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CORRECTIVE JUSTICE FROM ARISTOTLE TO SECOND ORDER LIABILITY: WHO SHOULD PAY WHEN THE CULPABLE CANNOT?

KATHRYN R. HEIDT*

INTRODUCTION

Many current analyses of tort law assert corrective justice as the basis for some forms of tort liability.¹ Arguably, corrective justice is one reason society requires the negligent automobile driver or the user of a hazardous substance (e.g., dynamite) to compensate a victim. However, several questions concerning corrective justice remain unresolved while others have not been considered. First, there is no agreement as to the amount of compensation corrective justice requires the injurer to pay the victim. The goal of deterring certain future conduct, usually seen as part of the economic analysis of law, is, however, a necessary corollary of corrective justice, and deterrence requires the injurer to fully compensate the victim.² Second, corrective justice and the economic analysis of law also coincide in preferring the early correction of a problem over a later, more costly correction.

Third, examinations of corrective justice and its relationship to tort law have tended to focus on "first order" liability, the liability of those who most directly and wrongfully caused an injury.³ But when those cannot pay,

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1. See Coleman, *The Morality of Strict Liability*, 18 WM. & MARY L. REV. 259 (1986); Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1981); Coleman, *Moral Theories of Torts: Their Scope and Limits, Part II*, 2 L. & PHIL. 5 (1983) [hereinafter *Moral Theories of Torts*]; Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1964); Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983). For additional reading on the subject, see generally Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979); Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981) [hereinafter *The Concept of Corrective Justice*]; Weinrib, *Liberty, Community, and Corrective Justice*, 1 CANADIAN J. OF L. AND JURIS. 3 (1988).

2. There are several ways in which conduct can be deterred. For a discussion of deterrence in the context of corrective justice and efficiency, see *infra* text accompanying notes 118-25.

3. See *supra* articles cited in note 1; R. EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW (1980) [hereinafter *THEORY OF STRICT LIABILITY*]; Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHL.-KENT L. REV. 451 (1987); Weinrib, *Liberty, Community, and Corrective Justice*, 1 CANADIAN J. OF L. AND JURIS. 3 (1988); Note, *Aristotle, Justice and Enterprise Liability in the Law of Torts*, 34 U.

who, if anyone, should compensate the victims? The question of "second order" liability is particularly important when the harm is so extraordinary that society will not allow the loss to remain on the victims but will provide for compensation from one source or another. Although the topic of victim compensation has been addressed from a variety of perspectives,⁴ corrective justice has not been used to analyze questions concerning liability beyond the first order.

After examining the origin and meaning of corrective justice, I examine the relationship between corrective justice and liability in the contemporary context of injury resulting from improper toxic waste disposal. Persons and entities directly responsible for the harms caused by toxic waste disposal sometimes become insolvent and financially unable to cleanup the site or pay compensation to victims. Due to the potential for extraordinary harm and the possibility that the responsible party will not have the ability to pay compensation, the toxic waste situation presents us with a good context in which to explore the concepts of appropriate victim compensation and "second order" liability.

Current statutes place the responsibility for a toxic waste cleanup on those who intentionally or negligently cause the illegal disposal—the enterprise responsible for the production, handling or disposal of the waste.⁵ In addition, some statutes, as interpreted by the courts, impose liability on the officers, directors, and shareholders of the responsible enterprise.⁶ Once the resources of that group are exhausted, the remaining cost of cleanup must fall elsewhere: either on the victims, society in general, or some other group. Corrective justice suggests two results. First, extraordinary losses should not remain on the victims. Second, before society has to bear the costs, some of the cost should fall on the secured creditors⁷ as well as on the other creditors of the responsible enterprise.

TORONTO FAC. L. REV. 84 (1976).

Further, current writers tend to focus on the relatively simple case involving one injurer and one injured, or an ordinary tort situation such as an auto accident, not a situation having the potential to cause great harm. An exception is Note, *Aristotle, Justice and Enterprise Liability in the Law of Torts*, *supra*, which deals with toxic waste dumping. It, however, only deals with the "first order" liability question.

4. See, e.g., G. CALEBRESI, *THE COSTS OF ACCIDENTS* 46-94 (1970) (from perspective of limiting number of accidents to some ideal level); Posner, *ECONOMIC ANALYSIS OF LAW* 187-90 (3d ed. 1986) (from economic perspective); Coleman, *The Morality of Strict Liability*, *supra* note 1.

5. I often refer to such an enterprise or person as the "responsible enterprise" or "dumper."

6. See, e.g., 42 U.S.C. §§ 9604(a)-(b), 9607(a), 9601(20)(A)-(D) and (9) (West 1983 & Supp. 1989); *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1985). For a summary of the liability provisions of the federal laws, see Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under C.E.R.C.L.A.*, *Wis. L. Rev.* 139, 141-44 (1988).

7. Several reasons exist for focusing on secured creditors rather than on creditors in general. First, a large part of the assets of an insolvent dumper likely are to be secured. To the extent unsecured assets do exist, they generally will be minimal compared with the unsecured

In a small number of cases, the secured creditor may find itself among those liable in the first order of responsibility—such as when it becomes an “owner or operator” of a toxic waste site.⁸ In most cases, however, secured creditor liability, if any, will be second order and in the toxic waste context, corrective justice justifies second order secured creditor liability. At the very least, corrective justice requires the secured creditor to relinquish any gains received resulting from the wrongful activity of the dumper, even though the secured creditor may not have acted “wrongfully.”⁹

Although corrective justice requires the secured creditor to give up the gains related to any improper dumping, this solution may be impossible to effectuate for practical reasons. Therefore, a compromise solution is needed. The liability of the secured creditor generally should be limited to relinquishing the creditor's priority in collateral to the state that has paid or will pay for the cleanup. As applied to the case at hand, this means that when a toxic waste dumper is insolvent, the limited assets of the dumper should be used first to clean up the site, even if the assets were pledged previously as collateral for a loan.¹⁰

I. APPLICATION AND SCOPE OF CORRECTIVE JUSTICE

In spite of the recent interest in corrective justice, its meaning and mode of operation are not the subject of universal agreement.¹¹ Corrective justice was explored some two thousand years ago by Aristotle¹² and traditionally

claims. If the state is given priority in the assets, the recovery of the unsecured creditors simply will be reduced from an already very low figure to zero. Second, it is the very nature of unsecured credit that others have or will be given priority over the unsecured creditors, unsecured creditors are compensated for this possibility via appropriate interest rates. Finally, any reasons for granting the state priority over secured creditors will apply with even greater force to unsecured creditors.

8. 42 U.S.C. §§ 9601(20)(A)(ii), 9607(a)(1)-(2). See, e.g., *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988); *U.S. v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *U.S. v. Mirabel*, 15 Env'tl. L. Rep. 209994 (E.D. Pa. Sept. 4, 1985). See also *U.S. v. Fleet Factors Corp.*, 724 F. Supp. 955 (S.D. Ga. 1988). For a current discussion of the concept of “owner or operator,” see Gillon, *Lender Liability Under C.E.R.C.L.A.: The Impact of Fleet Factors*, 3 TOXICS L. REP. 1177 (1988); Comment, *supra* note 6.

9. Two concepts related to corrective justice, equity and distributive justice, supply additional reasons to hold the secured creditor responsible to some extent. See *infra* note 90.

10. For a discussion of the fifth amendment implications of such a reordering of priorities, see Heidt, *Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in Toxic Waste*, 40 RUTGERS L. REV. 819 (1988). In that article I concluded that it is economically efficient for the state to have the first priority to a dumper's assets to pay for cleanup of a site contaminated with toxic waste.

11. See, e.g., Weinrib, *Aristotle's Forms of Justice*, in JUSTICE, LAW AND METHOD IN PLATO AND ARISTOTLE 133 (1985); Waluchov, *Professor Weinrib on Corrective Justice*, in JUSTICE, LAW AND METHOD IN PLATO AND ARISTOTLE 153 (1985); *supra* note 1 (citing more articles on the topic).

12. ARISTOTLE, *NICOMACHEAN ETHICS*, Book V (D. Ross Trans. 1963, 1980) [hereinafter ARISTOTLE]. I refer to five translations of the *NICOMACHEAN ETHICS*: the D. Ross 1963 edition;

is considered to apply when one person injures another.¹³ The function of corrective justice is to restore the parties, as nearly as possible, to the positions they held before the injury.¹⁴

Corrective justice sometimes is used loosely and without definition, causing confusion about its meaning and operation.¹⁵ Aristotle presents the first discussion of the concept and his discussion is the basis for the modern usage of the term. Because Aristotle's scheme accurately reflects the way justice has operated and still operates in most western societies since his time, Aristotle's scheme provides a good base from which to explore the concept of corrective justice and its application.

For Aristotle, two broad categories of justice existed:¹⁶ general justice and particular justice. General justice is the "whole of virtue."¹⁷ Particular justice concerns the distribution of "goods"¹⁸ to society's members.¹⁹ Par-

the editor's 1980 revision, which is almost identical to the former; the translation by M. Ostwald (1962); the translation by H. Rackham (1934), which also has the original Greek text; and the translation by J. Thomson (1976). The five are referred to as Ross 1963, Ross 1980, Ostwald, Rackham, and Thomson respectively.

13. See ARISTOTLE, *supra* note 12, at 1132a2 to 9 (D. Ross 1963). According to Joachim, the Greek term *diorthotikon* means "to redress"; to put right what is wrong." Joachim suggests the example of editing a text to correct an error made in copying. H. JOACHIM, ARISTOTLE, THE NICOMACHEAN ETHICS 136 (D. Rees ed. 1951).

14. See ARISTOTLE, *supra* note 12, at 1131b31-32, 1132a1, 1132a6 to a9, 1132a24 to 30, 1132b12 to 14, 1132b20 and 25 (D. Ross 1963).

15. For one criticism of the failure of some modern writers to define corrective justice as they use the term, see Posner, *The Concept of Corrective Justice*, *supra* note 1, at 194.

16. Aristotle's "book" on justice is one of three books that appear in both the Nicomachean and the Eudemian Ethics and there is some question as to which Ethics they originally belonged. The weight of authority indicates that the three books probably were part of the Nicomachean Ethics. See D. ROSS, ARISTOTLE 15 (1971). In a recent study using an extensive computer-based statistical analysis of vocabulary use as well as more "traditional" analyses of such matters as style and cross-references, Professor Kenny concludes that the work on justice originally was part of the Eudemian Ethics. A. KENNY, THE ARISTOTELIAN ETHICS 50-214 (1978). Kenny also questions whether the Eudemian Ethics predated the Nicomachean Ethics, as most Aristotle scholars believed. *Id.* at 215-16, 220-39.

17. ARISTOTLE, *supra* note 12, at 1130b17 to 18 (D. Ross 1963, 1980). General justice is concerned with "all the objects with which the good man is concerned." *Id.* at 1130b4 to 5.

18. To Aristotle, goods included not only money but also such items as honor and safety. ARISTOTLE, *supra* note 12, at 1130b1 to 4 (D. Ross 1963, 1980). "Goods" were those things "with which prosperity and adversity have to do." *Id.* at 1129b1 to 3. Specifically, he refers to *meriston agathon*, i.e., "divisible goods," which in Athenian society referred not only to material goods but also to honor, see *id.* 1130b32 to 35, 1130b30 to 32, and security and anything that can be divided among those who have a share in the political system. See *id.* at 1131b27 to 28.

On the surface, the application of corrective justice to modern day injuries appears to involve primarily the distribution of wealth to society's members. The intangible goods such as honor and safety are not absent, however. Winning a lawsuit against a tortfeasor brings not only money but also a vindication of one's honor and also protects the safety of others in the future by establishing the rights and duties to be enforced or applied in later cases.

19. Joachim believed general justice was concerned with wrongs that "rendered the agent liable to public penal law," JOACHIM, *supra* note 13, at 130-33, while particular justice was concerned with wrongs that are the subject of private lawsuits. *Id.* at 133-34. However, this

ticular justice applies to assure that one has one's rightful share of goods; no more, no less. Importantly, this means not only the appropriate share of the good things but also of the bad.²⁰ Aristotle further divides particular justice into distributive justice and corrective justice.²¹ Distributive justice applies to divide goods among the members of society to assure a continuing appropriate distribution. Corrective justice applies when one acquires more (or less) than one's rightful share as a result of one person causing injury to another person. The two concepts are bound up with one another, and one needs to focus briefly on distributive justice to fully understand corrective justice.

Distributive justice concerns how society distributes goods or wealth to its members.²² The aim of distributive justice is to establish or provide a method of establishing a proportion according to which the members of society will share so that the most deserving will be entitled to the most, and the least deserving to the least.²³ Persons share according to criteria society considers relevant. For example, Aristotle suggests that merit should be the basis for distribution.²⁴ A socialist society might prefer need. Current western society tends to use both merit and need as well as other criteria in determining the distribution of wealth and goods. Once the proportion is established, the "just" is the distribution according to the established proportion, that is, the just is "the proportional."²⁵

view has been criticized as being without foundation in Aristotle and inconsistent with Aristotle's scheme. Harrison, *Aristotle's Nicomachean Ethics, Book V, and the Law of Athens*, 77 J. HELLENIC STUD. 42, 43 (1957); W. HARDIE, *ARISTOTLE'S ETHICAL THEORY* 186 (1968).

20. ARISTOTLE, *supra* note 12, at 1129b9 to 11 (D. Ross 1963, 1980 & Ostwald).

21. *Id.* at 1130b30 to 1131a1 (D. Ross 1963, 1980 & Ostwald). The latter is also translated as "rectificatory justice."

22. *Id.* at 1130b30 to 34 (D. Ross 1963, 1980 & Ostwald).

23. *Id.* at 1131a321 to 27 and 1131a30 to 33 (Ostwald, Thomson & D. Ross 1963, 1980). In Aristotle's scheme, distributive justice served to provide not only for a just distribution *ab initio* but also operated in an ongoing manner to insure that newly introduced goods be distributed in a just manner. In Aristotle's time, distribution according to the established proportion apparently could be enforced by a member of society in a court of law. H. JOACHIM, *supra* note 13, at 138. Indeed, the Greek term used by Aristotle for "justice," both in the context of distributive justice and corrective justice, *dikaion*, also means "right," such as a right that can be enforced in a court of law. *See id.* at 138-40. Joachim believed that the rights mentioned by Aristotle corresponded to current Athenian legal rights, but Joachim's view has been criticized. Harrison believed Aristotle's interest in the legal system was only in passing. Harrison, *supra* note 19, at 43, 46. Harrison, however, recognized that Aristotle would have had some sense of the legal system. *Id.* at 46. *See also* Hardie, *supra* note 19, at 190-91.

24. ARISTOTLE, *supra* note 12, at 1131a24 to 30 (D. Ross 1963, 1980). Aristotle recognizes that opinions may differ with respect to the meaning and application of merit. *Id.*

25. Aristotle uses the device of mathematical proportion to illustrate his points about distributive justice and corrective justice. He likens the operation of distributive justice to the operation of a geometric proportion. ARISTOTLE, *supra* note 12, at 1131b12 to 15 (D. Ross 1963, 1980 & Ostwald). For example, the relative ratios of two individuals' intrinsic worth should equal the relative ratio of the goods the individuals each possess. Thus, by distributive justice the "greater person" would have the greater amount of goods and proportionally so.

Corrective justice protects the established distribution. Once goods or wealth are distributed to members of a society, social stability requires that the distribution be protected from untoward changes.²⁶ Without the ability to so restore the distribution, the established distribution and its attendant rights would have little value.²⁷ Corrective justice fills this role.²⁸ Corrective

Id. at 1131b6 to 15. Although the mechanics of the geometric proportion appear easy at first, the usefulness of the concept to the field of distributive justice is limited because the precise quantification of merit in society seems an impossible task.

In the area of corrective justice, Aristotle presents us with another mathematical analogy: the arithmetic, rather than geometric, proportion. *Id.* at 1132a29 to 30. Arithmetic proportion, in all but the simplest case, is terribly obscure. In the simple case, when Peter takes \$100 from Ruth, Peter has a gain of \$100 and Ruth has a loss of \$100 (assuming no other damages occurred to Ruth as a result). An arithmetic proportion requires we simply subtract from one and add to the other side an equal amount. Thus corrective justice means we take \$100 from Peter and give it to Ruth. This is apparently what Aristotle meant by "arithmetic proportion" in contrast to "geometric proportion"—*i.e.*, a "proportion" based on an addition-subtraction relation rather than one based on multiplication and division. Beyond the simple case, "[t]he precise interpretation of Aristotle's mathematical scheme is notoriously difficult and I do not pretend to understand it fully. . . ." Harrison, *supra* note 19, at 45. *But see* Weinrib, *Aristotle's Forms of Justice*, *supra* note 11, at 137 (appearing to understand the mathematical analogies because in his view gains always equal losses). For a further discussion of the problems presented when gains do not equal losses, see *infra* notes 91-93, 113-27 and accompanying text.

26. As far as corrective justice alone is concerned, the standards used in establishing the initial distribution are irrelevant. For a recent look at the two forms of justice in their legal setting, see Weinrib, *Legal Formalism: On The Immanent Rationality of Law*, 97 YALE L.J. 949, 977-85 (1988). For comments by a legal writer on a philosopher's (Nozick) views of distributive justice, see Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1294-97 (1989).

27. For example, if Ann takes Bob's watch and the legal system does not require Ann to return it, Bob's "right" to ownership and possession have little value. In this light, corrective justice is a necessary element in the legal system of any society recognizing rights of ownership or possession. Of course, what constitutes an "untoward" change to the proportional distribution will differ from society to society.

28. Professor Gordley reaches the same conclusion concerning the role of corrective justice. Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1589 (1981). The view that corrective justice protects the established distribution has been criticized recently. See Bensen, *Abstract Right and The Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1094 n.168 (1989). Specifically, Professor Bensen sees this view of corrective justice as indistinct from distributive justice because such a view "simply enshrines whatever contingently happens to be the preexisting set of circumstances." *Id.* Although corrective justice may use the established distribution as a starting point, corrective justice is a separate form of justice because it provides a basis upon which parties can recover from one another without resorting to the perhaps cumbersome distributive process. For example, when Ann takes Bob's watch, Bob could resort to the distributive process and prove that Ann and Bob do not have their appropriate share of resources under the distributive standard. Ann has more, Bob less. Bob may be able to recover from Ann through this process, but the process is likely to be cumbersome because Bob must put on elaborate proof regarding the appropriate share of wealth that each of the litigants is to have at a particular moment in the society. Corrective justice provides an alternative method of redress: Bob proves Ann injured him and that he suffered a loss as a result of the injury. Ann should be made to rectify the injury to return the two to the positions they held before

justice operates when a disturbance "violates the proportion"²⁹ established by distributive justice. Ideally the goal of corrective justice is to restore the actual *status quo ante* or, if that is not possible, the *proportionality* of the *status quo ante*.

In a broad sense, both distributive justice and corrective justice apply to maintain the proper distribution of goods in society. However, a clear distinction can be made between the types of disturbances to which corrective justice and distributive justice apply. Factors from outside or inside society can disturb the established distribution. Distributive justice applies when someone or something "outside" the society disturbs the status quo, while corrective justice applies when someone or something "inside" the society disturbs the status quo. For example, if a natural phenomenon or the act of a neighboring society adds goods to a society, the goods will be divided according to distributive justice in such a way as to maintain the established proportional distributions of wealth.³⁰

If a member of the society disturbs the distribution of wealth, corrective justice applies. To use Aristotle's terms, corrective justice applies to "private transactions."³¹ Aristotle recognizes that a "transaction" may be voluntary or involuntary.³² A voluntary transaction is one to which both parties consent (a contract, for example), while an involuntary transaction is one in which one party does not consent (an assault, for example).³³ This distinction between voluntary and involuntary transactions has been analogized to the modern distinction between contracts and torts.³⁴ My present

the injury, *i.e.*, to the appropriate distribution. That is, corrective justice provides a simpler and less costly method than the distributive process for restoring the status quo when an injury occurs.

29. ARISTOTLE, *supra* note 12, at 1131b31 to 34 (D. Ross 1963, 1980 & Ostwald). For a discussion of the mathematical proportions used by Aristotle regarding distributive justice and corrective justice, see *supra* note 25.

30. This idea applies equally to what might be called "sub-societies." For example, in a partnership, which is a smaller segment of a larger society, the division of assets is controlled by distributive justice. Here, the division or proportion would be established according to the contribution of the partners in Aristotle's view of Athens. See ARISTOTLE, *supra* note 12, at 1131b28 to 31 (D. Ross 1963, 1980).

31. *Id.* at 1130b35 to 1131a9, 1131b25 to 26 (D. Ross 1963, 1980 & Ostwald).

32. *Id.* at 1131a1 to 2 (D. Ross 1963, 1980 & Ostwald).

33. *Id.* at 1131a1 to 9 (D. Ross 1963, 1980 & Ostwald).

34. Lee, *The Legal Background of Two Passages in The Nicomachean Ethics*, 31 CLASSICAL QUART. 129, 130 (1937). Joachim states that a transaction is voluntary if "the relation between the parties arises with the consent of both parties." H. JOACHIM, *supra* note 13, at 137. Generally one must abide by the terms of one's bargain or contract. See ARISTOTLE, *supra* note 12, at 1164b12 to 15 (D. Ross 1963, 1980); see also *id.* at 1132b15-16; H. JOACHIM, *supra* note 13, at 137. Further, corrective justice requires that one party *injure* another, and, thus, it is difficult to understand how Aristotle would apply corrective justice to a voluntary transaction to which both parties have consented. Most authorities resolve the problem by saying that corrective justice applies when the contract is breached, that is, when one person fails to abide by the voluntary (consensual) transaction. H. JOACHIM, *supra* note 13, at 138. Hardie, *supra* note 19, at 194. Lee, *supra*, at 131. A few, resolve the problem by saying that a breach of contract gives rise to a second, involuntary (nonconsensual) transaction to which

focus is on involuntary transactions because there is no underlying consensual transaction between the injured on the one hand, and the responsible enterprise or other parties connected with it on the other.

In applying corrective justice after a disturbance in the status quo, Aristotle notes that one should look only to the loss or gain and the cause of the loss or gain, not to the social status of the parties. Aristotle says: "The law looks only at the nature of the damage, treating the parties as equal, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other sustained damage."³⁵ Aristotle's main point apparently is that the status one may enjoy for the purposes of distributive justice does not apply when corrective justice operates and that, instead, both parties are treated as equals. But the apparent secondary point—that the law applies when one has injured and another been injured—is the basis of corrective justice. The injury by one to another gives rise to the right of rectification or correction. However, the operation of this concept by no means is clear. For example, must a "wrongful" act cause the injury in order to require a correction? If so, what is the meaning of "wrongful"? Must the victim's compensation come from the injurer? How much compensation should the victim receive? How much should the injurer pay?

Aristotle's theory can be separated into three parts:³⁶

1. Someone must have been injured, meaning someone must have suffered a loss.³⁷
2. The loss must have been caused by another.³⁸
3. Rectification must be accomplished by restoring the parties to

corrective justice applies. J. STEWART, NOTES ON THE NICOMACHEAN ETHICS 431-32 (1892). This latter view has been criticized by those who view breach of contract as a voluntary ("consensual") transaction to which corrective justice applies. See Hardie, *supra* note 19, at 194. Both views ultimately reach the same result.

35. ARISTOTLE, *supra* note 12, at 1132a2 to 7 (H. Rackham 1934). The Ostwald translation is similar. The Ross translation is: "[t]he law looks only to the distinctive character of the injury, and treats the parties as equals, if one is in the wrong and the other is being wronged, and if one inflicted the injury and the other has received it." 1132a2 to 7 (D. Ross 1963, 1980). For a further discussion of this passage, see *infra* notes 78-80 and accompanying text.

36. These components should not be confused with the three "points" Judge Posner has noted about corrective justice. See Posner, *The Concept of Corrective Justice*, *supra* note 1, at 190-91. Judge Posner's three points are not the components of corrective justice. Rather, the points are items that he feels have been overlooked in discussing Aristotle's corrective justice and which Judge Posner uses in discussing various theories of corrective justice as applied to tort law.

37. ARISTOTLE, *supra* note 12, at 1132a2 to 10 (D. Ross 1963, 1980 & Ostwald). Presumably, if someone had a wrongful gain from an involuntary transaction and there were no corresponding loss, corrective justice, in Aristotle's view, would not apply. For example, one might drive through a red light without injuring another. The driver would not have to pay anyone compensation or give up her "gain." Whether this should remain the case under all modern applications of corrective justice is a topic left for another day.

38. In Aristotle's terms, the loss arises from a "transaction" with another. See *supra* notes 31-34 and accompanying text.

the position the parties occupied prior to the transaction. As Aristotle notes, the "just" is "having an equal amount before and after the transaction."³⁹

These three components can be referred to, respectively, as those concerning the "victims," the "injurers," and "compensation."

The injury bringing corrective justice into operation results in a change to the existing distribution of goods, a change in the status quo. The person causing the injury has a "gain,"⁴⁰ while the injured person has a "loss."⁴¹ Although Aristotle recognizes that the terms "gain" and "loss" are inexact when applied to certain types of harms, for example, assault,⁴² Aristotle states that the terms are appropriate terms "when a measured value is assigned to the suffering."⁴³

In the following section the victims and then the injurers are identified. In the final section I look at the question of rectification and consider both the appropriate victim compensation and the amount that the first and second order injurers should contribute to that compensation.

II. CORRECTIVE JUSTICE APPLIED

A. The Victims

Someone must suffer an injury or loss before corrective justice applies. In the toxic waste context, one might argue that no "injury" occurs until someone suffers actual physical damage from the disposal of the toxic waste. Toxic waste dumping, however, causes injury to two categories of victims long before the actual physical damage is assessed: to those who live near the site and to the public in general. First, those who live near the site suffer an injury when a person improperly disposes of waste because the effect on the property values will be almost immediate. The effect will be felt as soon as those concerned (buyers, sellers, tenants, and landlords) have the relevant information about the condition of the site. Second, some living near a site are injured when the toxic waste is dumped because the "right" to an environment capable of supporting life is violated.⁴⁴ Third,

39. ARISTOTLE, *supra* note 12, at 1132b19 to 20 (D. Ross 1963, 1980 & Ostwald). See also *id.* at 1132a7 & 25.

40. *Id.* at 1132a10 to 11 (D. Ross 1963, 1980).

41. *Id.* at 1132a11 to 12.

42. *Id.* at 1132a10 to 15 (D. Ross 1963, 1980 & Ostwald). These translations refer to one who "inflicts a wound."

43. *Id.* at 1132a13 to 15 (Ostwald). The Ross translation is: "at all events when the suffering has been estimated, the one is called loss and the other gain." *Id.* at 1132a13 to 15 (D. Ross 1963, 1980).

44. Not all would agree an absolute right to a clean environment exists, but a strong case can be made that we all have the right to an environment (air, water and land) that will not kill or substantially harm us. Further, in some states there is a right to a clean environment recognized by constitutional provision. See, e.g., PA. CONST. art. 1, § 27 (granting to people right to "clean air, pure water, and to the preservation on the natural, scenic, historic and aesthetic values of the environment"). See also ILL. CONST. art. 11, § 1. Professor Epstein believes that one's "property rights" are protected by corrective justice. Epstein, *Nuisance Law*, *supra* note 1, at 50-53. He includes nuisance within that group of injuries. *Id.*

when a dumper disposes of toxic waste improperly, the dumper has set in motion a series of events that are virtually certain to cause personal, physical injury in the future. Thus, the dumping already is a disturbance in the status quo due to the likelihood of harm.

When part of the environment is destroyed or damaged the general public also suffers a loss.⁴⁵ Arguably, a pollution free environment is a right,⁴⁶ the infringement of which is an "injury." At a minimum, destroying the livability of a portion of the environment increases the strain on the remaining living space and its inhabitants, and thus, causes injury to other inhabitants of the society.

B. *The Injurers and Gainers*

Two separate remaining questions are: who should be made to compensate the victims and how much must each compensator pay. The classes of possible compensators can be divided into four main groups:⁴⁷

1. Those who directly and knowingly made the decision to dump the toxic waste in direct violation of existing environmental protection laws. This group includes the dumper itself. This group also includes those individuals who made the decision to dump improperly or who knowingly carried out the dumping, for example, certain officers and directors of the dumper.
2. Those who negligently facilitated the dumping. This group can include a broad range of persons depending on their relationships and dealings with the dumper. Whether there has been negligence will depend on the current standards of negligence law and the facts of each case.
3. Those who facilitated the dumping but whose conduct cannot be said to be negligent under current standards. This group includes

45. Toxic waste pollution creates hazards and has effects that will last for generations to come. When the state allows a person to own property, the state does not allow the "owner" to so pollute the land with toxins that will cause the land and its surroundings to be uninhabitable and dangerous for generations to come. This right to be free from dangerous environmental conditions is arguably within the "public trust" doctrine if extended to environmental concerns as advocated by Professor Sax. See Heidt, *supra* note 10, at 860; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). As such, the state must enforce the rights of the public to a clean environment. *Id.*

46. Even if a person is not directly affected by a polluted site, people generally still desire a pollution free world. This feeling can be analogized to those who live in a city who garner satisfaction from the very fact that national parks exist even though they never plan to visit one. Such a person might oppose the sale of all national parks to private industry and consider herself "injured" if a national park actually were sold. For a wide range of ideas and opinions on the "appreciation" of nature see generally the articles contained in *People, Penguins and Trees* (D. v.d. Veer & C. Pierce Eds. (1986)).

47. This list is not intended to be exhaustive. Some of the categories could be broken down into smaller categories. For example, the last category, society in general, could be subdivided into "all corporations" or "all producers of toxic waste."

the shareholders and creditors who lent money to the dumpers but whose conduct does not rise to the level of negligence. This group also includes the consumers who purchased the product and created the demand for the product but whose actions fall short of negligence.

4. Everyone in a society.

1. First Order Liability—Groups 1 and 2

Those who knowingly, directly, and wrongfully caused the harm (Group 1) are squarely within Aristotle's concept of corrective justice and can be made to pay compensation. This still seems correct. Those who negligently caused the harm (Group 2) also can be required to pay some compensation. Today, negligent conduct is "culpable" conduct within the meaning of corrective justice.⁴⁸ Whether Aristotle himself considered negligent acts as subject to corrective justice is not clear.⁴⁹ The idea of negligent conduct was not a concept that was well developed in Athens nor was it discussed by Aristotle in any length. However, Aristotle does recognize some culpability for certain conduct we could classify today as negligent. For example, he would hold someone responsible who, by our standards, negligently failed to obtain information that could have prevented the loss.⁵⁰ Aristotle discusses certain categories of acts, some of which are similar to our concept of negligence,⁵¹ indicating that the actor is responsible for negligent acts.⁵² Thus, the modern day concept of negligence is within the types of acts for which even Aristotle might hold a person responsible.

No court has found that a creditor was "negligent" in lending to a toxic waste dumper, and it is beyond the goal of this article to set out what the criteria of such negligence might be. However, there is an increasing trend, albeit slight, to impose liability on lenders in certain transactions.⁵³

48. Several writers debate the precise relationship between corrective justice and negligence but all seem to assume, expressly or implicitly, that negligent conduct should be a type of wrong or unjust act within the meaning of corrective justice. See Posner, *supra* note 1, at 201-02; Coleman, *Corrective Justice and Wrongful Gain*, *supra* note 1, at 424; Coleman, *Moral Theories of Torts*, *supra* note 1, at 8-11; Weinrib, *supra* note 11, at 10.

49. Some have believed Aristotle considered only deliberate wrongs to be within the concept of corrective justice, (see, e.g., Posner, *supra* note 1, at 201-02 for his earlier ideas on this), but this is less than clear. Aristotle distinguishes between unjust acts and unjust persons. In Aristotle's view, the just/unjust person does not necessarily coincide with the just/unjust act. So, for example, a person may commit an unjust act, but if he does so unknowingly or without deliberation, his integrity as a "just" person remains intact. However, this does not mean that he is not responsible for that unjust act. Aristotle says that "some involuntary acts are pardonable while others are not." ARISTOTLE, *supra* note 12, at 1136A5 (Ostwald 1962). One's culpability for one's actions and one's integrity are two separate things. *Id.* at 1135b11 to 1136a9 (D. Ross 1963, 1980).

50. *Id.* at 1114a1 to 3.

51. See *id.* at 1135b11 to 25. See also *id.* at 1113b30 to 1114a3.

52. *Id.*

53. Recent lender liability suits are an example. However, these suits generally involve liability to the borrower, not to a third party.

Courts are finding duties on the part of lenders where none existed by contract, statute, or former case law. Although no court has been willing to impose specific duties with respect to lending to the toxic waste industry, given the increasing awareness and concern for our ecosphere and the increasing jurisprudence of lender liability, one cannot overlook the possibility that future courts may expand and impose duties and find corresponding negligence when those duties are breached.

One who is responsible as a result of an intentional or negligent act (that is, one within the first order) generally is made to pay some compensation. The discussion of the amount of the compensation that corrective justice requires is postponed until compensation is discussed in detail.⁵⁴

2. Second Order Liability: The Secured Creditor

Once beyond the groups that can be said to have acted intentionally or negligently in the dumping and ensuing damage, one enters the realm of what our legal system sometimes calls "strict liability." Some writers have argued that corrective justice might not apply to determine when someone should be held strictly liable because corrective justice requires a "wrongful" act,⁵⁵ the type of act often missing when strict liability is imposed. Yet Aristotle himself does not seem to require that an act be "wrongful" for corrective justice to apply.⁵⁶ Moreover, the function of corrective justice itself is the restoration of the *status quo ante* (or its proportionality) when the *status quo ante* is disturbed in a "transaction" between parties.⁵⁷ With that goal in mind, using corrective justice to correct any injury or distortion caused by one person or group to another from within the society seems appropriate whether "wrongful" or not. Finally, although the persons in the second order may not have acted wrongfully, there has been a wrongful

54. See *infra* text accompanying notes 106-27.

55. See, e.g., Coleman, *Corrective Justice and Wrongful Gain*, *supra* note 1, at 424. Again, it is the often quoted passage that causes the difficulty: "whether one has done and the other suffered injustice, whether one inflicted and the other sustained damage." ARISTOTLE, *supra* note 12, at 1132a2 to 7 (Rackham). It is questionable whether a "wrongful" act is required before corrective justice comes into play. See *infra* text accompanying notes 78-81. In addition, Aristotle may have meant a legal wrong or injustice, meaning an act that gives rise to a cause of action which can be maintained in a court of law, not a moral wrong. Thus, it is possible to have a "wrongful" act within the meaning of Aristotle, although we do not have "fault" within the meaning of a negligent or intentional act.

Professor Coleman's view is that corrective justice requires either a wrongful loss or a wrongful gain, neither of which require a wrongful act. (The example that he uses is a person who justifiably uses and damages another's property in an emergency). This view distinguishes a moral wrong from a legal wrong. However, Aristotle arguably meant a legal wrong, not necessarily a moral wrong. One who innocently uses and damages another's property may have committed a legal wrong, although not a moral wrong, to which corrective justice would apply. Judge Posner recognizes the apparent conflict between strict liability and corrective justice but does not resolve it. Posner, *supra* note 1, at 205.

56. See *infra* notes 78-81 and accompanying text.

57. See *supra* notes 31-33 and accompanying text.

act here—the dumping in violation of existing environmental laws. Corrective justice should apply to remedy this act even if the remedy may require compensation from one other than the wrongdoer.

Two types of arguments require some of the cost of cleanup to be placed on the secured creditor. One argument is based on the wrongdoing of the dumper. I call this argument “indirect liability” because the secured creditor’s exposure is based upon the dumper’s wrongdoing. The second argument is based on the link between the secured creditor and the dumping, and thus, the liability is more direct.

Before exploring these ideas, I want to clarify that what is at issue here is the compensation of victims in a rather extraordinary case. The point is not that in every case when a person has suffered, someone must pay. However, one must shift the focus somewhat, and perhaps the rules of liability as well, when confronted with an extraordinary harm or the potential for extraordinary harm. An extraordinary harm is one that, although rare, can alter substantially the existing proportionality or social fabric. An extraordinary harm can cause great disaffection among members of society. It now is well known that toxic waste can cause severe physical injury and death and further that a site polluted with toxic waste can continue to cause serious illness and injury for decades or even centuries. In the Love Canal case, for example, a contaminated site caused substantial and truly horrible injury.⁵⁸ Greek law recognized some extraordinary harms, although not in the context of corrective justice. In the case of homicide, Greek law provided a right of redress even though the injury was not caused by a “wrongful” act. Homicide was considered a matter of grave concern—so much so that there was a spiritual pollution and the relatives of the deceased legally could pursue the slayer even if the slaying was justified.⁵⁹ Although the particular cause of action may not exist in today’s society, its existence in Aristotle’s time shows two important points. First, when applied to an extraordinary harm, one must shift focus somewhat, and the level of “wrongdoing” necessary to impose liability diminishes. Second, liability is easier to find when the injury is extraordinary, when the risk of a extraordinary injury is high, or when the activity to be controlled is significant in some way to the society.⁶⁰ For example, homicide (and its consequences) was important to

58. For a detailed account of the exposure of the situation at Love Canal and the damage the site caused, see M. BROWN, *LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS* (1979).

59. See generally 2 R. BONNER & G. SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE*, 192-231 (1968). See also Lee, *The Legal Background of Two Passages in the Nicomachean Ethics*, 31 *CLASSICAL Q.* 129, 135 (1937); Loomis, *The Nature of Premeditation in Athenian Homicide Law*, 62 *J. HELLENIC STUDIES* 86, 95 (1972). See also R. POSNER, *THE ECONOMICS OF JUSTICE* 217-24 (1981) (outlining a possible rationale for this attitude and practice).

60. One writer has concluded that “anyone who carries on hazardous activity which alters the social proportion of benefits by inflicting injury must bear the burden, because the nature of the activity has brought gain to the enterpriser.” Note, *supra* note 3, at 90. That

the Athenians for spiritual (and perhaps other)⁶¹ reasons. Toxic waste can cause extraordinary harm. A toxic waste cleanup is important to society given the extensive horror toxic waste pollution can bring. In such cases society must be willing to "shift" somewhat the "standard" rules of liability.⁶²

Given the potential for extraordinary harm in the toxic waste context, society should provide compensation to the victims even when the actual wrongdoer is unable. The question then becomes whether the costs should be placed on the public generally or whether some of the cost should be placed on those associated more closely with the toxic waste dumping, even if those individuals acted within the existing legal rules.

a. Indirect Liability

Often wrongful activity yields gains not only to the wrongdoer, but also to some other person or group. One might refer to the latter person or group as "innocent gainers." To the extent that the actual wrongdoer cannot compensate the victims, corrective justice requires that the innocent gainers be made to give up their gains to compensate the victims.⁶³

Typically, the dumper has knowingly disposed of toxic waste in violation of existing laws. The dumper's activity was "wrongful" in both a legal⁶⁴ and a moral sense. This wrongful activity yielded gains to the creditors in one form or another. At most, the gains were the total interest earned on all loans to a dumper.⁶⁵ However, the gains may be something less than the total interest payments on all loans because some portion of the interest may have been earned absent improper dumping. At a minimum the secured creditor realized gains to the extent the creditor earned interest over and

author believes corrective justice requires this result because the risk of harm is "disproportionate to the expectations of citizens living together by agreement in commonwealth." *Id.* The enterprise's gains result from the departure from the appropriate standard of conduct. This departure potentially can alter the existing proportionality quite significantly. However, because the gains are not likely to equal the losses, the question of the amount of compensation remains.

61. R. POSNER, *supra* note 59.

62. One writer has recommended a shift in the standard rules of liability in the case of toxic waste dumping. The writer grounds his argument by combining corrective justice and the economic analysis of law regarding enterprise liability. Note, *supra* note 3, at 90.

63. If the actual wrongdoer, the dumper, can pay then the innocent gainers should not be responsible because this is analogous to a gain without injury.

64. Its activity was a legal wrong given the laws prohibiting the dumping and the laws requiring the dumper to cleanup the site and pay victims compensation. See, e.g., 42 U.S.C. §§ 9601, 9604, 9607 (Supp. 1989).

65. I use the term interest to mean net interest, that is, over and above the costs of making the loans. I do not take into account the opportunity costs of the money lent, although this may be a useful way of comparing or measuring the amount of one's "profits" or gains. For other problems relating to the calculation of the creditors' gains, see *infra* text accompanying notes 130-33.

above the interest the creditor would have experienced if the dumper observed the environmental laws.⁶⁶

The dumper's wrongful activity resulted in both the losses to the victims and the gains to the creditors. If the actual wrongdoer, the dumper, cannot compensate the victims, the creditors' gains have, in effect, been at the victims' expense.⁶⁷

Society can partially restore this distortion by taking the gains related to the dumping away from the innocent gainers. The gainers will be restored to a position they occupied before the distortion⁶⁸ and the victims are moved closer to the position they occupied before the distortion. Some may view a proposal that an innocent person disgorge all gains resulting from the wrongful activity of another as a significant departure from the present law. Such a proposal is, however, an appropriate remedy for three reasons.

First, taking gains away from innocent gainers is the correct result from a pure corrective justice standpoint because the proposal best restores the proportionality of the gains and losses. Stripping innocent gainers of their gains advances the goal of restoring the proportionality of the status quo. Society can complete the compensation and restore the proportion of the status quo by taking the remainder needed for the cleanup from the members of society according to distributive standards. For example, assume D wrongfully disposes of toxic waste, is ordered to clean up, cannot pay for the cleanup along with its other debts, and files a bankruptcy petition leaving the state to clean up the site. Assume that one somehow can determine that Bank, one of D's creditors, had gains related to the dumping in the amount of \$500,000. The cleanup cost was \$2 million more than the unencumbered assets of the dumper.

Before the dumping, society recognized neither losses nor gains from the dumping. After the dumping, two options exist: 1) take the entire \$2 million from the general public (which will require Bank to pay its distributive share as it is also a member of the public), or 2) take \$500,000 from

66. The costs the dumper saves by improper disposal of toxic waste may have resulted in an underpriced product. See A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 86-88 (1983); G. STIGLER, *THE THEORY OF PRICE* 111 (1966). Assuming the dumper's business growth is tied to the product, an underpriced product results in overproduction and overconsumption of the product. The dumper thus reaps a larger amount of profits due to the overproduction and grows at a more rapid rate than it should have had the dumper priced its product properly. Arguably, the dumper borrowed above an optimal level, paying more in interest to creditors. As such, the creditors had increased gains to the extent of the increased lending to this industry. This statement and the assumptions on which the statement relies are very broad because increased sales could have a number of effects on a dumper's borrowing practices.

67. Professor Coleman separates these two questions of compensation and injury. COLEMAN, *MORAL THEORIES OF TORTS*, *supra* note 1, at 11-14; Coleman, *Corrective Justice and Wrongful Gain*, *supra* note 1, at 424-27. Professor Weinrib believes the two questions of compensation and injury are inseparable at least in the negligence context. Weinrib, *Causation and Wrongdoing*, 63 *CHI-KENT L. REV.* 407, 410, 429-44 (1987).

68. This may mean taking all loan costs into account, including the time value of money, if creditors are to be stripped only of their gains.

Bank and \$1.5 million from the public (which again may include Bank).⁶⁹ Under the first option the members of society other than Bank are returned to the proportionality that existed prior to the dumping, although the overall wealth is reduced. However, the Bank still has its gains of \$500,000. Therefore, the overall proportionality is not restored because Bank has more than Bank had before the dumping.⁷⁰ Under the second option, Bank is returned to the position it held before the dumping and the overall proportionality of society is restored. In both scenarios the total wealth is less.⁷¹

Second, the case of toxic waste dumping is a case of extraordinary harms in which the shifting of our established notions of liability is justified.⁷² A substantial amount of injury will occur, absent cleanup. This does not mean one can assign liability arbitrarily, but it does allow one to shift focus. In the extraordinary case of toxic waste dumping, taking the gains from the creditors moves society toward the *status quo ante*, a step required by corrective justice.

Finally, a logical extension of Aristotle leads to the same conclusion. According to Aristotle, taking more than one's share is unfair⁷³ and unjust.⁷⁴ When one receives gains as a result of the wrongful act of a third party, an act that also causes an innocent party a loss, the gains are arguably "unfair" because the gainer is getting more than its share. Even a mechanical application of corrective justice requires that such gains be used to compensate the victims.⁷⁵

69. Other options, such as requiring the Bank to pay the full amount, are discussed later. See *infra* text accompanying notes 134-38.

70. If a reason existed for the bank to have more on distributive justice grounds, the result in the first option would be justified.

71. Note that it may be difficult to maintain the proportionality of the *status quo ante* when society provides a subsistence level for its members. See *infra* text accompanying notes 98-99.

72. See *supra* text preceding and accompanying notes 58-62.

73. ARISTOTLE, *supra* note 12, at 1129b10 to 11 (Ostwald, Rackham).

74. *Id.* at 1129b1 and 10 (Ostwald). Ross translates such an unjust person as "grasping" rather than "unfair." *Id.* at 1129b1 (D. Ross).

Aristotle attempts to provide a single motive for all unjust acts: *pleonexia* or, roughly, greediness, the desire for gain or for more than one's fair share. While this desire may motivate some to steal or otherwise take more than their share, Aristotle's attempt to apply it to all unjust acts is less than fully convincing and sometimes is contradictory. See ARISTOTLE, *supra* note 12, at 1137a1-2 where Aristotle awkwardly speaks of getting an unfair share of gratitude or revenge, and compare *id.* at 1130a17-18, where Aristotle himself contrasts *pleonexia* with other motives, not subsuming them. For a good discussion of Aristotle's use of *pleonexia* as well as other matters within Aristotle's concept of injustice, see Williams, *Justice as a Virtue*, printed in *ESSAYS ON ARISTOTLE'S ETHICS* 189 (A.O. Rorty, ed. 1980).

75. Professor Coleman develops a view of corrective justice that requires the "annulment of both wrongful gains and losses." Coleman, *Moral Theory of Torts*, *supra* note 1, at 6. In this view, corrective justice is concerned not so much with finding bad or "defective" motivation as with identifying those gains and losses that should be eliminated. *Id.* at 9. Although Professor Coleman has not extended his view to "innocent" gainers, this view of corrective justice supports the result that the creditor must give up the creditor's undeserved gains. The gains were the result of wrongful activity (although not on the part of the creditor) and these

b. Direct Liability

The members of group three facilitated the dumping of the waste to some extent, albeit perhaps unknowingly. The creditors and the shareholders contributed the capital to make the venture possible.⁷⁶ Thus, the secured creditor partially "caused" the ultimate problem.⁷⁷ One reading of Aristotle's famous passage on corrective justice supports the view that to trigger corrective justice only an injury is required and that it is not necessary that a "wrongful" act caused the injury. Aristotle said corrective justice requires the judge to restore the status quo "if one is in the wrong and the other has been wronged, and [or] if one inflicted injury and the other received it."⁷⁸ It is unclear from Aristotle's construction whether both an injury and a wrong are required.⁷⁹ Thus, to the extent Aristotle may require only that one causes injury and another suffers it, he requires only a causal connection between an injury and an act and not that a "wrongful" act caused the injury.⁸⁰ If only a causal connection is required, that requirement is met in the creditor's lending.⁸¹

However, a bare causal requirement does create other problems because almost everything is related causally to everything else at some level.⁸² As

gains must be annulled, at least when a victim needs compensation. The creditor's motivation is immaterial to this conclusion.

76. Shareholders will receive no return on their investment until all debts, including the cleanup, are paid. The shareholders are the last to recover, or regain their investment. Thus, they will "share" in the cost of the cleanup to the extent of their contributed capital. In situations in which the shareholders are considered to have controlled the dumper's activities, the shareholders may be required to contribute more to the compensation. *See supra* note 6. Without addressing the question of wrongfulness, others may have received gains as well. For example, the employees can be said to have gained from the activity. Perhaps the employees have more work due to the increased volume of business of the dumper related to the dumping or perhaps the employees received higher pay due to the greater profit margin. However, employees generally are not seen as parties who should pay for the gains or wrongs of their employers. Employees do suffer, however, when their jobs cease to exist.

77. The term "cause" is used reluctantly because the term evokes unanswerable questions of meaning and application. The assumption is that "cause" by itself has some value in determining who should be responsible in a second order sense for the cleanup.

78. ARISTOTLE, *supra* note 12, at 1132a4 to 6 (D. Ross 1963, 1980). I have indicated an alternate conjunction of "or" used by some translators. *Id.* (Thomson). Rackham omits a conjunction. *Id.* (Rackman).

79. The sentence has been translated without a conjunction, *id.* (Rackham), with an "or," *id.* (Ostwald), and with an "and," *id.* (D. Ross 1963, 1980). Recall that Aristotle is making the point here that the law is to treat the parties as equals and is only to ask whether "one is in the wrong . . . [etc.]"

80. The first part, therefore, requires only that one do and another suffer a wrong or an injustice. This would raise the question whether there must be an injury before corrective justice would apply. The doing and suffering of a wrong is itself an injury, even if no monetary damages are suffered. In our legal system we sometimes award nominal damages to acknowledge this doing and suffering to signify that there is an injury in theory.

81. The question of the amount of compensation that the creditor should pay is discussed *infra* text accompanying notes 128-41.

82. The tort system has had to apply a second notion of "cause", called "proximate

a result, although causation may be a factor to consider among other factors, it is difficult to use causation as the sole factor upon which to base liability.⁸³ A reading of Aristotle that requires only causation in all cases is too broad, although plausible. One needs some way to contain or limit the concept of causation to impose liability in a way that satisfies the existing society.

If the two clauses are read in the conjunctive—so that both a “wrong” and an injury must occur—the question turns to Aristotle’s meaning of “wrong.” The term used in the original Greek for “wrong,” *adikon*, which is often translated as “injustice,”⁸⁴ may also mean an act that gives rise to a legal right, *i.e.*, a right that can be enforced in a court of law. Such a definition becomes circular upon attempting to determine whether the creditor’s actions give rise to a claim upon which a legal action can be maintained.

Some believe Aristotle does require that the injury be the result of a wrongful or unjust act before corrective justice applies to require the injurer to compensate the victim.⁸⁵ Even so, the search for the meaning of “wrongful” has taken many paths. By most accounts the term ‘wrongful’ includes morally wrongful acts. The term also includes acts that violate certain rights of another, although the act itself was justified. On corrective justice grounds, for example, one who uses another’s property in an emergency is liable for damage to the property.⁸⁶ In the toxic waste context, the creditor acted within the limits of existing laws (assuming no actual wrongdoing or negligence), but the creditor’s actions caused the invasion of the victim’s rights.

cause,” to attempt to have a rational or sensible system. See Epstein, *A Theory of Strict Liability*, *supra* note 3, at 160-62. Cause in the latter sense has not been susceptible to complete definition or explanation and has recently been abandoned by some writers in favor of other factors to explain or analyze tort law. See G. CALABRESI, *supra* note 4; R. POSNER, *supra* note 4.

83. Professor Epstein advocates a tort system (and later a system of nuisance) based upon causation. R. EPSTEIN, *A THEORY OF STRICT LIABILITY*, *supra* note 3, at 165-89 (1973). Epstein, *Nuisance Law*, *supra* note 1, at 56-60. However, Epstein’s use of the term is based upon four causal paradigms that do not cover all possible injuries. Further, Epstein’s concept is a theory of negligence and is more appropriately considered as a discussion of first order liability. As in the case of other writers, Epstein’s use and examples are aimed at those most directly responsible (for instance, the dumper) and not those who might also be responsible. For example, Epstein focuses on the creation of a dangerous condition, and its link to the ultimate injury. Epstein considers intermediate causes to the extent that the causes might or might not absolve the creator of liability. The thrust of Epstein’s paradigm seems to be on the initial actor with no exploration of the possibility that others may *share* in the responsibility or may have been a cause of the ultimate injury. R. EPSTEIN, *A THEORY OF STRICT LIABILITY*, *supra* note 3, at 177. Epstein does not consider the question of second order liability.

84. ARISTOTLE, *supra* note 12, at 1132a4 to 5 (Thomson, Rackham).

85. See Posner, *supra* note 1, at 190. Regarding the application of corrective justice to negligence, see *supra* notes 48-52 and accompanying text.

86. See Coleman, *Moral Theory of Torts*, *supra* note 1, at 17-18; Coleman, *supra* note 3, at 463. For other approaches, see Weinrib, *supra* note 11, at 49-54, 57; R. EPSTEIN, *A THEORY OF STRICT LIABILITY*, *supra* note 3.

In my view, causation plus some other factor must be present to impose liability. In negligence the additional factor is the concept of duty as well as proximate cause.⁸⁷ Strict liability requires some other factor in addition to causation, for example a hazardous activity, before liability is imposed. Within the concept of strict liability for hazardous activities is another more limited category of liability. When the activity or substance is so hazardous that it can cause extraordinary harm, liability can be extended to those not otherwise within the normal circle of strict liability. The level of involvement needed for liability changes with a wrongdoing that triggers extraordinary harm. Where an extraordinary harm is concerned we routinely provide victims compensation⁸⁸ and we can also justify some shift in the level of basis for liability.⁸⁹

In the toxic waste context the persons responsible are the first liable and they are liable for the full amounts of the damage. Beyond that, if necessary, we can extend liability to others causally connected to the activity, i.e., the creditors, in the case of extraordinary harms.⁹⁰

C. Rectification

In the simple case—when the gains to the dumper equal the losses to the victims—the solution is relatively easy: require the dumper to compensate the victims. Compensation includes cleanup of the site and payment of other appropriate damages.⁹¹ In the more usual but complex case in which the gains are not equal to the losses, the question of compensation becomes more complicated.⁹² Society must decide 1) how much compensation the

87. See *supra* note 82 and accompanying text.

88. For example, in cases of hurricanes and earthquakes, the government routinely provides disaster relief measures.

89. See *supra* notes 61-63 and accompanying text.

90. There are also other Aristotelian reasons based on equity for finding some secured creditor liability. Aristotle realized that the established laws would always be an incomplete expression of justice. See ARISTOTLE, *supra* note 12, at 1137b11 to 34 (D. Ross 1963, 1980). Aristotle suggests that "equity" fill in the gaps, in a manner that seems similar to the way in which equity developed and still works in the common law systems, many centuries after Aristotle's death. For example, Aristotle says: "And this is the nature of the equitable, a correction of law where it is defective owing to its universality." ARISTOTLE, *supra* note 12, at 1137b26 (D. Ross 1963, 1980). Equity is used to "correct the omission" in a law and to try to "say what the legislator himself would have said." *Id.* at 1137b22 to 24. Equity is not directly part of corrective justice but is necessary to effectuate and supplement it. To use equity in the present problem we must ask whether equity would place some of the cost of cleanup on the secured creditor or all of it on society in general. The secured creditor had some gains in the form of profits from the dumping, although indirect. See *supra* notes 60-66 and accompanying text. The secured creditor supplied some of the means to the dumper. Placing some cost on the secured creditor, therefore, seems fair or equitable.

91. As discussed in the next section, generally corrective justice will require early cleanup of a site rather than the later compensation of victims after the victims have suffered physical injury. See *infra* notes 94-126 and accompanying text.

92. When gains equal losses, compensation is achieved easily and the status quo is restored by requiring the injurer to transfer the gains to compensate the victim. See *supra* note 25 and *infra* note 108 and accompanying text.

victims⁹³ should receive and 2) how much compensation the various injurers should pay.

1. Cleanup as Appropriate Compensation: The Fundamental Relationship Between the Economic Analysis of Law and Corrective Justice

Corrective justice itself requires cleanup of the site containing toxic waste and that the cleanup occur early. The problem of toxic waste dumping could be dealt with at three different times in three different ways: proper disposal of the toxic waste initially; cleanup after improper disposal and before actual injury to any individual occurs; or payment of compensation to victims suffering actual physical damage from toxic waste dumping.⁹⁴ The cost of initial proper disposal will be less than the costs of later cleanup, which in turn will be less than the costs of compensating victims for damages, even if those damages are discounted to present value.⁹⁵ Assuming the time for proper disposal has passed, the choice must be made whether to cleanup or to compensate victims later when injury occurs. Assuming later victim compensation will cost more than cleanup, corrective justice requires that the site be cleaned up. For example, assume that cleanup of a site will cost \$2 million. If the site is not cleaned up, the cost to compensate victims later for their actual physical harm will be at least \$5 million, in present-day dollars. Leaving aside the question of who will pay, society has two choices: cleanup at a cost of \$2 million, or pay actual compensation later at a cost of \$5 million (in present-day dollars). The cleanup alternative makes not only the most "sense," but also is required by corrective justice. The function of corrective justice is to restore society to the *status quo ante* if possible and, if not possible, to restore society to the proportionality of

93. For the sake of simplicity, the assumption is made that the "victim" here is society in general. For a more detailed discussion of the identity of the victims, see *supra* text notes 44-46 and accompanying text.

94. One might combine options two and three in many ways to provide additional options; for instance, a site might not be cleaned up for five years and then individual victims might receive compensation and a cleanup might be performed to prevent further injuries. However, given the current technological and scientific state of affairs, hazardous sites can be identified and cleaned up before actual injury occurs. After the time for initial proper disposal has passed, this article limits the discussion of options to two to clarify discussion. These two options are to cleanup, or to wait and compensate victims for their injuries as they occur without performing a cleanup.

95. See, e.g., H.R. REP. NO. 1016, pt. I, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6165; S. REP. NO. 848, 96th Cong., 2d Sess. 11, 18 (1980). Further, the fear of toxic waste and other threats of our nuclear age cause a high degree of apprehension, see Erikson, *Toxic Reckoning: Business Faces a New Kind of Fear*, 90 HARV. BUS. REV. 118 (1990), and thus the continuing failure to clean up creates additional but unquantifiable costs. Toxic waste will cause a substantial amount of actual physical damage to people and property if we allow that physical damage to occur. See, e.g., M. BROWN, *supra* note 58.

the *status quo ante*.⁹⁶ While one cannot return to the actual *status quo ante*,⁹⁷ one can choose the option that leaves society closer to the actual *status quo ante*. Cleanup leaves society closer to the *status quo ante* because society's members will have to contribute less to rectify the situation than society's members would have to contribute if compensation were deferred. Thus, corrective justice requires that society clean up the site to keep the disturbance caused by the injury to a minimum and to return the members of society to a position as close as possible to the one they occupied before the dumping.

Second, if one focuses only on proportionality, the appearance is given that the proportion of the status quo can be maintained by either early cleanup or late compensation—one would just have to take more from everyone to pay the higher cost of compensation. If that were the case, corrective justice does not solve the question of whether to rectify early or later. This is not the case, however, if, as in our society, a subsistence level standard of living has been established.⁹⁸ The choice is still between the \$2 million cleanup and \$5 million compensation. But the cost cannot be collected from all members of society according to the proportion established under the prevailing distributive justice system, because some members of society would be placed below the subsistence level. Thus, more must be taken from those sufficiently above the subsistence level. As a result, the exact proportionality of the status quo cannot be restored. The question then is, which choice will leave the proportionality closer to the one that existed before the dumping? The answer, again, is the lower priced choice: cleanup. Because the cost is lower, those who contribute will have to pay less. A lower cost can be distributed more evenly than a higher cost because fewer members of society will be moved to the subsistence level. When a higher cost is imposed, more people will be moved to the subsistence level,

96. See *supra* notes 26-29 and accompanying text.

97. See *infra* note 114 and accompanying text and text accompanying note 120.

98. A subsistence-level standard of living involves a number of concepts. Generally, a subsistence-level standard calls to mind such things as a minimum income that the government guarantees (for example, the minimum income provided by welfare) or below which is not taxed (for example, the standard deduction and personal exemptions under federal income tax law). The subsistence level also includes the bankruptcy process itself, at least when an individual debtor is concerned. The bankruptcy process (and also the state laws that exempt certain assets from execution) guarantee each member of society a certain minimum amount of wealth or number of assets. When a person falls below that minimum, the person can declare bankruptcy, and, with some exceptions, the person's debts will be discharged. The person can then continue life with the protected assets as well as the right to have future earnings free from past debts.

A member of society who falls below the subsistence level standard of living will not have to contribute to the cleanup collection. Whether one who files bankruptcy will have to contribute will depend upon the way contributions are made. If contributions are collected from tax revenues to which the discharged debtor is subject post bankruptcy, the person will have to pay her share. If the collected contributions are a non-governmental prebankruptcy claim, they may be discharged.

fewer people will share the cost, and more of the cost will fall on fewer people.⁹⁹ As a result, the original proportionality becomes more and more distorted as the cost of rectification grows.

Thus, corrective justice requires us to choose a wealth maximizing move, an "efficient" move. That is, when the burden of compensation is being placed on society as a whole¹⁰⁰ and there are choices which will provide theoretically equal compensation to the victims but will cost different amounts to society, corrective justice requires choosing the path of the least cost. First, the lowest cost path leaves society closer to the *status quo ante*. Second, the lowest cost path disturbs least the *proportional* distribution—at least in a society providing minimum subsistence levels to its members. Indeed, this analysis applies even in the more typical tort case when the injurer, rather than society, is made to pay the compensation. Society can still require that, given two options, the option that maximizes wealth be chosen. The wealth maximizing solution leaves the injurer closer to the position the injurer occupied prior to the injury than if the injurer pays the later, higher compensation. Thus, this move is required by corrective justice. Because the injurer is in a better position than if the injurer had been required to pay later compensation, the injurer should not complain.¹⁰¹ Judge Posner has concluded that efficiency requires corrective justice.¹⁰² The reverse also is true. Corrective justice requires efficient moves at least when choosing between two competing methods of compensation.

Third, corrective justice itself is a necessary corollary of the fundamental principle of nonmaleficence. The principle of nonmaleficence, that one should not do harm to another, requires early cleanup because failure to cleanup will cause injury and harm to others. If one violates this principle and does wrong, a concept of rectification is needed. A principle that requires the wrongdoer to correct the wrong is required. Failure to correct the wrong will itself violate the principle of nonmaleficence because allowing the uncompensated (and wrongful) injury to continue is itself a wrongdoing.¹⁰³ Given knowledge that failure to clean up a site will cause future

99. Such a result distorts the distributive proportion of the *status quo ante* more and more and does not move society toward applying corrective justice effectively.

100. The burden will fall on society or some segment of it (victims, taxpayer, or creditors) if the injurers cannot pay.

101. The injurer could argue that it should have the right to choose when to compensate, meaning that the injurer should be allowed to weigh all of the possibilities and risks and then decide whether its interests are best served by early or late compensation. Of the two modes of compensation, however, cleanup is not only the cheaper option of the two modes of compensation but also cleanup is more certain to remedy the problem. The injurer may not be able to pay compensation later. Additionally, most dumpers are corporations and arguably are not entitled to many of the fundamental rights accorded individuals, such as certain freedoms of choice, especially when the rectification of other individuals' injuries is concerned. A state-imposed requirement of early cleanup would therefore be within the power of the state to safeguard the health and welfare of its citizens.

102. See Posner, *supra* note 1, at 201-06.

103. For example, if A smashes the window in B's car, every day that the window goes unrepaired causes B further injury. If B has the window repaired at a cost of \$100, the injury

injury, to fail to act is to harm future victims. Even if society agreed to pay the later compensation for this harm, allowing people to suffer and offering them only a money substitute for that suffering is still harmful.

Monetary compensation of victims in the future, after actual damages are suffered, is only a poor substitute for in kind compensation. Ex post money damages are arguably unfair to victims as victims may be undercompensated. Victims tend to be undercompensated ex post for two reasons. First, as a matter of course, courts disallow subjective elements in valuation, such as the sentimental value attached to a particular object that another has damaged. Second is the problem of ex post versus ex ante compensation. If A breaks the window in B's car, which B must pay \$100 to have repaired, a court will award as damages the \$100. If, however, A bargained ahead of time for the right to break the window in B's car, B would have bargained for an amount that she believed compensated her for the cost of replacing the window but also for the hassle of having the window replaced and any subjective value she placed on it. The ex post compensation is almost always less than the ex ante compensation one would demand.¹⁰⁴ Thus, cleanup is certain to restore society to a much closer approximation of the *status quo ante* than would future victim compensation.¹⁰⁵

2. The Amount The Compensators Must Pay

a. First Order Injurers

Corrective justice requires that intentional and negligent injurers pay some compensation. The appropriate compensation here is cleanup. But

continues until A reimburses B because A has lost the use of the \$100. Corrective justice supplies the needed concept of rectification.

When the goals of corrective justice are considered, one can see the relationship between the two concepts. Corrective justice is aimed at maintaining the status quo, or the proportionality of the status quo. Nonmaleficence is the direct exhortation not to do wrong, meaning not to distort the status quo.

One might argue that nonmaleficence has not occurred if the injurer is willing to pay for the injury caused. However, damages are only an approximation of injury compensation. A wrong is better avoided than compensated. *See infra* notes 104-05 and accompanying text.

104. It is difficult, maybe even impossible, to value life or limb (although economists claim otherwise). Further, the effects of the wealth of the parties may also contribute to distortions between ex post and ex ante compensation.

105. Finally, the idea of Pareto superiority also requires the same result. A Pareto superior move is one that makes at least some persons better off and no one worse off. Pareto superiority is compatible with corrective justice here. Given only two choices—cleanup and victim compensation—cleanup is the Pareto superior choice. As between the choice of paying \$2 million or \$5 million, most citizens will be better off with the \$2 million choice because they will have to pay less than with the \$5 million choice. Consistent with a Pareto superior choice, no one will be worse off. *See supra* notes 94-99 and accompanying text. Note that this result holds only between the two alternatives of cleanup or victim compensation. To compensate at all may not be Pareto superior. In addition, not everyone will be better off because those near the subsistence line would contribute the same amount under either choice. (Once a person reaches the subsistence level, the person will not have to contribute further.) Those persons above the subsistence line would be better off because they would have to pay more if the \$5 million choice is made.

how much of the cost of cleanup should the first-order injurers be compelled to pay? Returning again to Aristotle, it is the judge¹⁰⁶ who is to restore the *status quo ante* "by means of a penalty taking away from the gain of the assailant."¹⁰⁷ In the simple case in which the gain equals the loss, Aristotle would take the gain from the injurer and give it to the victim.¹⁰⁸ This restores the injurer and the victim to the exact positions each held prior to the transaction. One writer believes that corrective justice itself does not require that the victim's compensation be paid by the injurer.¹⁰⁹ However, Aristotle states clearly that the compensation should come from the injurer—at least in the simple case in which gains are equal to losses. Aristotle talks of taking the gain away from the injurer¹¹⁰ and also of subtracting from the one that has more and adding to the one that has less.¹¹¹ Further, the very idea of corrective justice binds injurer and injured, requiring the former to compensate the latter.¹¹²

Corrective justice is more difficult to apply to the "complex" case in which the gains do not equal the losses.¹¹³ The difficulty arises for two reasons. First, if an injurer's gains were less than the loss to the victim, the injurer may not have the funds to compensate the victim fully. In such a case a decision must be made whether to nonetheless compensate the victims and, if so, who should pay that compensation. Second, if gains are less than losses, returning to the exact distribution that existed prior to the injury is impossible.¹¹⁴ To require the injurer to compensate the victim fully

106. Joachim asserts that by "judge" Aristotle means the arbitrator who first heard private suits in Athens and not the law court which had a large jury. H. JOACHIM, *supra* note 13, at 146. Regarding the role of arbitrators in Greek societies, see A. HARRISON, *THE LAW OF ATHENS*, PROCEDURE 64-68 (1971).

107. ARISTOTLE, *supra* note 12, at 1132a9 (D. Ross 1963, 1980). Ostwald translates the clause as "by inflicting a loss on the offender, the judge tries to take away the gain and restore the equilibrium." *Id.* at 1132a9 (Ostwald).

108. ARISTOTLE, *supra* note 12, at 1132b2 to 7 (Ross 1963, 1980 & Ostwald). Specifically, Aristotle uses a graphic example where a segment of a line is taken from one person and added to another. It is easy then to simply take the segment away again and restore it to the original "owner." *Id.* at 1132b6 to 9 (Ross 1963, 1980 & Ostwald). *See also id.* at 1132a25 to 1132b10 (D. Ross 1963, 1980 & Ostwald).

109. *See supra* note 67 and Coleman, *supra* note 3, at 463-64 (stating that while corrective justice requires compensation for injuries, corrective justice does not require that compensation be provided by the actual injurer). Under Aristotle's concept of corrective justice, Professor Coleman's assertion that victim compensation and injurer liability are not related is not well founded. Professor Weinrib also has concluded that the questions of victim compensation and injurer liability are related. Weinrib, *Causation and Wrongdoing*, *supra* note 67, at 429-44.

Some writers believe that Aristotle does not preclude "an alternate method of rectification, such as criminal punishment." *See* Posner, *Corrective Justice*, *supra* note 1, at 202. *See also id.* at 194.

110. ARISTOTLE, *supra* note 12, at 1132a9 (Ross 1963, 1980 & Ostwald).

111. *Id.* at 1132b2 to 7. *See also id.* at 1132a26 (Ross 1963, 1980 & Ostwald). *See also supra* note 25.

112. Weinrib, *supra* note 67, at 410.

113. In the typical tort case the victim's loss often is more than the injurer's gain.

114. The same is true in cases in which gains are greater than losses because whenever there is a net loss (or gain) to society, returning to the exact *status quo ante* is impossible.

places the injurer in a position worse than the position occupied by the injurer prior to the transaction. Yet if full compensation is not required, the victim is not restored to the proper position. Returning society (including injurer and victim) to the proportional *status quo ante* is possible, but I do not believe that this is the correct result either. Specifically, corrective justice protects the proportions established by distributive justice. Although one cannot restore the precise *status quo ante*, one can restore the proportions that existed prior to the disturbance.¹¹⁵ The gains that the injurer received from the transaction can be taken and used to compensate the victim partially. A collection from the members of society according to the prior proportion can be used to pay the remainder of the compensation.¹¹⁶ Therefore, each member of society will have the same proportion of the total wealth of society as the member had before the activity that caused the distortion.¹¹⁷ Because the injurer's actions resulted in a net loss to society, this is the only way to restore the proportion of the *status quo ante*. Restoring the proportion in such a manner, however, is not always a desirable end because this method provides no incentives against undesirable activities.

Aristotle recognizes the existence of a complex case, but does not tell us specifically what the compensation should be in such a case.¹¹⁸ In most instances, our society requires both intentional and negligent wrongdoers to compensate their victims fully¹¹⁹ even though compensation for the loss may exceed the gains to the injurer. If John intentionally smashes the window of Mary's car, the compensation that John must pay Mary is not limited by the amount of "gains" John had (perhaps some enjoyment from the activity). Rather, John must compensate Mary for her full loss (replacement of the window, at least). Full compensation alters both the *status quo ante* and the proportionality of the *status quo ante*. Although full compensation returns the victim to the situation that the victim occupied prior to the event, full compensation does not return the injurer to the situation that the injurer occupied prior to the event. The injurer has had to pay more

115. Proportionality is most easily seen in the proportions of wealth held by the various members of society, but proportions of other "goods" are also affected. See *supra* note 18 (discussing Aristotle's definition of "goods").

116. As a member of society, the victim will have to contribute to her own compensation. Thus, the victim is not made completely whole because the victim does not have the same amount as before the injury, but the victim is returned to the same position held in society relative to the other members of society.

117. Returning to the exact proportion of the *status quo ante* may be impossible in cases in which society has established a subsistence-level standard of living. See *supra* notes 98-99 and accompanying text.

118. "When one party has received and the other given a blow, . . . the active and passive aspects of the affair exhibit an unequal division; but the judge tries to equalize them with the help of a penalty, by reducing the gain." ARISTOTLE, *supra* note 12, at 1132a8 to 10 (Ross 1980).

119. Note that the victim is considered restored to the *status quo ante* based on the ex post compensation value. The victim is not given her ex ante compensation.

than he gained, thus he will be in a worse position than before the transaction. In the last two decades legal writers have advanced several theories for this result. One reason is specific deterrence.¹²⁰ If one had only to give up one's gains, there would be no deterrent to activity considered wrongful by society because the rational player would discount potential liability given the likelihood of not getting caught. The deterrence rationale often is linked to efficiency because it deters harmful or undesirable conduct so as to keep it at an "optimal" level.¹²¹

The deterrence rationale also preserves the distributional status quo, a goal served also by corrective justice. By deterring people from engaging in harmful conduct, the amount of injury and overall social distortion that occurs is lessened. In some ways deterrence protects the *status quo ante* better than an after-the-fact application of corrective justice. First, it often is impossible to return to the *status quo ante* after an injury because of the inequality of gains and losses. Second, invoking corrective justice requires calling upon the power of the state. The judicial process must be used, resulting in society paying the costs of operating the system, and the litigants bearing the costs of attorneys and experts. Litigation costs result in a net loss to society and prevent society from restoring the *status quo ante*.¹²² In both of these cases the most society can achieve is the correct proportionality, not a return to the *status quo ante*. Deterrence helps to maintain the status quo by preventing the occurrence of the injury in the first instance and therefore society suffers no net loss and a resort to corrective justice is avoided. Thus, deterrence serves the same ultimate goals served by corrective justice. Corrective justice provides a way to rectify an injury, and it may seem inaccurate to talk about serving corrective justice through avoiding injuries.¹²³ However, while the very function of corrective justice is to restore the status quo, corrective justice also has the effect of main-

120. See, e.g., G. CALABRESI, *supra* note 4.

Additionally, a rule that requires a wrongdoer only to give up his gains will create disaffection on the part of society because either the victim does not receive compensation or society pays for the victim's compensation. This disaffection results in costs that will alter the existing distribution of wealth or goods.

121. See A. POLINSKY, *supra* note 66; R. POSNER, *supra* note 4, at 148-49, 187-88.

Although other means, such as a penalty may deter wrongful activities, requiring the injurer to pay the actual compensation for the injury has the effect of internalizing the costs of injuries. This in turn results in an optimum level of accidents, at least at a theoretical economic level. Thus, deterrence as used here means more than just an incentive to avoid injury. Deterrence means the correct amount of incentive to avoid the correct amount of injuries. Further, requiring the injurer to pay the compensation, instead of a payment determined by some other administrative actor, may save external costs of administration (although the present system already has its own administrative costs).

122. A net loss may not result if one takes the view that the costs paid by society and the litigants redistribute wealth rather than reducing wealth. According to this view, wealth is transferred to the judges, court staff, attorneys and others involved in the process as part of an accepted distributional scheme.

123. That is, in most instances, corrective justice applies when an injury has occurred and needs to be corrected.

taining the status quo. Deterrence has the same effect and thus corrective justice is fundamentally related to economic analysis.

The difficult question arises in determining the amount of deterrence-based compensation corrective justice requires. To deter rational potential injurers, the compensation must exceed the injurer's gains,¹²⁴ but corrective justice does not provide any guidelines to fix the amount of compensation awarded. Because corrective justice does not provide the answer, other criteria must be used. According to efficiency or economic criteria, the wrongdoer is required to pay an amount equal to the victim's losses.¹²⁵ Efficiency can supplement corrective justice here in supplying an amount, which fine tunes the remedy required by corrective justice.

Thus, members of group one (those directly and voluntarily responsible for the dumping) should pay the full cleanup cost in addition to other victim compensation, limited only by the amount of the wrongdoer's assets. Current toxic waste liability schemes do require that those in the first category pay cleanup costs. The dumper, and sometimes its directors, officers, and shareholders, are, and should be, liable for the cleanup.¹²⁶ For the same reasons, and in particular the deterrence effect, those who negligently caused any dumping should be liable for the full cost of cleanup.¹²⁷

b. Second Order Compensators

When those in the first order cannot pay, how much must those in the second order pay?

Corrective justice supports the idea that the secured creditor should contribute to cleanup costs. Corrective justice also supports one idea of compensation that moves everyone toward the proportionality of the status quo: taking away the secured creditor's unfair gains and the gains to rectify the harm caused by the dumping. Taking the gains from the secured creditor places the creditor in the same position as before the dumping. By using the gains to pay for the cleanup (that is, pay compensation) victims are moved toward the position they occupied prior to the dumping. To complete the process, the remaining costs of cleanup must be collected from all members of society (including the secured creditor) according to societal distributive standards.¹²⁸ This will then restore the proportionality of the

124. See *supra* text accompanying notes 120-21.

125. This forces the injurer to internalize all social costs of its activity. It will result in the injurer acting at the optimal activity level and, if the injurer is a manufacturer it will set its output at an optimal level. See *supra* note 121.

126. In addition, laws regarding intentional acts may require punitive damages in some cases.

127. The creditor may argue that the amount of harm caused by its negligent lending, not all of its lending to the debtor, should limit the creditor's liability. Proving the amount of harm caused by the creditor's negligence presents a practical problem of proof. The secured creditor could argue that its liability should be limited accordingly, as in the case in which the creditor's continued negligent lending caused or facilitated only a small portion of the total dumping.

128. See *supra* text preceding and accompanying notes 69-71 (discussing specific example).

status quo ante.¹²⁹ The secured creditor cannot be allowed to keep its gains because the creditor would be better off, both actually and proportionally, as a result of the dumper's wrongful act. Neither the status quo nor proportionality would be restored. Corrective justice thus requires taking away the secured creditor's gains.

Taking away the secured creditor's gains, however, may be very difficult to effectuate. The first problem is in ascertaining the amount of the secured creditor's gains. The gains might be seen as the total interest¹³⁰ the secured creditor earned on all loans to the dumper or might be only the interest related to any increase in borrowing resulting from the dumping.¹³¹ Even once the improper gains are defined, proving the amount of those gains will be extremely difficult and will require many assumptions, some speculative.¹³² The cost of determining these gains may exceed significantly the amount of the gains themselves. If society decides to strip the secured creditor of its gains and the transaction costs of that recovery are substantially more than the recovery itself, then society is worse off overall and only a small increase in the accuracy of restoring the proportionality is achieved. Such a wealth minimizing move requires society to look for alternative solutions. The solution should comport with the goals of corrective justice without severely displacing other societal values such as overall wealth maximization, which, as we have seen, is a necessary adjunct to corrective justice in some cases.

In deciding how much the secured creditor should pay, it is easiest to consider the extremes first. At the low extreme, society could impose no liability on the secured creditor. Imposing no liability on the secured creditor does not comply with corrective justice at all because at least the unfair gains should be taken from the secured creditor. Allowing the creditor to escape liability completely means that society would be subsidizing the secured creditor's unfair gains to the extent that citizens pay for the cleanup.¹³³

129. If society has established a subsistence level standard of living, then returning society to the exact proportion of the *status quo ante* may not be possible. See *supra* text and accompanying notes 98-99.

130. For a discussion of the creditors' gains and interest in this context, see *supra* notes 65-66 and accompanying text.

131. See *supra* notes 65-66 and accompanying text.

132. For example, to calculate the amount of profits the creditor would have had irrespective of the dumping one must calculate what the level the dumper's business would have been absent dumping and then one must speculate as to the amount the dumper would have borrowed under such a scenario. In addition, one must determine whether the interest rate would have been the same (good monitoring may have allowed the creditor to know of proper disposal, potentially reducing the interest rate, or perhaps at a lower level of lending the interest rate would change). These are just a few of the many variable factors that must be determined to establish the actual gains to the creditor resulting from the dumping.

133. Cases may exist in which society wants to subsidize a particular group, person, or project, but in such a case society must recognize the effects of subsidization and then make an informed choice to subsidize. Society should not subsidize anything simply by default.

At the other extreme, should the secured creditor have to pay for the full cleanup cost? The requirement that the dumper and other intentional and negligent actors compensate the victims fully¹³⁴ does not apply here. That rule applies to conduct that society has decided should be deterred—often termed “wrongful.”¹³⁵

The unique situation of a creditor in our society also leads to the conclusion that a secured creditor should not be liable for the full loss or cost of cleanup. Imposing full liability on a creditor ignores the fundamental nature of credit in our society. A creditor has both a limited upside and a limited downside potential. A creditor will not share in the profits of a venture to which it has lent money;¹³⁶ nor will a creditor be required to share the losses of such a venture.¹³⁷ At most, the creditor's gain is the interest on the loan and its loss, the amount of its loan or the amount of the collateral when collateral would otherwise secure the loan.¹³⁸

The optimal solution of taking only the creditor's gains is impossible as a practical matter since the creditor's gains cannot be proven efficiently. A compromise solution is needed, somewhere between no liability and full liability, between letting the creditor off the hook and requiring full compensation. The solution must have the fairness of taking the unjust gains away from the creditor without resulting in the prohibitive and inefficient costs associated with the process of proving the gains.

One compromise solution is to deny the secured creditor the first priority to the collateral in favor of the victims.¹³⁹ Assuming society recognizes that an early cleanup of toxic waste sites is preferable to paying victim compensation later on, the state will cleanup the site early. The “victims” in this case are the state and the taxpayers. The state, therefore, should have the first right to the collateral. One could temper the apparent arbitrariness of this solution by allowing the secured creditor to prove its actual gains and

134. See *supra* notes 106-24 and accompanying text.

135. Whether we as a society want to deter lending to those involved in industries related to the production, handling, or disposal of toxic waste is a decision society will have to make. Currently the mere fact of lending is not deemed “wrongful” and thus the lenders are not required to compensate fully the victims of their borrowers.

136. This ignores forms of credit that border on ownership interests or are forms of ownership interests when issued (certain types of preferred or hybrid stocks, for example). Even if a right borders on, or in fact is, an equitable interest, the owner's risk is limited to the amount invested (again with limited exceptions provided by the environmental laws).

137. In some cases the rights of creditors may be subordinated to those of other creditors due to close involvement of the creditor with a debtor in addition to other factors. See *Pepper v. Litton*, 308 U.S. 295 (1939); *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307 (1939). Even so, such a creditor will only lose the amount of the creditor's loan at most.

138. The most any creditor normally stands to lose is the amount of its loan, including outstanding interest and charges. The secured creditor has the additional safety net of the collateral. It is the value of the “secured claim,” which is the lesser of the value of the collateral of the amount of the loan, that the secured creditor stands to lose as a result of any change in the existing priority structure.

139. The secured creditor still will have priority with respect to the unsecured creditors if any assets remain after payment for the cleanup is made.

to relinquish only the gains proved. The secured creditor will take this course only when gains plus costs of proof are less than the collateral the creditor stands to lose. In a like manner, society also should allow the state to prove that the secured creditor's unfair gains were more than the value of the collateral and to recover the full amount of gains when it is efficient to take this course.

Stated differently, we can set up a presumption that the secured creditor should lose the creditor's preferred position regarding the collateral to the state (but not other creditors). The secured creditor then has the opportunity to prove that it gained less, and the state the opportunity to prove that the secured creditor gained more, than the value of the creditor's priority position with respect to the collateral.¹⁴⁰

This solution is in the range of appropriate remedies when viewed from the standpoints of both distributive and corrective justice. Applying a strict rule of corrective justice requiring the creditor to give up only its gains (the gains rule) will create a rule with a large margin of error since those gains are so difficult to prove. Creating a rule that requires the secured creditor to give up its collateral may also have a large margin of error. Allowing the creditor or the state the opportunity to prove actual gains can lessen the margin of error if the second rule is chosen. This rule can be justified over the "gains rule" because allowing the creditor or the state the opportunity to prove actual gains reduces costs to society. The latter rule also maximizes wealth. Yet the latter rule allows the one who more efficiently can prove the "gains rule" to do so.

Finally, it can also be argued that given the indeterminacy of the corrective justice analysis with respect to the amount of compensation, the result reached using an alternative economic analysis based on efficiency should not be disturbed. Such an analysis requires the subordination of the secured creditor's interests to the interests of victims.¹⁴¹

CONCLUSION

In ordinary losses from ordinary transactions that have ordinary risks, first order corrective justice often is sufficient to determine liability.¹⁴² However, when those in the first order cannot pay, society needs to look at second order liability. This is especially important when the harm poten-

140. This approach also serves other valid societal goals. Efficiency requires that the secured creditor bear some of the burden to monitor the dumper. See Heidt, *supra* note 10, at 839-51. The possibility of the secured creditor losing priority will encourage some level of monitoring.

141. See Heidt, *supra* note 10.

142. Perhaps we need second order liability with respect to ordinary transactions, too, such as for regular torts when the enterprise cannot pay. This would require us to examine our current schemes in light of both corrective and distributive justice. For other reasons, one writer has concluded that in the field of torts generally, secured creditors should lose their priority to tort victims in certain cases. Comment, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045 (1984).

tially is so great that we have an overriding concern to assure that the victims receive compensation. To the extent that a secured creditor has gains resulting from the wrongful disposal of hazardous waste, corrective justice requires that those gains be used to compensate the victims of that disposal and to clean up the site.

However, the transaction costs simply may be too high to ascertain the amount of the unfair gains.¹⁴³ Nevertheless, to permit the secured creditors to keep their gains means that the public is subsidizing those gains. A compromise solution compatible with the dictates of corrective justice is to subordinate the secured creditor's interest in its collateral to the interests of the state and the victims.¹⁴⁴

143. See *supra* notes 131-32 and accompanying text.

144. This can be accomplished by the enactment of a "superlien"—a statute granting first priority to the state on all assets of a dumper in order to pay for the costs of clean up. Nine states have some form of a superlien statute. For a summary, see Schnapf, *Superlien Laws for Environmental Clean-Ups: Making The Bank Insecure*, BUTTERWORTHS J. INTL. BANKING AND FIN. L. 62 (Feb. 1989). Some superlien statutes are prospective in application while some are retrospective as well.

Potential problems with superlien laws, especially the claim that they are an unconstitutional taking in violation of the fifth amendment to the United States Constitution if applied retroactively, are discussed in Heidt, *supra* note 10, at 854-59.

In 1986 Congress added a superlien provision to CERCLA, 42 U.S.C. § 9607(1) (Supp. 1987). The federal superlien is limited to real property and is subject to the rights of existing secured creditors. The effectiveness of the superlien, therefore, is severely limited.

Absent a superlien statute, arguments based on a public rights theory are possible. See Heidt, *supra* note 10, at 859-61. General principles used to establish the priority of claims in a bankruptcy proceeding also may be useful to subordinate the secured creditor's claim. *Id.*

