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PUNISHMENT AND COMPENSATION*

GEORGE P. FLETCHER**

When novelists and philosophers turn to the work of lawyers, they tend to gravitate toward certain issues and ignore others. Two processes—punishment and compensation—lie at the heart of our legal system, but only the former has drawn the attention of literary and philosophical minds.

The issues of wrongdoing, guilt, and expiation are of endless fascination not only for Dostoevsky and Dürrenmatt, but for any writer who seeks to fathom the foundations of our moral life. For philosophers, the concept of punishment has become a proving ground of the even broader conflict between deontological and utilitarian moral theories. Deontologists hold that punishing crime is right and just in itself.¹ Utilitarians insist that the good of punishing criminals depends on the beneficial consequence of deterrence and incapacitation.² For lawyers as well, the concept of punishment comes center stage as the standard for distinguishing criminal prosecutions from civil actions. When a sanction constitutes punishment, the state must provide the procedural trappings of a criminal trial. Thus, the courts confront the question whether particular sanctions, such as deportation³ and punitive fines,⁴ constitute the kind of punishment characteristic of criminal trials.⁵

The equally important notion of compensation enjoys none of this glamour. Philosophers do not probe the meaning of compensation as they write unceasingly about the nature of punishment. As lawyers we speak daily about compensating the victims of accident and of governmental programs, but the question whether

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1. The classic text is I. KANT, *METAPHYSISCHE ANGANGSGRÜNDE DER RECHTSLEHRE* § 49E at 452-59 (1797). See also Morris, *Persons and Punishment*, in H. MORRIS, *ON GUILT AND INNOCENCE* 32 (1976); Lewis, *The Humanitarian Theory of Punishment*, 6 RES. JUDICATAE 224 (1953).

2. J. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 170 (1823 ed.).

3. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (deportation determined not to constitute "punishment").

4. Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419, 420-21 (1909).

5. See generally Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 U. CHI. L. REV. 290 (1965).

transferred funds constitute compensation or something else rarely concerns us.⁶ That we ignore the nature of compensation should not puzzle us. Offsetting injuries by compulsory compensation lacks the dramatic appeal of crime and punishment. Yet the distinctions among institutions for transferring wealth are important, both morally and politically. The criteria for marking off compensation from welfare and redistributive taxation warrant our attention. These criteria bring into focus critical, undiscussed features of our legal institutions.

If punishment occupies the intersection between deontological and utilitarian moral theories, compensation can claim the same distinction. Do we require tortfeasors to compensate their victims because the victims deserve a monetary surrogate for their injuries or, alternatively, because we wish to stimulate changes in the behavior that generates accidents? Deontological theories insist that compensation for damages done is right and an end in itself. Utilitarian theories hold that compensating victims makes sense only as a means of furthering social objectives, such as reducing the costs of accidents and encouraging socially useful behavior.

A proper analysis of compensation does not require us to commit ourselves, as a moral matter, to either a utilitarian or deontological theory. In this article, I shall offer a conceptual account of compensation, which turns out to include the elements of a deontological theory. The method of inquiry resembles philosophical work on the concept of punishment. The result of the inquiry conforms, structurally, to those views that stress the intrinsic retributive component of sanctions properly called punishment.⁷ The question that guides our inquiry, then, is not "What is the purpose of compensation?" but rather "What is the nature of compensation?" This question invites a conceptual analysis of compensation rather than an explicit moral choice between utilitarian and deontological moral theories.

EXTRINSIC AND INTRINSIC PERSPECTIVES

At the outset I wish to introduce a terminological distinction that will assist me in referring to various theories of compensation and punishment. The extrinsic aspect of punishment and of com-

6. Tax lawyers do debate whether funds paid to an employee are deductible from company income as "a reasonable allowance for salaries or other compensation." I.R.C. § 162(a). Cf. *Patton v. Commissioner*, 168 F.2d 28, 31 (6th Cir. 1948) (deduction disallowed).

7. Quinton, *On Punishment*, in G. EZORSKY, *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 12-13 (1972). See Wasserstrom, *Some Problems with Theories of Punishment*, in *JUSTICE AND PUNISHMENT* 180-81 (J. Cederblom & W. Blizek eds. 1977).

pulsory compensation refers to the impact of the sanction on future behaviour, either of the defendant or of other people. The intrinsic aspect inheres in the relationship between the sanction and the wrongful or harmful act for which the sanction is imposed. This aspect of both punishment and compensation finds expression in inquiries about whether the sanction is fitting or appropriate. The intrinsic question about punishment is whether it responds justly to the actor's wrongdoing. The analogous concern about compensation is whether it serves to rectify the injury as suffered by the victim. Note that both of these intrinsic questions carry intimations of magic in the legal process. Punishment magically expunges the wrong; it enables the criminal to repay his debt to society. Compensation similarly expunges the damage done to the victim; the mere payment of money turns back the clock and puts the victim in the position she would have been in had the injury not occurred.

This intrinsic magic prompts some observers to doubt whether either punishment or compensation makes sense in any way except its extrinsic potential impact on future behavior. These sanctions presumably have an external impact, while the intrinsic, magical component remains open to doubt. The concreteness of the extrinsic perspective tends to support utilitarian theories, both of punishment and of compensation. These theories take the extrinsic perspective to be the only relevant consideration.

Focusing exclusively on the extrinsic aspect of punishment and compensation may avoid certain soft arguments about rectifying the wrongs of the past, but only at the expense of imprecise and unprovable claims of social impact. No one has yet figured out a way to determine the relative deterrent impact of a single incident of punishment or of requiring compensation. Even more critically, the extrinsic point of view blurs important distinctions among parallel sanctions that may have the same hypothetical social impact. From the extrinsic point of view, one has considerable difficulty distinguishing between punishment and civil commitment. In the field of compensation, the same extrinsic perspective obfuscates the contours of compensation both from the defendant's and from the plaintiff's point of view. If impact is all that matters, then the defendant's paying compensation and his paying a fine appear to be of equal moment. If receiving money is all that matters, then the plaintiff's receiving compensation hardly differs in nature from her receiving incentive payments, relief, or welfare. The underlying question is whether we must build these distinctions into any account or model we generate of our legal processes. I will argue that any theory of law that ignores this intrinsic side,

either of punishment or of compensation, fails to capture our legal reality.

Though no one, so far as I know, has offered a theory of compensation parallel to the elegant theories of punishment, several influential writers have taken implicit stands on the nature and relevance of compensation. In fact, two of the more important schools of contemporary jurisprudence build on implicit stands about the nature and role of compensation. In the school of economic jurisprudence, as typified by the work of Calabresi⁸ and Posner,⁹ compensation as such turns out to be irrelevant.¹⁰ In the opposing philosophical literature, typified by the work of Robert Nozick, the distinction between compensation and redistribution proves to be a critical premise of a libertarian political theory.¹¹ In order to gain some perspective on the concept of compensation, we should digress to consider these divergent views on the relevance of the intrinsic perspective and of the concept of compensation.

IS THE INTRINSIC PERSPECTIVE NECESSARY?

As Calabresi and Posner approach tort law, the relevant inquiry consists in the external impact of monetary sanctions, never in examining the intrinsic aspect of compensation. Forcing a defendant to pay money might stimulate similarly situated risk-takers to invest more in safety or to be more careful in the future, but it is irrelevant that in the particular case the compensation flows from the defendant to the victim. The money could, as well, have been paid as a fine to the state.¹² If economic efficiency were the sole concern of the tort system, this conclusion would be plausible. The shift of assets from one party to the other has no economic significance. Of course, the reallocation of wealth poses distributional issues, but economists concede that in their professional goals, they know nothing about distributional justice, or for that matter, any other form of justice. Thus the economic approach to tort law suppresses the intrinsic question whether the damage award rectifies the loss suffered.

An analogous system of thought has arisen in analyzing whether the government should pay compensation to persons whose property is allegedly taken in the course of regulation and

8. G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

9. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

10. See G. CALABRESI, *supra* note 8, at 357-74; R. POSNER, *supra* note 9, at 24-33.

11. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 149-231 (1974).

12. See, e.g., G. CALABRESI, *supra* note 8, at 73; R. POSNER, *supra* note 9, at 320-32.

other governmental actions. The fifth amendment requires just compensation to those whose property is taken, either directly or indirectly, for the public good.¹³ But as Michelman¹⁴ and Ackerman¹⁵ develop their versions of economic jurisprudence, the obligation to compensate should turn exclusively on whether buying off those who file claims is the socially least costly way of resolving the conflict.¹⁶ The social cost of compensating or not compensating includes the administrative costs of processing the claims and the potential demoralization costs to those who are not compensated. But the social costs do not include the out-of-pocket expense of shifting assets from the government to the individual. Again, from the economic point of view, the mere redistribution of wealth does not represent a social cost. Again, we observe that economic jurisprudence systematically ignores the intrinsic aspect of compensation.

If economic jurisprudence ignores the compensatory aspect of required payments, the contrasting school takes the intrinsic aspect of compensation to be a central concept in determining the functions of a just state. To appreciate this point, we must turn to the theories of Rawls and Nozick.

In the wonderfully simplified world of economics as applied to the law, all legal questions fall into two categories: economic efficiency and the distribution of wealth. This bifurcation ignores the critical distinction between corrective and distributive justice. Corrective justice requires the transfer of assets in order to correct some injury for which the paying party is properly held accountable. Distributive justice, in contrast, dictates the distribution of assets in establishing the starting point for voluntary social cooperation. In Rawls' monumental work, the central concern is distributive rather than corrective justice. Rawls' basic premise is that all deviations from the equal distribution of wealth must be justified.¹⁷ He ignores the question of corrective justice, for these issues arise not in establishing the framework for social cooperation, but only to correct concrete disturbances that occur in the course of social life.¹⁸

In Nozick's powerful retort to Rawls, however, the concept of

13. U.S. CONST. amend. V.

14. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

15. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 72-76 (1977).

16. See, e.g., Michelman, *supra* note 14, at 1193.

17. J. RAWLS, A THEORY OF JUSTICE 62 (1971).

18. *Id.* at 8, 244-45 (responding to injustice in "the conduct of individuals" excluded from the ideal conception of justice).

corrective justice becomes the plumb line for staking out a plateau of just, voluntary relationships free of unjust coercion. For Nozick, taxing the rightfully held assets of the rich amounts to a violation of the natural right to hold property.¹⁹ In contrast, requiring compensation for a harm caused stands as an acceptable form of coercion. Compensation merely corrects a harm for which the paying party is justly held responsible. Although it is coercive, required compensation does not violate anyone's natural rights. Indeed, the failure to require compensation, when justly due, would represent a violation of the victim's right to a redress of his injuries.²⁰

In the structure of Nozick's argument, the distinction between corrective and distributive justice, between compensation and redistribution, figures most prominently in developing a model of voluntary, just, processes that would lead to a minimal, Night Watchman state.²¹ The challenge for libertarians is to develop a model of the state that entails neither the unjust loss of liberty nor the redistribution of wealth.

The stumbling block to a purely voluntary state would obviously be those citizens who preferred not to join the central state and instead to run their own courts and enforce their own judgments. Forcing these independents to give up their courts and their private police would, according to Nozick, intrude upon their natural rights.²² And if they were coercively absorbed into the state, the state would have to accord to them its peacekeeping protection and its dispute settling services. Persons involuntarily subjected to the state's monopoly of force would presumably not pay for access to the state's courts. But if they did not pay, the implication would be that other voluntary citizens would have to pay a surcharge in order to support the services extended to the involuntary members. Nozick concludes that this surcharge would represent a redistribution of wealth. The voluntary members would in effect subsidize the involuntary members. A state based on the principle of subsidization would be tainted by the unjust redistribution of wealth.

To overcome these two impediments to a just, minimal state, Nozick borrows principles of compensation and prohibition from the common-law tradition. The argument for prohibiting independent courts and police is that these independent courts would expose the voluntary citizens of the emerging state to exces-

19. R. NOZICK, *supra* note 11, at 169.

20. *Id.* at 150-53.

21. *Id.* at 26.

22. *Id.* at 101-02.

sive risks of arbitrary judgments. As some dangerous activities are prohibited as nuisances, an emergent state could legitimately prohibit independent courts and police "not known to be, both reliable and fair."²³

There remains the problem of characterizing the free services to involuntary members so as to avoid the taint of redistribution. Nozick's argument is that because individuals are deprived of their natural right to enforce their own claims, the free services of the state should be seen as a form of compensation. Nozick draws the analogy between epileptics prohibited from driving and independents prohibited from running their own courts.²⁴ Both prohibitions are based on the fear that the exercise of a basic right excessively endangers other people. Nozick argues that epileptics should be compensated for being deprived of the right to drive, and therefore, by extension of the same principle, independents are entitled to compensation for being deprived of their courts. The compensation consists in the free services offered by the state.²⁵

Nozick's argument needs some shoring up at several turns.²⁶ My point in outlining this argument is not to endorse his conclusion that a state might evolve without the redistribution of wealth, but to demonstrate the importance of distinguishing between redistribution and compensation in developing a political theory.

It is fair to say that the writers I have mentioned shape the basic debate in our law schools today. Yet among these influential thinkers we find divergent postures on the relevance of compensation. The school of economic jurisprudence ignores the intrinsic aspect of compensation, for as their premises imply, a shift in wealth has no economic significance. In contrast, theorists who hold to the distinction between corrective and distributive justice tend to regard coerced compensation as immune to traditional libertarian concerns. It is imperative that we take a stand on this conflict. The issues are both substantial and methodological. At stake is the way we think about our legal institutions. And the way

23. *Id.* at 108.

24. *Id.* at 78-79 (epileptic must be compensated); *id.* at 110 (those deprived of self-enforcement must be compensated).

25. *Id.* at 110-13.

26. Nozick has been criticized for simply assuming that individuals have rights and not offering any argument or rationale for these rights. See Nagel, Book Review, 85 *YALE L.J.* 136, 137-38 (1975). This assumption does not trouble me. The logic of Nozick's derivation of the minimal state depends, however, on the assumption that independents are entitled to compensation for the loss of their right of self-enforcement. R. NOZICK, *supra* note 11, at 110. The principle that harmful activities may be prohibited only if compensation is paid, runs against the common law as well as other legal traditions. Defending this principle, critical to Nozick's argument, would be the place to begin the shoring up.

we think has long-range implications for what we regard as acceptable uses of legal power.

PHILOSOPHICAL ACCOUNTS OF PUNISHMENT AND COMPENSATION

How do we go about determining whether the intrinsic perspective is necessary for an adequate account of compensation? I suggest we follow the lead of the philosophical literature on punishment and attempt to apply its teachings to the related concept of compensation. The two notions, after all, are closely related. From the extrinsic perspective, both function as sanctions imposed against persons, who, in general terms, cause harm or endanger others. From the intrinsic perspective, punishment seeks to rectify the public imbalance generated by the defendant's wrongdoing; compulsory compensation seeks to rectify the private imbalance generated by the defendant's causing harm. The problem in both contexts consists in refining this general account of the two remedies.

In the philosophical literature on punishment, two recurrent issues present themselves. The first focuses on the required relationship between the punishing person and the wrongdoer; the second, on the reasons for requiring the wrongdoer to suffer. Let us work through both these issues, first with regard to punishment, and then by extension to the process of requiring compensation.

Assume that someone has done something morally wrong. We want to do something about it. If we take action against a wrongdoer, the suffering we inflict does not always amount, conceptually, to punishment. For an example of self-help that does not amount to punishment, think of the proposed boycott against the Nestle Corporation's marketing its infant formula in underdeveloped countries. Many people have argued that Nestle's expanding its market in this way constitutes a moral wrong. The effect is to induce poor women in underdeveloped countries to expend their resources for formula rather than to nourish their children with their natural milk. The proposed remedy is to boycott Nestle products in the United States. If the boycott succeeds, it would unquestionably inflict economic harm on the Nestle Corporation. From the external point of view, this harm seems very much like punishment. The effect of lost profits on the Nestle Corporation would resemble the government's imposing a fine for wrongdoing. Yet, regardless of their economic power, private individuals conducting a boycott cannot, in the nature of things, punish the Nestle Corporation.

Similarly, the United States' boycott of the Olympic Games could not, conceptually, amount to punishment of the Soviet Union for invading Afghanistan. The reason that these boycotts do not amount to punishment is that the person seeking to punish stands as an equal with the alleged wrongdoer. Equals cannot punish each other. Punishment presupposes a superior authority who judges the conduct of the other as wrong. God can punish man; the state can punish its citizens; parents can punish their children. This point about authority is a conceptual point.²⁷ It is a claim about the nature of punishment, not a normative thesis about how we ought to construe the concept.

The concept of compensation lends itself to an analogous conceptual restriction. If someone has suffered injury in an accident or natural disaster, anyone might offer assistance to help reduce the suffering of the victim, but not everyone who offers money or other forms of wealth is in a position to compensate the injured party. Suppose a fire strikes a Navajo village and we send money to help relieve the suffering of the deprived villagers. We can help the victims with our funds, but as a conceptual matter, we do not compensate them. Had an arsonist set the fire and been required to pay for the damage, however, her payments would constitute compensation. This subtle distinction invites others. Suppose the villagers have fire insurance and they collect the proceeds on their policies. We would not ordinarily refer to the funds paid by the insurance company as compensation. Why not? I submit that these variations of the problem fall into a pattern described by a required relationship between the paying party and the injurious event. The paying party must bear some responsibility for the harm caused. If we offer relief to the villagers, we do so without any suggestion of responsibility for the fire. The same is true of the fire insurance company, which merely acts to fulfill its contractual obligation. But the arsonist obviously stands in a relationship of responsibility and therefore her paying does constitute compensation.

The conceptual alternatives to compensation take a variety of forms. We might call the funds we offer to the villagers charity, or if the government came forth with the funds, "relief" would be the right term. The proceeds paid by the insurance company would be neither compensation nor relief, neither welfare nor charity. The distinguishing feature of the insurance transaction is the insured

27. For agreement on this point, see Hart, *Prolegomenon to the Principles of Punishment*, in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1, 4-5 (1968) (listing five elements in a definition of punishment).

parties' right to receive the proceeds under their policies. Note that most cases of obligatory payment constitute compensation, but the fire insurance example stands as an exception. In that instance the policyholder's contractual right takes the payment out of the categories of welfare and relief, but the company's not having a responsible relationship to the fire inhibits us from describing the payment as compensation.

In the second perspective that we derive from the philosophical literature on punishment, we focus on the reason for judicial or administrative action. A range of sanctions meets all the external criteria for punishment. Impeachment, deportation, disbarment—all of these, in H.L.A. Hart's words, "involve pain or other consequences normally considered unpleasant."²⁸ All of them occur in the required relationship of authority and they all otherwise meet Hart's necessary and sufficient conditions for punishment. Yet we know intuitively that none of them constitutes punishment.

Consider impeachment and conviction of civil officers of the United States. This sanction is imposed for "high Crimes and Misdemeanors,"²⁹ and yet removal from office does not constitute punishment for these crimes. If it did, we would expect the double jeopardy clause to prevent subsequent criminal prosecution of the removed officer. Yet the double jeopardy clause does not apply. If impeachment represented a way of paying one's debt to society, we might expect the President's pardoning power to apply to the relevant crime and thus remove the debt that need be paid. By express exception in the Constitution, however, the pardoning power does not apply to impeachments.³⁰ How do we explain that a sanction can border on punishment and yet fall short? The explanation, I believe, resides in the reason for impeachment and removal from office. The point of this remedy is not to cancel out the wrong, but to protect the public by removing the offending civil officer. The significance of the high crime or misdemeanor is that it provides evidence of unreliability and untrustworthiness in office. It may be that the stigma of impeachment is greater than that for recall by popular election, but the weight of the sanction falls on the side of social protection rather than retribution for wrongdoing. As a measure of separation and protection, impeachment fails to qualify as punishment. The same analysis explains why legally and philosophically, deportation and disbarment fall beyond the range of punishment and thus may be imposed without

28. *Id.* at 4 (the first element of punishment).

29. U.S. CONST. art. II, § 4.

30. U.S. CONST. art. II, § 2, cl. 1.

all the procedural protections of a criminal trial.³¹

In referring to this cluster of issues as the reason for the sanction, I do not mean to say that individual judges necessarily have a particular reason in mind when they impose a sentence. Rather the reason should be inferred from the attributes of the sanction, both as they have been designed, and as they have crystallized in practice. The quality of impeachment and deportation becomes evident by comparison with a related sanction, expatriation, which the Supreme Court properly treats as punishment.³² Expatriation for wrongdoing is subjected to the type of scrutiny ordinarily reserved for criminal sanctions. The difference between deportation and expatriation is important. The pain and deprivation implicit in deportation is incidental to the aim of separating an offending alien from the country; the compulsory separation accomplishes its end of protecting society. Expatriation, in contrast, does not accomplish anything except the disgrace of the dishonored citizen. The expatriated citizen remains at home; if he is dangerous, he remains dangerous even as a resident alien. If there is a social benefit that derives from expatriation, it is only as the result of the additional mechanism of example and deterrence. If others witness the dishonoring of a citizen, they might arguably abstain from the same crime.

The emergent thesis is that if a sanction automatically protects society by removing someone from a position in which he endangers us, then the sanction bears a nonpunitive component. If, in contrast, the sanction functions primarily to disgrace and stigmatize the offender, then we are inclined to see the sanction as punishment. Impeachment, deportation and disbarment fall into the category of sanctions that in their very imposition achieve a socially desirable goal of separating the offender from a role or a place where he might be dangerous. Expatriation more closely resembles flogging, capital punishment, and penitential confinement. These are sanctions designed to disgrace and stigmatize the offender, and through this act of labelling, perhaps to reform the offender and encourage others to abstain from similar behavior.

The difficulty of this analysis, I must note, is that it fails, at first

31. For further elaboration of this argument, see G. FLETCHER, *RETHINKING CRIMINAL LAW* 408-13 (1978).

32. Compare *Perez v. Brownell*, 356 U.S. 44, 60 (1958) (expatriation of citizens who vote in foreign elections upheld on the ground that expatriation terminated the American involvement in foreign elections) with *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (expatriation of wartime deserters invalidated as cruel and unusual punishment, no constitutionally valid end achieved by sanctioning wrongdoing with the deprivation of citizenship).

blush, to explain why we regard imprisonment as a form of punishment. So far as confinement in prison serves merely to separate dangerous offenders from society, imprisonment functions very much like deportation for a specific term. Perhaps the stigmatizing effect of imprisonment is sufficient to explain why this form of separation differs from those cases that we regard as nonpunitive. Alternatively, confinement might be a special form of separation, for more intrusive upon liberty than merely removing someone from a position or from a particular society. Though I think my general account of punishment is correct, I concede that the central case of imprisonment may require a distinct analysis.

My aim here is to illustrate a method of analysis which I believe carries important lessons for understanding the structure of compensation in the law of torts and eminent domain. Recall Nozick's reliance on the distinction between compensation and redistribution. How do we decide whether a particular payment constitutes one or the other? It is not enough to point to a prior incident of causing harm as the stimulus for the required payment. We have to pose the additional question: what does the payment do? What is it designed to do? The analogy with mechanisms of separation breaks down at this point, for there is no easy way to inspect a monetary payment in order to determine what it accomplishes. We have to reflect on the criteria for assessing the amount of the payment. Do we look to the relative wealth of the parties in assessing damages? If we do, we can hardly avoid the suggestion that the payment effectuates a redistribution of wealth. On the other hand, if we limit our focus to the transaction causing harm, the payment functions more as a measure of compensation. Do we apply the principle that the defendant must take the victim as he finds him? If so, again it appears that the reason for the sanction is to correct the effects of the harm on the particular victim. Redistributive measures do not take the victim in his or her concrete particularity; rather they treat the victim as a member of the class of persons who warrant a greater share of society's wealth. Thus, if we consider the particular victim's age and earning capacity, we structure the obligatory payment to highlight the compensatory effect.

In our systems for requiring compensation to victims of torts and governmental takings, we do not permit evidence of the parties' relative wealth. Rather we require, particularly in the tort system, that the defendant take her victim as she finds him.³³ This

33. *Vosburg v. Putney*, 80 Wis. 523, 530, 50 N.W.403, 404 (1891) (defendant liable for unexpected consequences of kick); *Thompson v. Lupone*, 135 Conn. 236, 239, 62

suggests that the function of tort payments is to render compensation rather than to redistribute wealth. Of course, we could change the system so that it operated differently, but my aim here is to analyze the requirements of a model that would explain our practices. Revolutionary arguments are reserved for those who can convince us, as a matter of principle, that what we are now doing is wrong.

CONCLUSION

If I have offered an adequate account of compensation as that concept has crystallized in our legal practices, then one feature of that account takes us back to the conflict between the economic and philosophical analysis of compensation. The criteria for gauging the payment—critical in understanding whether it is compensation or redistribution—coincides with what we referred to earlier as the intrinsic aspect of compensation. The extrinsic perspective tells us merely that compensation is like many other actions that have the effect of transferring wealth from one person to another. The intrinsic perspective informs us whether the payment responds fittingly to a particular victim injured on a particular occasion.

Now recall the contrast at the beginning of this article between economic jurisprudence, which ignores the intrinsic perspective on compensation, and the philosophical school typified by Nozick's work, which relies on the intrinsic perspective in elaborating a political theory. If my account of compensation is correct, then it follows that economic jurisprudence cannot possibly offer a faithful account of the concepts that we actually employ in discussing legal problems. No system of thought that ignores the intrinsic perspective, on either punishment or compensation, can possibly capture the distinctions that we use every day in approaching legal problems.

This categorical rejection of economic descriptions of our legal system could well provoke a pointed objection. How is it possible, one might say, that by engaging in conceptual analysis, I can solve the normative questions that concern every reflective lawyer? What is the purpose of tort law? Is it merely to provide compensation or is it to minimize the costs of accidents? What is the purpose of the eminent domain clause? Is it to secure private property against redistribution or is it to minimize the social costs

A.2d 861, 863 (1948) (defendants held liable for complications due to victim's being overweight; "The defendants took her as they found her.").

of governmental programs? These normative issues are at the forefront of every theoretical discussion. How can one simply brush them aside with an argument about the structure of compensation?

The objection is a powerful one, and indeed it goes to the heart of contemporary disputes about justice and efficiency as legal values. The pursuit of the "right" purpose of criminal law, of torts, of the first amendment, indeed of every institution in our legal system, dominates theoretical discourse. Yet in my opinion this pursuit is misconceived.

First, the pursuit of the "right" purpose directs our attention to the impact, or the extrinsic perspective, of our legal institutions. The "right" purpose consists always in the pursuit of some goal that the theorist posits. The preoccupation with these goals or policies obfuscates the boundaries among parallel institutions, all of which favor the same goal. From the point of view of social protection, we can hardly distinguish among punishment, impeachment and deportation. Yet the life of legal argument consists precisely in elaborating distinctions of this sort, probing essences of related concepts and staking out the boundaries between them. That is the simple fact that we confront every time we think about speech under the first amendment, about searches under the fourth amendment, about the concept of testimony in analyzing the privilege against self-incrimination, and about criminal punishment under the sixth amendment. The habit of drawing distinctions defines the lawyerly craft, and any mode of thought that blurs the boundaries of related concepts speaks not to lawyers, but to others who care more about functional similarities than about the structure of ideas. The preoccupation with purposes and goals, in short with the extrinsic perspective, blurs distinctions; for it directs us away from those intrinsic considerations that are necessary to distinguish among institutions that tend to have the same external impact.

My second response to those who favor focusing on purposes rather than on conceptual distinctions begins with a point of political theory. I start on the assumption of a heterogeneous society, in which we all pursue diverse purposes. The function of legal institutions is precisely to enable individuals with diverse goals to engage in peaceful and effective cooperation. It follows that our legal theory should not enthrone particular purposes as criteria of legitimation. In the doctrines of contracts, torts, and criminal law we find a systematic tendency to de-emphasize purposes and motives. The validity of a contract does not turn on the parties' purposes. It

matters not why an individual borrows money, merely that she borrows it. Similarly, tort liability for battery does not turn on why A kicked B, but merely that A intentionally kicked B. As a general matter, motives are equally irrelevant in assessing criminal liability. Disregarding ultimate purposes enables us to establish a set of principles that function as the lowest common denominator among diverse purposes and motives. That is precisely what we need in a society in which we seek to cooperate despite our cherishing private purposes.

By like token, we should recognize that every theorist has a favored explanation of why we punish criminals, why we require compensation for takings, and why we protect free speech. Precisely as the validity of contracts does not turn on the parties' ultimate purposes, the analysis of our institutions should not incorporate the favored purposes of this or that group of theorists. Rather, we should view the criminal law, tort law, takings law, and other institutions as the common denominator of competing purposes. That is why I have urged a conceptual analysis of punishment and of compensation rather than a view of these sanctions hitched to some goal that we should all take for granted. The intrinsic perspective does not start from a goal, but from the reality of crystallized concepts in everyday legal discourse. It is in examining this discourse that we discover the implicit structure of our concepts and further a vision of law free of officially approved purposes. As we turn away from private purposes, we elaborate a legal method that conforms to the way lawyers actually think and argue. But most importantly, by recognizing that a proper analysis of punishment and of compensation need not incorporate a particular social goal, we encourage diversity of purpose behind a common institution. We maintain the unity of our legal system at the same time that we favor individuality and human freedom.