COMPENSATORY JUSTICE: CASES AND PRINCIPLES

1) In English, the terms, 'compensation» and 'compensatory justice' are somewhat ambiguous, as they can refer either to: (a) *rewarding* a person for his contribution, e.g., a person's wage or salary is compensation for his labor, and the question can arise whether he has been adequetedy, or justly, compensated for his effort and accomplishment; or these terms can refer to: (b) *restoring* a person to the status quo ante some injury or loss, e.g., when a person is injured through the malice or negligence of another we might ask the latter to provide compensation to the former, and regard the failure to do so as doubly unjust (for the injury itself is unjust, and the neglect to remedy it is a further injustice).

That this ambiguity in 'compensation» and compensatory justice' is important can be seen from the way it bears on the *principles* of compensatory justice, When it is said that «unpleasant, onerous, and hazardous jobs deserve economic compensation» (1), a principle of compensatory justice in the (a) sense is being asserted. But this is not a principle of compensatory justice in the (b) sense. The reason is that this principle applies even if no injury occurs to the one who runs the risk; whereas the principles of compensatory justice in the (b) sense apply only to cases of actual injury.

Let us henceforth confine our attention here exclusively to injustice of this latter sort and to the principles governing its remedy.

2) I call the concepts of *compensation, restitution, reparations, redress* and all allied remedial notions *the progeny of diorthotic justice* because the first mayor attempt to grasp the idea of compensatory justice is in Aristotle's relatively neglected account of diorthotic justice.

Diorthotic justice applies to «transactions between man and man»

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(1) JOEL FEINBERG: *Doing and Deserving* (Princeton University Press, 1970), p. 93.

(1131a1) (2), or between groups of persons; it has two divisions corresponding to the two originating principles of these transactions, viz., «the voluntary and involuntary» (1131a2). Under the voluntary, Aristotle included «such transactions as sale, purchase, loan for consumption, pledging, loan for use, depositing, lettin» (1131a3-4). He calls these 'voluntary' presumably because *both* parties to such a transaction *consent* to it and to its terms. Diorthotic justice enters presumably because the transaction can *fail* to be executed as agreed, and thus one of the parties suffers some undeserved loss.

Under the involuntary Aristotle lists two sorts, those, that he calls «clandestine», e.g., «theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness» and those that he calls «violent, such as assault... murder, robbery with violence, mutilation...» (1131a6-10). These are called 'involuntary' presumably because the victim does *not* consent to the «transaction».

Common to both the voluntary and involuntary cases is *an undeserved injury deliberately inflicted* by one party upon the other, and of *undeserved benefit* to the latter, resulting in an imbalance calling for rectification, by taking from the offender something appropriate to make up to the victim for his loss and thereby restoring the equilibrium of the status quo ante between them. It is this corrective action, imposed by a corrective judgment (typically trough not necessarily from a third party in judgment upon a complaint by the victim) which is governed by the principles of diorthotic justice and which gives this class of actions its name in Greek.

3) The two branches of compensatory justice that Aristotle has identified are today dealt with under law in quite different ways. As to his voluntary acts, this class amounts to breach of contract, revocation of offerings, etc., and is the subject of long standing social interest in *private suits for civil damages,* including (but not confined to) restitution or money compensation. As to his involuntary acts, this class amounts to criminal offenses and not merely interpersonal involuntary transactions, and has become the subject of much interest in recent years. The subject of *victim compensation schemes,* paid out of the public treasury (3), is addressed precisely to this class of acts.

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(2) *Nichomachean Ethics,* tr. W. D. Ross, Oxford University Press, 1925. All references in the text are to the Bekker pagination.

(3) For a recent discussion of this subject, see Donal E. J. MacNamara and John J. Sullivan, «Making the Victim Whole», *The Urban Review,* VI (1973), pp. 21-25.

4) Before it can be regarded as laying an adequate basis for a general theory of compensatory justice, Aristotle's theory of diorthotic justice needs to be expanded in one direction, contracted in another, and clarified in a third.

First, Aristotle entirely omits any mention of compensation for injuries that are neither violation of a contract nor commission of a crime, but that occur through culpable negligence or even through accident, mistake, ignorance, and the like, i.e., *torts* generally (4). It is as though Aristotle had no notion at all of an injustice consisting of an injury caused by negligence, etc. It is clear from discussion elsewhere in *Nichomachean Ethics* that he believes ignorance is one of many excuses which negatives responsibilility. Perhaps he reasoned that in the absence of an intention on the agent's part, *no fault* accrues to him for any injury he causes another, and therefore he has *no liability* for corrective justice to the injured party in such cases. Yet to us, it seems only a slight extensión of the transactional metaphor Aristotle uses to include under the scope of diorthotic justice also compensation for injuries owing to negligence and accident, etc., i.e., involuntary injuries. Surely, such injuries are not the less transactional because they are doubly involuntary (sought neither by the agent nor by the victim), and society has long agreed that it has an interest in imposing liability on those whose conduct failed to measure up to some standard of reasonable care, attention, foresight, etc. To put it another way, compensatory justice has to be concerned not only with malicous injuries but also with nijuries to the innocent that arise from any or no motive or intention. All such injuries need to be rectified; at least, that is the perspective of compensatory justice.

Second, if this extensión is made, then it will also follow that benefit accruing to the injuring party is not a necessary feature of cases under diorthotic justice. For, typically, in the case of accidental but compensable injury, no benefit is gained by one party as a result of the injury to another.

5) Third although Aristotle does see the difference between responding to an injury by punishing the offender and responding to it by making the victim whole again, it is also true that in his discussion of

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(4) MAX HAMBURGER: *Mords and Law: The Grouth of Aristotle's Legal Theory* (Yale University Press, 1950), p. 43, is quite wrong when he says that Aristotle's distinction between the voluntary and involuntary classes of acts subject to diorthotic justice corresponds to the modern distinction between breach of contract and tort.

diorthotic justice, the difference between «reparation of damage and punishment is practically suppressed or ignored.» (5) His attack on reciprocal or retaliatory (antipeoponthetic) justice, lex talionis, makes it quite clear that he sees the difference between these two (6). But Aristotle never clearly develops a contrast between diorthotic justice and punitive or retributive justice as such. This contrast is necessary.

It is important to see how punishment and compensation are alike and yet distinct. Both have in common that (a) they can be exacted from a person, and in the typical case the person who has to «pay up» in either way loses something he values, and (b) they are responses to the injuries of others after the fact and typically enforced upon those who inflict the injury by persons in authority acting under standing rules. The chief difference between punishment and compensation is that they are directed primarily at different persons. Punishment leaves the person subjected to it *worse off* than he was, by taking away some right of his which in the status quo ante he possessed, and punishment does not affect the originally injured party one way or the other. Compensation makes the injured party *better off* by restoring both parties, the victim and the offender, essentially to the status quo ante.

Although there is no inconsistency in fastering upon a given offender both the duty to compensate his victim and a punitive deprivation of rights (cf. compensatory and punitive damages in the law), contemporary society (a least in the United States) rarely does impose both requirements. Thus, the scope of injuries to which compensatory justice is applied under law tends to exclude the scope of injuries to which retributive justice is applied, roughly as the civil law and private suits are distinct from the criminal law and punitive actions. Why this is true and whether it would be wise to alter this arrangement are issues beyond the scope of this paper. Suffice to note here the standard view. It holds that there are many cases where «compensation for a wrong is out of the question», and that in such cases there is nothing but punishment to take its place (7). E.g., since there is no restitution possible for most bodily injuries, since the poor cannot provide compensation for most property damage, and since most injuries are of the latter sort, the prisons teem

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(5) GIORGIO DEL VECCHIO: *Justice*, ed. A. H. Campbell (Edinburgh University Press, 1952), p. 53.

(6) See the commentary by W. D. Ross on *E. N.* 1132a1, and also the text, *E. N.* 1132b21-30.

(7) O. W. HOLMES: *The Common Law* (Little, Brow and Co., 1881), p. 40, 41.

with the lowest socio-economic classes in the name of exacting criminal *justice*.

6) How do cases calling for reparations or compensation differ from cases that give rise to claims of justice based either on desert or on need? Compensatory justice always seeks to make the victim whole again, but only in cases where he suffers injury at the hands of another person. It does not address itself to the cases where disadvantage, hurt, or loss is imposed upon a person by a «step-motherly nature» (Kant), «hardship» (Sidgwick) or «the natural lottery» (Rawls). Even though every case of some innocent person injured, intentionally or otherwise, by the action or omission of another constitutes a case where the injured person *deserves* and may *need* to be made whole again, the converse is not true. This proves that the *cases* in which claims of compensatory justice arise are not merely a subclass of the cases where claims of justice arise, but are a special species thereof. And this suggests that the *principles* of compensatory justice will not be a mere subset of the principles of justice generally.

7) Let us look now at the most general features about such cases and the principles governing them.

Cases calling for compensatory action and thus falling under the principles of compensatory justice tend to divide into several major classes.

First, there are those cases that exhibit *malice* upon the part of the injuring party, as distinct from those that do not. Within the latter, there are those cases that exhibit *negligence* upon the part of the injuring party, as distinct from those that do not. Within the latter, there are those cases where neither malice nor negligence rests upon the injuring party but where (fautless) *liability* is none the less fastened on him, in contrast to cases where he is not liable for the injury he caused. These distinctions bear upon the nature of the intention and the fault to be fastened upon the person doing the injury.

Another set of distinctions concerns the cases where the injury is such that *restitution* can be provided, in contrast to those cases where only *compensation* is possible. Compensation typically proceeds by providing the victim with some fungible commodity (usually money), whereas restitution (as I use the term here) will involve literally the return of the thing taken, or a simulacrum thereof. These distinctions bear upon the nature of the injury and the nature of the commodity available and acceptable to provide compensation.

Another distinction divides those cases where the injuring party also *benefits* through the loss suffered by the injured party, in contrast to the cases where there is no benefit coordinated with the loss.

Finally, there are the cases where the compensation or restitution is *direct,* from the injuring party to the injured party, in contrast to the other three possibilities all of which are *indirect* (viz., from a proxy of the injuring party to the injured party, or from the injuring party to a proxy of the injured party, or from a proxy of the one to a proxy of the other).

8) In order to see the principles of justice involved in cases of compensation for injustice, it is best to proceed by reference to a formal definition of this class of cases: Something, *x,* is a case of compensable injustice, and therefore falls under the principles of compensatory justice, if and only if

(a) in x, A, a person or group of persons, has suffered an injury, *y,*
(b) A is innocent or faultless with respect to this injury,[4]
(c) in *x,* B, some person or group of persons, through some act or omission, caused A's injury,
(d) there is something, *z,* that can restore A to the status quo ante his injury.

These four conditions articulate what we can call the Principle of Compensation itself, viz., that anyone who causes an injury to an innocent other owes rectification of that injury. The foundation of this principle in our sense of justice and the price it is reasonable to pay to exact compensatory justice rather than to pocket injuries must be left for discussion to another occasion. Similarly, complications in the above definition, arising from the unavailability of the parties, which forces reliance upon proxies and which require a shift from restitution to compensation, must also be ignored.

9) Our concept of compensatory justice evidently involves a minimum of four different kinds of moral principles, all of which can be said to be principles of compensatory justice in so far as they are jointly necessary and sufficient to cope with the class of cases covered by the above definition.

First, of course, there is the principle I have called the Principle of Compensation itself. In addition, there are three other sets of principles.

There will be *Principles of Wrongdoing,* the rules or principles that

specify the rights, privileges, immunities, liberties the breach or violation of which constitutes an injury to a person. These principles will in effect spell out the circumstances behind clause *(a)* in the above definition. Without such principles, clause *(a)* is inapplicable, since nothing otherwise counts as an injury as distinct from a loss or harm inflicted by one person on another.

Next, there will have to be *Principles of Liability,* the principles that deal with intention (malicious or otherwise) and absence of care and knowledge (negligence), and thus determine the scope and degree of fault and liability to which the offender is subject. Clauses *(b)* and *(c)* in the above definition cannot be applied without such principles.

Finally, there will be *Principles of Evaluation,* needed to define the extent of the loss or injury and the character of the compensatory good needed to remery the injury. Without such principles, clause *(d)* cannot be applied.

10) Discussions of justice, at least among philosophers writing in the English language, during the past decade or so, have concentrated almost entirely upon the principles of *distributive* justice (8). Many lawyers, however, would agree that the problem of justice is primarily the problem of «the redress of wrongs personally inflicted and incurred.» (9) If so, then the chief problems of justice are the problems of *compensatory* justice. This difference in perspective and interest between philosophy and the law need not trouble us. What remains to be done in the theory of justice is mainly to work out how the principles of distributive justice and of compensatory justice are related to each other.

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(8) See, e.g., the treatises by Otto Bird, Edgar Bodenheimer, Norman Bowie, Morris Ginsburg, H. H. Marshall, N. M. L. Nathan, Chaim Perelman, Nicholas Rescher, Julius Stone, and especially John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

(9) Lloyd Weinreb, in *Harvard Law Review,* 76 (1963), p. 1968, note 10.