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This is an author eprint, which may not incorporate final edits.
The definitive version of the paper is published in

Russell Christopher (ed), *George Fletcher's Essays on Criminal Law*
(Oxford: Oxford University Press 2012)

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Punishment and Compensation: a Comment

JOHN GARDNER *

George Fletcher observes, in his 1981 article ‘Punishment and Compensation’, that a great deal more philosophical attention has been paid to the punishment of offenders than to the compensation of victims.¹ In the intervening years, there has been some rectification of this imbalance. In particular, there has been major new philosophical work on the payment of compensatory damages in the law of torts and the law of contract.² So we now have finessed versions of many of Fletcher’s insights. Nevertheless Fletcher’s paper remains important as one of very few philosophical works that compare and contrast the compensatory and the punitive, giving even-handed attention to both. In the following remarks I will attempt to augment and refine Fletcher’s comparisons and contrasts.

A preliminary question is whether compensation is really the subject that interests Fletcher. His analysis seems to be of a narrower concept, which might more naturally be called reparative compensation, or reparation. Fletcher thinks that when an insurance company covers its policyholder’s losses arising out of a fire, that is not compensation, since the insurance company did not ‘bear [causal] responsibility for the harm caused.’³ Presumably the various government schemes in modern

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¹ *Creighton Law Review* 14 (1981), 691 at 691–2. Hereafter ‘P&C’.

² For example: Jules Coleman, *Risks and Wrongs* (Cambridge 1992); Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass 1995); Dori Kimel, *From Promise to Contract* (Oxford 2003).

³ P&C, 699.

welfare states that are said to compensate people for the adverse effects of industrial diseases, criminal injuries, and so on, are by the same token misnamed in Fletcher's view, for they too are paid without 'any suggestion' that the diseases and injuries in question can be attributed causally to the government.⁴ My own conceptual intuitions differ from Fletcher's here. To my mind all of these insurance-type payments are straightforwardly compensatory. What they are not is reparative. Reparation is a special kind of compensation which has the added feature that it is paid by or on behalf of someone who bears causal responsibility for the injury or loss that is being compensated. This added feature is the one that particularly interests Fletcher. So in my view his article might more illuminatingly have been called 'Punishment and Reparation'.

Nevertheless there is something helpful about beginning with the wider concept of compensation. For even before one begins to ask who should be paying compensation, there is a prior question of why anyone should be receiving it. This question forces us to spell out a unifying feature of all compensation schemes, reparative or otherwise. As Fletcher says, such schemes aim to restore their beneficiaries, so far as it can be done, to the position they would have been in had a certain misfortune not befallen them.⁵ I add 'so far as it can be done' to accommodate both conceptual and practical limitations. Some misfortunes cannot be (wholly) undone even in an ideal world. Others could be (wholly) undone were there no budgetary caps or policy exclusions. Both types of limitations afflict most compensation schemes. In spite of such limitations, however, all compensation schemes by their nature have the aim just mentioned, the aim of 'expung[ing] the damage done to the victim'.⁶ This is, in Fletcher's useful terms, their 'intrinsic' aim as compensation

⁴ P&C, 699.

⁵ P&C, 693.

⁶ P&C, 693.

schemes.⁷ They are more perfect as compensation schemes, the closer they get to eliminating the effects of the specified misfortunes on those whom they compensate.

Because he dives straight into discussing the special case of reparative compensation, Fletcher does not stop to point out how odd this intrinsic aim of compensation is. Why set about restoring the unfortunate to the position they *would* have been in rather than the position they *should* have been in? Of course in some cases it may come to the same thing. In some people's lives, apart from the misfortune that now falls to be compensated, things would have been as they should have been. But in other cases the two come apart. Since I should not have been so rich and you should not have been so poor, why (following some misfortune that afflicted us both) restore me to riches and you only to poverty? This is the perennial challenge issued by those who doubt the sanity, or even the intelligibility, of distinguishing corrective from distributive justice. Surely, the argument goes, it cannot be just to restore a distributive injustice. So corrective justice has no separate work to do. Compensation following a misfortune can be just only inasmuch as it puts us into the distributively just position that we should have been in anyway. There are many objections to this line of argument, some of which are outlined by Fletcher.⁸ The most important, however, is one that he does not mention. The proposed assimilation of corrective to distributive justice overlooks the independent negative value of disruption in human life. All else being equal, there is a stronger case for protecting people in the lives they already have than there is for giving those same lives to people who have not had them before. So the question of whether someone should receive \$50 by way of compensation for the loss

⁷ P&C, 693.

⁸ P&C, 695-8.

of \$50 is not the same as the question of whether, had he never had the \$50, \$50 should now be found for him.

Like it or not, this conservative principle is the main moral basis for the payment of compensation. But how can it be applied to cases of reparation? In reparation cases the loss is not automatically spread thinly across a large group of contributors, as it is with government compensation schemes or first-party insurance, but rather is shifted in its entirety (so far as this can be done) from the person who first suffered the loss to someone else who made some causal contribution to it. Why is this? Why eliminate disruption from one person's life, only to move it to another person's life? It is no answer to say that the person who is liable to pay reparative compensation (we can call her 'the defendant') may in turn take out third party insurance to spread her loss thinly and thereby reduce the disruption to her life. The question remains: Why shift this burden of loss-spreading to her in the first place? Why make it her problem?

The common response is to say that, as between someone who suffers a loss and someone else who makes a causal contribution to it, it is fairer (all else being equal) to shift the burden to the latter. The former is a patient and the latter is an agent, and this makes a moral difference to which of them should bear the disruption (or the burden of avoiding the disruption).⁹ This seems right to me. Economists of law have tried to cast doubt on whether the distinction between agents and patients can be sustained. In my view their attempts have failed.¹⁰

⁹ Two very different versions of this thesis: Richard Epstein, 'A Theory of Strict Liability', *Journal of Legal Studies* 2 (1973), 151; Tony Honoré, 'Responsibility and Luck', *Law Quarterly Review* 104 (1988), 530.

¹⁰ They have tried to switch attention from the defendant's wrongful action to the activity of which it forms part. Observing that the plaintiff is also (typically) engaging in an activity when she suffers her loss, and that the loss comes of the interplay of the two activities, many economists conclude that both plaintiff and defendant are agents of the loss. This is fallacious. When A

Nevertheless the same writers have succeeded in raising a deeper challenge to the common response. Why should the pool of possible loss-bearers be restricted in advance to these particular people, to the person who suffers the loss and the person or people who made a causal contribution to it? Why not begin with a much larger pool of possible loss-bearers?

This is a genuine puzzle. It is the puzzle with which Fletcher grapples when he characterises the intrinsic aim of reparative compensation in the following way:

[Reparative] compensation seeks to rectify the private imbalance generated by the defendant's causing harm.¹¹

This is clearly along the right lines. But the formulation is too impressionistic to do the work that Fletcher needs it to do. Talk of 'rectifying imbalances' suggests that it is just as important to eliminate the defendant's gain as it is to eliminate the plaintiff's loss. Sometimes, of course, the two go together. If I stole your car, then (all else being equal) taking the car from me and giving it back to you annuls my gain as well as annulling your loss.¹² But sometimes annulling your loss will not be enough to annul my

and B are fighting both are engaged in the activity of fighting. Nevertheless A's punching B in the face is an action by A of which B is the patient, and B's using his head to ram A is an action of B of which A is the patient. One can make an infantile joke out of the difference by saying, after punching someone: 'Next thing I knew, his head rammed into my fist.' This is the infantile joke that the economists are a bit too clever to get. They elevate it to a serious proposal. I am thinking particularly of Ronald Coase. 'The Problem of Social Cost', *Journal of Law and Economics* 3 (1960), 1, which has had widespread influence on economic thinking about law. It has also influenced the work of some philosophers, such as Jules Coleman and Arthur Ripstein in 'Mischief and Misfortune', *McGill Law Journal* 41 (1995), 91.

¹¹ P&C, 698.

¹² Arguably this is a case of restitution rather than a case of reparation. The intrinsic aim of restitution is to restore things to the way they were, not to the way they would have been in the absence of the theft.

gain. Suppose that I won a lucrative bet by stealing your car successfully. Should we care to annul this gain too? Some people believe that there are valid principles of corrective justice that require such surplus gains to be annulled by their 'disgorgement' to the plaintiff. On this view gains, even without corresponding loss, are part of the 'private imbalance' that needs to be 'rectified' under the heading of corrective justice.¹³ I doubt whether this view is right. But be that as it may, such annulment of gains is not compensation, and nor therefore is it reparation. Reparation aims to eliminate the plaintiff's losses, never mind the defendant's gains. In that respect talk of reparative compensation 'rectifying a private imbalance' is apt to be misleading.

This matters for the contrast with punishment. Fletcher rightly argues that there are sanctions and remedies which meet the 'external criteria'¹⁴ for punishment, but which are not truly punitive. Such sanctions and remedies are not punitive because the 'pain and deprivation implicit in [them] is incidental' to other aims.¹⁵ It is not itself part of their aim. Reparative compensation is such a non-punitive remedy. Whether it succeeds *qua* reparation does not depend on whether the defendant suffers or is deprived by being bound to pay it. Permitting him to rely on third-party insurance to meet his reparative obligations does not defeat the object of the reparative exercise, even if the insurance company declines to recoup the payment from the defendant through increased premiums. But the same indemnity would defeat the object of the punitive exercise. The object of the punitive exercise is (or includes) that the punished person should suffer or be deprived. Where does disgorgement of gains fit into this contrast? Is there any sound reason to extinguish a surplus gain from the defendant's holdings other than to subject him to

¹³ This was Coleman's old view, defended or illuminated in several of the essays collected in his *Markets, Morals and the Law* (Cambridge 1988).

¹⁴ P&C, 700.

¹⁵ P&C, 701.

suffering or deprivation? Maybe there is. But one wonders what it is, since *ex hypothesi* the transfer of surplus gains does not put the plaintiff back in the position she would have been in but for the defendant's actions, and so cannot be explained as an instance of compensation, reparative or otherwise. One cannot account for it by pointing to the need to mitigate disruption. So it is at least tempting to think that those who are against the retention of surplus gains are being punitive in their attitude.

I am not sure that Fletcher makes enough of this distinction between the incidental pains of reparation and the intentional pains of punishment. He prefers to emphasise, as his master-contrast, the private rectification of reparation as against the public rectification of punishment. On his view,

punishment seeks to rectify the public imbalance generated by the defendant's causing harm.¹⁶

But in what sense are the imbalances tackled by punishment 'public'? This (I think) is Fletcher's explanation:

Equals cannot punish each other. Punishment presupposes a superior authority who judges the conduct of the other as wrong.¹⁷

Once again I do not share the conceptual intuition. Many people respond to wrongs committed by their friends and relatives by sulking, withdrawing favours, etc. I see no reason to doubt that this is punishment, nor to regard it as a less central case of punishment than, say, criminal punishment. *Pace* Fletcher, a consumer boycott of the Nestlé Corporation by 'private individuals'¹⁸ is straightforwardly punitive, so long as the

¹⁶ P&C, 698.

¹⁷ P&C, 699.

¹⁸ P&C, 698.

intention of those individuals is that Nestlé (or its directors, shareholders, etc.) should suffer for the corporation's wrongs.

More generally, I am sceptical about the idea that the rectification of imbalance is part of the very idea of punishment, as opposed to one possible reason (among many) for punishing. Why punish? People may say 'to get even' or 'to settle scores' or to have the wrongdoer 'pay her debt to society' but they may equally say 'to teach him a lesson' or 'to give him a taste of his own medicine' or 'to make an example of him'. Are the latter non-rectificatory reasons for punishing in some way parasitic upon or secondary to the former rectificatory ones? Do they presuppose an undisclosed rectificatory objective on the part of those who cite them? I think not. Punishment's intrinsic aim is only that the wrongdoer should suffer or be deprived on the ground of her wrongdoing. Beyond that the possible aims of punishment are various.¹⁹ In this respect punishment and reparation are more asymmetrical than Fletcher seems to allow. For rectification as between the defendant and the plaintiff is part of the very idea of reparation – part of reparation's intrinsic aim – and not merely one possible reason for exacting it.

I confess that I have not said anything so far to solve the puzzle of how rectification by reparation works. So I have not managed, so far, to improve on Fletcher's impressionistic formulation of reparation's intrinsic aim. Let me end by floating a suggestion about how one might make progress with this. When I fail to perform a duty that I owe to someone, there is something that I still owe that person afterwards. Strictly speaking, I still owe him performance of the duty, which continues to bind me. But if it is too late to perform – the dirty deed is done – I now owe him the next best thing.²⁰ I owe it to

¹⁹ See my *Offences and Defences* (Oxford, forthcoming 2007), chs 10-12.

²⁰ For further discussion, see J. Raz, 'Personal Practical Conflicts' in P Baumann and M Betzler (eds.), *Practical Conflicts: New Philosophical Essays* (Cambridge 2004), 172. Much the same idea is briefly floated by Weinrib in

him to put him back, so far as it can now be done, into the position he would have been in if I had done my duty in the first place. So how does the negative value of disruption fit in? The negative value of disruption is part of the rationale for the original duty, the one that I failed to perform. It was, at least in part, a duty of non-disruption. This means that the 'next best thing' I now have a duty to do includes mitigating or alleviating, so far as possible, the disruption that I left behind. Often but not always the best way to mitigate or alleviate is to compensate. In short, the compensation is needed because of the disruption, and the duty to compensate is owed by me because I was the disrupter. That means it is the special kind of duty to compensate that, at the outset, I called a reparative duty.

Needless to say this line of thought requires a great deal more work before it holds up. But properly developed, it explains a lot.²¹ In particular, it helps to bring out the most fundamental asymmetry of all between reparative compensation and punishment. For there is no way to represent punishment as the fallback performance by the wrongdoer of the duty that he originally failed to perform. Unlike reparation, punishment is not something that the wrongdoer owes. For it is not something that he can give. It is something that is inflicted upon him by others, and the norms regulating it belong, in the final analysis, to their normative position and not to his.

If this is right then Fletcher's article makes reparative compensation and punishment seem more fundamentally alike than they are. Nevertheless the article casts a great deal of light on both concepts and on the relationship between them. It was primarily this article by Fletcher that inspired me, as a graduate

The Idea of Private Law, above note 2, at 135. It points to one possible interpretation of his more famous thesis that the tortfeasor always enjoys a 'normative gain' corresponding to the victim's 'normative loss'.

²¹ I have done some but not all of that work in 'What is Tort Law For? Part 1: The Place of Corrective Justice', *Law and Philosophy* 30 (2011), 1.

student, to think about the similarities as well as the differences between crimes and torts, and between criminal law and tort law, which in turn inspired me to invest philosophical energy (ever since!) in writing about both areas of law.