements to satisfy the requirement on the state to anticipate or mitigate the circumstances of dependence.

In determining distributive justice, the role of the legislature is paramount. Unlike the judiciary, which operates within the confines of the case before it, the evidence relative to that case, and the contingencies of decisions by litigants, the legislature under the principle of the division of state powers has the institutional competence to assess the full range of possible distributions, to articulate the details of the preferred distribution, to provide for its funding, and to set up the regulatory structure that administers it. The legislature also has the authority to commit the polity as a whole to a particular set of distributive arrangements; legislators can then be held accountable through the democratic process for the distributive decisions that they make on behalf of everyone.

In determining the distributions that support the independence of all, the legislature has broad latitude. Both in their scope and in the details of their construction, different schemes of distribution can aim at the amelioration or prevention of dependence in different ways. A distributive arrangement can deal with dependence over a broader or narrower range by addressing different activities or conditions. The level of benefits that it dispenses can be higher or lower. The eligibility criteria can be more or less restrictive. Its effect on private law can be more or less pre-emptive.

These determinations are matters of politics for which legislatures are accountable, rather than of legal theory. By mentioning politics I do not mean the free play of individual interests in exercising power or in influencing or controlling collective decisions. Rather, within the Kantian approach, the notion of politics refers to the enterprise of applying concepts of right to human experience; it includes managing the public apparatus of the civil condition in accordance with the requirements of right.[[35]](#footnote-35) Determining distributive justice is political, in that the task calls for a good faith judgment—on which citizens may differ but which the legislature authoritatively exercises at the end of the day—about the measures that, given the contingent context of a particular legal system, would best sustain the independence of all by most felicitously alleviating the systemic dependencies that the legal system would otherwise enable. In making such determinations the role of legal theory is comparatively modest: to identify the normative space within which such determinations occur and to relate that space to other spaces within the normative ecology of a legal order. In starting from corrective justice, a Kantian theory of rights maps out these normative spaces by working out the stages of the conceptually ordered sequence through which they are related and by elaborating the thematic role of independence in that sequence.

In view of this legislative latitude, several mechanisms are available for reducing the prospect of one person’s dependence on another. Without claiming to be exhaustive, I list four of these. One mechanism is for the state to authorize arrangements that foster the development of persons’ independence or that prevent vulnerabilities that would expose them to domination or exploitation by others. An example of the former is the creation of systems of education that give each person the opportunity to develop as a self-determining moral being and as a self-supporting economic actor. Examples of the latter are the recognition of collective bargaining in the employment context and the statutory regulation of residential tenancies, so as to mitigate the power that employers and landlords would have if matters were settled solely on the basis of private ordering.

A second mechanism is for the state to provide each person with a social minimum. In the civil condition this minimum is geared not to subsistence as a biological matter but to the human dignity that consists in the possibility of taking charge of one’s life as an independent person. Like all normative ideas within a system of rights, the dignified human existence at which the social minimum aims is a relational, not a monadic, concept. It refers to the person as an interacting being in the context of the particular society in which he or she lives. It includes the possibility of maintaining relationships with others and of participating in at least a minimal way in the social life that marks human existence.[[36]](#footnote-36) What comports with the social minimum for independence varies with a society’s resources and social conditions. Thus, in working within its legitimate and unavoidable latitude, the legislature’s task is to orient the social minimum “towards the respective stage of development of the polity and toward the existing conditions of life.”[[37]](#footnote-37)

A third mechanism is for the state to mandate or to operate social insurance arrangements that deal with the impact of injuries that would otherwise endanger the independence of injured persons. A common feature of such arrangements is that, for injury that prevents one from working they include payments that are based on a percentage of one’s prior earnings rather than being directly related to one’s need. One the one hand, such payments are more generous than what would be due under the social minimum. On the other hand, they provide a measure of continuity between a person’s pre-injury and post-injury condition, thereby treating independence not merely as an desideratum tied episodically to the occurrence of the contingencies that threaten it, but as a normative idea that it applies over a whole life and reflects the unity of that life.

A fourth mechanism involves responding to injury by blending the social minimum or the social insurance with a limited range of tort damages. Many automobile injury compensation schemes and proposals take this form. They carve out a set of injuries for which an accident victim receives benefits on a no-fault basis while retaining tort law (or elements of it) either as a possible alternative to the no-fault scheme or as a separate regime operative for injuries that are above a threshold of severity. A pervasive goal of these compensation schemes—which differ widely in their details as to the ceiling for no-fault benefits, the floor for tort recovery and the connection between the no-fault compensation and tort damages—is to demarcate the circumstances under which some measure of income replacement, as well as medical and rehabilitation benefits, will promptly be available to a significant proportion of automobile accident victims without their having to prove fault through the protracted and laborious process of tort litigation. The compensation scheme thus forms part of the network of arrangements that aim to maintain the victim of injury as an independent person.

The possibility that social insurance might replace, or at least partially displace, areas of private law has led some to question the viability of tort law’s treatment of personal injuries in comparison with the compensation systems that are its distributive alternatives. When considered as a mechanism for compensating personal injuries, tort law has obvious shortcomings: injuries not caused by someone’s fault are not compensated; the individualized determination of fault and damage assessment involves delay, uncertainty, and expense; and even if fault is found or conceded, financially irresponsible or uninsured injurers may be unable to pay the damages that are due to the injured party. The reason for these shortcomings is that, properly understood, tort law is not a mechanism of compensation at all, but rather a system of redress for one person’s wrongful infringement of the rights of another. Individualized determinations of fault are integral to such a system of redress, in which compensation follows only from, and to the extent of, the wrongful infringement by a particular defendant of the right of a particular plaintiff. Because the provision of compensation to all injured persons is not a goal of tort law, the restricted compensation that tort law provides is not a failure of tort law. Tort law and compensation schemes have different functions and therefore do different things. So formulated, the difference between compensation systems and tort law merely rehearses the pluralism of justice.

When the two forms of justice are seen as sequentially ordered, it makes little sense to ask as a general question whether tort law should be replaced. The inquiry has to be more fine-grained, with due attention to the normative role both of tort law and its alternatives and to the particular circumstances in which the question arises. On the one hand, from the standpoint of corrective justice, tort law is a normative phenomenon that strives to actualize its own distinctive virtues: fairness as between the litigants, respect for the rights of others, responsibility for one’s actions, the operation of law within a culture of justification, the possibility of a coherent public reason. Consequently, tort law can be criticized to the extent that it betrays those virtues, for example, by legal reasoning that is incoherent or prejudicial to one or the other of the parties and by institutional procedures that make standing on one’s rights difficult and expensive, and that thus provide opportunities for abusive conduct through the process of litigation. Corrective justice, therefore, does more than illuminate tort law as a practice merely because that practice exists.[[38]](#footnote-38) It also construes tort law as the vehicle of a distinctive set of moral ideas—and as intrinsically valuable for that reason.

On the other hand, the rights that tort law vindicates and the fault-based manner in which it vindicates them may be inadequate to preserve the ability of persons to make their own way in life without recourse to the charity of others and without exposure to exploitation by them. This inadequacy is not a defect that undermines the inherent normative character of tort law as such, but rather a consequence that arises in specific circumstances and in connection with specific kinds of activities. In the face of this inadequacy, the appropriate legislative response is to institute a scheme of distributive justice to deal with it in its particular circumstances. This may well involve the pro tanto displacement of tort law.

Thus, the overall picture that emerges is this: Private law (and tort law more specifically) constitutes a system of rights between individuals that has an intrinsic and abiding moral valence. The legislature, however, has the normative authority to set up distributive arrangements that limit or displace private law in particular circumstances. What justifies this authority is the systemic imperative in the civil condition to sustain the independence of all persons in their relationships with one another. The result is a sequential movement of thought in which the private law rights remain the underlying norm, yet in particular contexts they cede to the state’s inherent authority to deal with dangers to this independence.[[39]](#footnote-39)

***Conclusion***

This chapter has focused on several interconnected ideas. The point of departure was the pluralism of justice—the notion that corrective justice and distributive justice are categorically different structural ideas that cannot directly be integrated into a single overarching structure. From this pluralism arises the problem of the juridical unity of the state as a whole that is expressive of reciprocal freedom while comprehending both forms of justice. The chapter proposed that the distinctive kind of unity responsive to this problem is the unity of a conceptual sequence. This kind of unity features a series of thematically linked stages each of which presupposes and complements the one that precedes it. The contention of this chapter has been that corrective justice and distributive justice participate in such a conceptual sequence.

For this sequence the idea of the reciprocal independence of all persons is thematic. In the correlatively structured relationships of corrective justice, independence refers to freedom from interference with one’s innate right in bodily integrity and with one’s acquired rights, such as rights in property and contractual performance. When, however, the state creates the possibility of accumulation by making the exclusivity of ownership legally effective, it also creates the possibility of dependence for those whose action is confined to what is unowned by others. In the civil condition, subjection to another’s will is no longer identical with the suffering of an injustice as a matter of corrective justice; and being able to make one’s way as an independent person can no longer be assured by private law alone. Through arrangements of distributive justice the state systemically addresses this consequence of the system of rights. The root idea of a system of rights, that the actions of persons be consistent with the freedom of others, thereby finds its place both in a state’s private law and in its public law.

1. Aristotle, *Nicomachean Ethics*, 5, 2-4. [↑](#footnote-ref-1)
2. Above Chapter 1, section 6. [↑](#footnote-ref-2)
3. Aristotle, *Nicomachean Ethics* 1129a26; compare ibid. 1130b6: “the justices are plural.” [↑](#footnote-ref-3)
4. Above, Chapter 1, section 7. [↑](#footnote-ref-4)
5. H Kelsen, *General Theory of Law and State* (A Wedberg tr., HUP, Cambridge, 1945) 110-111. [↑](#footnote-ref-5)
6. On the role of sequence in ordering different values, see GP Fletcher, ‘The Right and the Reasonable’*,* [98 Harv. L. Rev. 949, 950-54 (1985)](http://ecarswell.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3084&FindType=Y&ReferencePositionType=S&SerialNum=0102054644&ReferencePosition=950), distinguishing between “flat” and “structured” legal thinking, and John Rawls, *Political Liberalism* 259-62 (Columbia UP, New York 1993), discussing unity by appropriate sequence. [↑](#footnote-ref-6)
7. Kant, ‘On a Supposed Right to Lie from Philanthropy’ in I Kant, *Practical Philosophy* (M Gregor trans./ed., Cambridge University Press , 1996) 614-615 (8:429-430). [↑](#footnote-ref-7)
8. B Chapman, ‘Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation*’* in GJ Postema (ed.) *Philosophy and the Law of Torts* (OUP, 2001) 276. 278. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. Ibid., at 277. [↑](#footnote-ref-10)
11. Ibid. at 317. [↑](#footnote-ref-11)
12. Ibid. at 308-10; see GP Fletcher, ‘Fairness and Utility in Tort Law’ 85 Harv.LR 537-556 (1972). [↑](#footnote-ref-12)
13. EJ Weinrib, *The Idea of Private Law* 53-55. [↑](#footnote-ref-13)
14. Chapman, above n. 8, at 309. [↑](#footnote-ref-14)
15. *See* Chapman, above note 8, at 310. [↑](#footnote-ref-15)
16. Kant’s treatment of the excuse of necessity in criminal law (I Kant, *The Metaphysics of Morals*, ed. Mary Gregor (Cambridge University Press, 1996) 28 [6:235-236]) has the requisite sequenced structure. For Kant, punishment embodies a pluralism of functions. Retribution is the function of the particular penalties that respond to particular criminal acts, whereas deterrence fulfills the law’s systemic function of channeling conduct away from what the law proscribes. Both functions are essential. Without the retributive function the law would use the criminal as a means, because the punishment would no longer correspond to the specific criminality of the act. Without the deterrent function punishment would lose its legal character, because the distinguishing feature of law (in contrast to ethics) is that coercion provides the incentive for conforming one’s conduct to what the law requires (ibid. 20-22 [6:218-221]). The special problem posed by situations of necessity is that the prospect of retribution cannot possibly provide an incentive for acting in accordance with the law. The act is excused, in that although the act is criminal, punishing the actor would be systemically pointless. The retributive consequence that the law assigns to criminal wrongdoing and the availability of the excuse belong in the same sequence because both of them deal with aspects of the system of rights, the former with the retributive penalty occasioned by committing the particular crime, the latter with the law’s general function of deterring wrongful conduct. On the one hand, the deterrence function cannot be pushed back to the setting of the penalty without violating the criminal’s right to have penalty correspond solely to the criminality of the act. On the other hand, the fact that the law specifies a penalty is not determinative of what a court should decide; in certain circumstances that penalty may not live up to the deterrence function of rightful coercion, and may therefore fail to be properly juridical. The second stage of the sequence introduces no consideration exogenous to the system of rights. Rather, a fundamental and defining feature of law—that the law’s coercion is an incentive toward lawful conduct—requires special consideration in the unusual circumstances in which the deterrent influence of punishment is unavoidably absent. Thus, in the treatment of excuse the retributive and deterrent functions of punishment remain distinct within a sequence that endows their conjunction with a normative unity.

    [↑](#footnote-ref-16)
17. Kant, above n. 16, at 30 [6:237]. [↑](#footnote-ref-17)
18. Ibid, at 30-31 [6:237-238]. [↑](#footnote-ref-18)
19. Ibid. at 29 [6:236]. [↑](#footnote-ref-19)
20. Above, Chapter 3, section 6. [↑](#footnote-ref-20)
21. Above, Chapter 3, section 5. [↑](#footnote-ref-21)
22. An example is the ancient Roman practice of *nexum*; see A Berger, ‘Encyclopedic Dictionary of Roman Law,’ 43 (New Series) Transactions of the American Philosophical Society 333, 595 (1953). [↑](#footnote-ref-22)
23. *West Coast Hotel v. Parrish,* 300 US 379, 398-399 (1937): “What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition… The exploitation of a class of workers who are in an unequal position with respect to bargaining power, and are thus relatively defenseless against the denial of a living wage, is not only detrimental to their health and wellbeing, but casts a direct burden for their support upon the community. “ [↑](#footnote-ref-23)
24. Kant above n. 16, at 93 [6:316]. [↑](#footnote-ref-24)
25. A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (CUP Cambridge 2015); J Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (CUP Cambridge 2016). [↑](#footnote-ref-25)
26. In Kant’s treatment of the family, a child has an innate right to the care of parents, who are supposed to exercise this care to develop him “so that in the future he can look after himself and make his way in life” (Kant, above n. 16 at 65 [6:281]. [↑](#footnote-ref-26)
27. *Asylum Seekers Case* 1 BvL 10/10 (2012)(Germany); Barak, above n 27, 288-292 (Israel); *Johannesburg v Mazibuko* [2009] 3 All SA 202, para 17 (CA) (South Africa). Article 25 of the Japanese Constitution entrenches “the right to maintain the minimum standards of wholesome and cultured living;” see *Minimum Standards of Wholesome and Cultured Living Cas*e (1948), in W Murphy and J Tanenhaus, *Comparative Constitutional Law: Cases and Commentaries* (New York, St. Martin’s Press 1977) 283-285. [↑](#footnote-ref-27)
28. *Lochner v. State of New York,* 198 US 45, at 65 (1905, Harlan J. dissenting). [↑](#footnote-ref-28)
29. For example, the following passage describes the position of workers before the advent of workmen’s compensation. It succinctly sets out the economic compulsion forcing them into dangerous work, the frequency and seriousness of employment injuries, the inadequacy of tort law to provide redress, the obstacles to litigation, and the difficulty in receiving damages even when damages were awarded:

    Economic necessity compelled people to work long hours under conditions more hazardous than they would freely choose and without any opportunity to provide for their personal safety. The physical conditions, equipment, and work methods of the day often increased the likelihood of accidents and decreased the likelihood of recovery in tort. As many as half the workplace accidents were found to result from hazards of the workplace, not from anyone’s fault. When an employer was at fault, he could erect the common law defences of contributory negligence and voluntary assumption of risk to insulate himself from liability. Both of those defences, though generally available, operated with particular harshness in the workplace, because despite the dangers of the workplace and the work tasks, there were no real alternatives open to the worker. In addition, employers alone could assert the defence of common employment to neutralize claims based on the fault of a worker’s fellow employees. All of these defences operated as absolute bars to recovery… Finally, even successful worker plaintiffs had no assurance of meaningful recovery. Wealthy employers could also exhaust the worker’s resources in a series of appeals. Legal fees and other costs reduced the amount realized from any award. Impecunious employers often could not pay the judgments against them. For slow developing industrial disease claims, workers might find that their employers had gone out of business or disappeared.

    Medwid v. The Queen in the Right of Ontario, (1987) 48 DLR (4th) 272, at 280 (HCJ), affirming the constitutionality of provisions of Ontario’s Workers’ Compensation Act that removed from a certain class of workers the right of action for tort damages against employers other than their own. This paragraph was adopted verbatim from the factum of the Attorney-General of Ontario, which supplies references for the historical assertions it contains. I am grateful to Lorraine Weinrib, who acted as counsel for the Attorney-General of Ontario, for bringing this case to my attention and for making her factum available to me.

    For an account of the labour ideal of independence in the nineteenth century, see JF Witt, ‘Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement’ 114 Harvard LR 690,724-732 (2001). Witt, at 731, cites testimony at the time that previously independent and self-supporting families were “obliged to turn in humiliation and permanent injury to the charitable societies or to relatives and friends.” [↑](#footnote-ref-29)
30. For this supposition see H Dagan, *Property:Values and Institutions* (OUP Oxford 2011) 65-66. [↑](#footnote-ref-30)
31. The idea of independence to which this section has been devoted resembles the idea of non-domination that has been central to contemporary neo-republican thinkers; see, for example, P Pettit, *Just Freedom: A Moral Compass for an Unjust World* (WW Norton, New York and London 2014); Q Skinner, *Liberty Before Liberalism* (Cambridge UP, Cambridge, 1998). This is not surprising, given Kant’s position in the history of republicanism. See Pettit, ‘Two Republican Traditions,’ in A Niederberger and P Schink (editors*), Republican Democracy: Law, Liberty and Politics (*Edinburgh UP 2013) 169. However, the Kantian account I have offered differs from contemporary neo-republicanism in theoretical orientation. Neo-republicanism is consequentialist, with non-domination playing the same role as the principle of utility in utilitarianism; P Pettit*, Republicanism: A Theory of Freedom and Government* (Oxford UP, 1997) 99-102; F Lovett, *A General Theory of Domination and Justice* (Oxford UP, 2010) 159-163. The Kantian account is not consequentialist, but rather the working out of the significance of the juridical relations that constitute law as a distinctive normative phenomenon. Similarly, the neo-republicans start from a conception of freedom in which non-domination contrasts with non-interference. The Kantian account starts from the very idea of coherent juridical relations, which it then elucidates through a sequenced argument that includes both non-interference (in private law) and non-domination (in public law). [↑](#footnote-ref-31)
32. Above, Chapter 1, section 6. [↑](#footnote-ref-32)
33. Above, Chapter 4, section 2. [↑](#footnote-ref-33)
34. Above, Chapter One, section 2. [↑](#footnote-ref-34)
35. Kant, above n. 7. [↑](#footnote-ref-35)
36. *Social Minimum Case (Hartz IV*), 1 BvL 1/09 para. 134 (German Constitutional Court). [↑](#footnote-ref-36)
37. Ibid. para. 133. See also Barak, above n. 25, 289: “The minimum needed to live with dignity … cannot be determined by a medical measurement. It is the product of society’s view regarding the minimum a person needs in order to express her personality in the framework of the society in which she lives.” [↑](#footnote-ref-37)
38. As asserted in the elegant essay by John Goldberg, ‘Unloved: Tort in the Modern Legal Academy’ 55 Vanderbilt LR 1501, 1515-1517 (2002). [↑](#footnote-ref-38)
39. This sequential ordering resembles the approach to the police power (though without its constitutional significance) present in Justice Harlan’s dissenting judgment in *Lochner v People of the State of New York*, 198 US 45 (1905); see Lorraine Weinrib, ‘The Postwar Paradigm and American Exceptionalism,’ in Sujit Choudhry (ed.), *The Migration of Consitutional Ideas* (Cambridge UP, Cambridge 2006) 84, 103-110 [↑](#footnote-ref-39)