

William & Mary Law Review

Volume 18 (1976-1977)
Issue 2 Symposium: Philosophy of Law

Article 7

December 1976

Justice in Compensation

James W. Nickel

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Jurisprudence Commons](#)

Repository Citation

James W. Nickel, *Justice in Compensation*, 18 Wm. & Mary L. Rev. 379 (1976),
<https://scholarship.law.wm.edu/wmlr/vol18/iss2/7>

Copyright c 1976 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

JUSTICE IN COMPENSATION

JAMES W. NICKEL*

This Article discusses some moral and philosophical issues that arise in the practice of compensation. This practice, rooted in both morality and law, typically involves the transfer of money, goods, or services from a person whose faulty behavior has caused a loss to the victim of that loss. Compensation may be paid out of a sense of duty, or as an attempt to repair a shattered relationship, but generally it is paid because it is required by a legal judgment. When a person who has caused a loss pays compensation the loss is shifted from the victim to the person who caused it. Because this shift does not necessarily make the loss easier to bear or less disruptive in its consequences, one may wonder why it is required. The most common answer is that justice requires it, and it is this alleged connection between justice and compensation that this Article will explore.

By focusing on how considerations of justice bear on the desirability of compensation I do not mean to suggest that these are the only relevant considerations. Even if considerations of justice are the dominant considerations in dictating the overall character of compensatory practices in American law — something that I would hesitate to assert — it is nevertheless likely that these considerations of justice are tempered substantially by other considerations such as promoting welfare and prosperity, achieving administrative efficiency, encouraging valuable but risky enterprises, and protecting people against disruptive losses. Because these sorts of considerations often have considerable relevance to decisions about whether to award compensation, an account of justice in compensation cannot be translated into a straightforward account of when people do or should have a legal right to compensation. Conversely, that this account of justice in compensation does not square directly with compensatory practices in our legal system is not direct evidence against it.

THE PRACTICE OF COMPENSATION

To have a clearer idea of the various cases in which compensation is held to be appropriate, consider the following examples: (1) someone deliberately allows his cattle to graze on his neighbor's pasture

* A.B., Tabor College; Ph.D., University of Kansas. Associate Professor of Philosophy, Wichita State University. Visiting Scholar, Columbia University Law School, 1976-77.

without receiving permission to do so; (2) someone fails to signal a turn while driving and as a result there is an accident badly injuring the other driver; (3) someone contracts to buy 4,000 fuchsia neckties, they are delivered as specified, and he refuses to pay; (4) a person who is indebted to another has inaccurate records of how much he has paid, makes an overpayment, and the payee refuses to return the amount by which he was overpaid; (5) a government exercises its power of eminent domain over a house and lot without paying the owner its full value; and (6) civilians are deliberately and unnecessarily killed, wounded, and deprived of their property during wartime. In cases like these it often is claimed that it is *just* for the offenders to pay compensation and for the victims to receive it. Although there are many interesting analogies between compensating a person for work or services and compensating a person for a loss suffered, and it may be possible to construct an account that views these two kinds of compensation as different aspects of a single practice, such an account will not be offered. The concern of this Article is compensation for injury or loss rather than for services rendered.

It often is maintained that the immediate goal of compensation is to restore the level of wealth and welfare that the victim had prior to the injury — the status quo ante. This is not entirely correct. If, for example, the victim was engaged in activities at the time of his injury that would have increased substantially his level of wealth and welfare by the time of compensation, and if these prospects were destroyed by the injury, then merely to return him to his pre-injury level would be to leave him worse off than if he had not been injured. Although there often are practical reasons why it is unwise or impossible to make the innocent victim as well off at the time of compensation and thereafter as he would have been at those times had the loss not occurred, this seems to be the ideal. The victim of an injury may receive as compensation a larger amount of goods than it would be fair for him to have if his past losses were not considered. The practice of compensation alters present holdings¹ in response to past events, giving the victim a larger share now in order to counterbalance the smaller share that he had to live with in the past because of an unjustifiable loss.

1. The term "holdings" is taken from R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974), and refers to the possession of things, both tangible and intangible. Thus, holdings, as used here, may include not only money and property, but also such things as life, liberty, health, and happiness.

Not every loss that a person suffers entitles that person to compensation, and not every loss that a person causes creates an obligation to compensate the loser. If a person breaks his leg, apart from contractual coverage, no one will be obligated to pay his medical expenses — even if he was faultless in breaking his leg. Similarly, if A's ringing B's doorbell in a normal way causes B's china shelf to collapse, A's role in causing a loss will not make him morally or legally liable. It generally is held that for a person to be obligated to compensate another for a loss there must be some shortcoming on his part in causing the loss. And, for a person to have a right to compensation, it generally is held that there must be some person at fault who therefore has the obligation to provide compensation.² But when the traditional fault system is modified by widely-held liability insurance contracts, those whose faulty actions cause losses are protected from direct liability. Nonfault systems have the same result, but provide compensation for losses without determining who was at fault.³ Both types of insurance systems serve as loss-spreading mechanisms because they do not impose the cost of the loss on either the victim or the person at fault but spread it over a large group of policy holders or taxpayers. As a result the person at fault is relieved of the burden of paying compensation. His payments into the system typically cover only a small part of the loss that he caused. The rest is borne by persons who are likely to be as innocent as the victim.⁴ A system of this sort makes it possible to compensate the victim without imposing ruinous losses on the person at fault, and this is an advantage from the perspective of utility. A question, to be discussed below, is whether these systems are compatible with the requirements of justice.

A LINK BETWEEN JUSTICE AND COMPENSATION

The suggestion developed in the rest of this Article is that an important link between justice and compensation is that compensa-

2. Of course, the doctrine of strict liability, which exacts as the price for engaging in certain dangerous or unusual activities an obligation to compensate for any injuries or harm caused by such activities regardless of fault, is an exception to the general rule of liability based on fault.

3. See G. CALABRESI, *THE COST OF ACCIDENTS* (1970); Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967). For a history of the fault criterion see Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815 (1967).

4. R. KEETON, *VENTURING TO DO JUSTICE* 127 (1969).

tion protects just distributions, and the rights they involve, by undoing, insofar as possible, actions that disturb such distributions. Put briefly, justice is a matter of people having those things that they deserve, are entitled to, or otherwise ought to have, and compensation serves justice by preventing and undoing actions that would prevent people from having these things.

A statement by Rawls about Aristotle's view of justice provides a useful starting point in developing this position.

The more specific sense that Aristotle gives to justice, and from which the most familiar formulations derive, is that of refraining from *pleonexia*, that is, from gaining some advantage for oneself by seizing what belongs to another, his property, his reward, his office and the like, or by denying a person that which is due to him, the fulfillment of a promise, the repayment of a debt, the showing of proper respect, and so on Aristotle's definition clearly presupposes, however, an account of what properly belongs to a person and of what is due to him.⁵

The basic philosophical problem about justice is to provide such an account of the rights, benefits, and duties that people ought to have in various circumstances. If we had such an account we would have an account of what things are injustices, and compensation could be connected with justice in terms of the role that it plays in preventing and remedying some of those injustices. As Rawls' work illustrates, offering a general account of justice is a monumental task. I will not offer such an account but will try to show how compensation could be connected with such an account of justice if we had one that was satisfactory.

For a simple illustration of how compensation can protect just distributions, suppose that the following case arose in a society whose overall distribution was basically just. Jones, who had borrowed \$20,000 from Smith, made an overpayment of \$1,000 in repaying the loan because of inaccurate records, and Smith refused to return the money when the mistake was discovered although there was no doubt that Jones had a clear right to it. In this case Smith's action is rather like theft, and its results are that Jones's right to the \$1,000 has been violated, Smith has \$1,000 that he has no right to, and the distribution of goods resulting from the transaction is less just than the one existing previously. If Smith is required to return the money, Jones's right to it will be affirmed, Smith will

5. J. RAWLS, A THEORY OF JUSTICE 10 (1971).

not have \$1,000 that he has no right to, and the just distribution that his action upset will be restored. By undoing unjustifiable losses and gains, compensation protects people's rights to the justifiable holdings and thus preserves the fair aspects of existing distributions. Compensation, by upholding rights after they have been violated, provides a second line of defense for rights and fair holdings. Compensation also may serve to deter initial violations because potential offenders will know that it is likely they will have to remedy their offense, that is, that their offense will create an enforceable obligation to give up what they gained and to restore what the victim lost.

It is useful to conceive of the obligation to provide compensation which often arises as a result of violating someone's rights as one of the obligations that creates and supports a secure system of just holdings. On this view, a person's right to his life savings is not just a matter of other people being obligated not to take the money away from him by force or fraud; it is also a matter of other people being obligated to return the money if they do. A right is not extinguished by its violation; rather, respecting the right after one has violated it requires restoration or replacement instead of mere non-interference. On this view, an obligation to compensate (and the corresponding right to compensation) is integral to the creation and maintenance of a secure system of just holdings even though this obligation arises only when there has been a failure to act appropriately in regard to the holdings of others.

Because this approach to the connection between justice and compensation emphasizes the function of compensation in preserving desirable states of affairs one might take the approach to be utilitarian. This would be incorrect. The approach justifies the practice of compensation in terms of its results, but the approach is nevertheless not utilitarian because the end in terms of which compensation is justified is not utility but justice. The justification is not that compensation makes victims better off, but that compensation restores just aspects of distributions by returning to people the things to which they are entitled. The same reasons that make a just distribution desirable also make desirable the preservation and restoration of such distributions. Deterrence of violations of rights and security of justifiable holdings are not exclusively utilitarian considerations; they are considerations of justice as well. Furthermore, if one views these as strictly utilitarian considerations one will find

that there is not much content left in considerations of justice.⁶

Although I do not intend to offer a general account of what a just distribution is or of what a justifiable or fair holding is, it may be helpful in giving some content to these key terms to sketch the basic elements of such an account. The most familiar account of justice is in terms of desert: a distribution is said to be just when each person's holdings are in proportion to his or her deserts. The difficulty with this characterization is that not all of the facts that we consider relevant to the justness of a distribution can be accommodated within the framework of deserts unless the notion of desert is conceived in a misleadingly broad way. If, for example, Jones has \$50 that is rightfully his, and he makes a gift of it to Smith, Smith's holding of that \$50 will be just, other things being equal, even if he has done nothing to deserve it.⁷ Instead of saying that a just distribution is one in which each person has what he or she deserves, we might say that a distribution is just if each person's holdings are justifiable. Just as the former claim needs to be filled in with an account of how people come to deserve things, the latter claim needs to be supplemented with an account of the various ways in which holdings can be justified. For example, a holding might be justifiable because one has a natural right to it, as one might have to life or liberty. Another way to justify a holding might be in terms of deserving or earning the good that is held, as one might deserve a prize or wages for one's work. A third method of justification is in terms of a fair transaction from which the holding results, such as certain gifts, trades, and contracts. This list of justifying considerations is only sketched, but it does indicate the ways in which it is necessary to go beyond deserts in order to give an adequate account of justice in holdings. It should be noted that holdings as used here include not only such items as money and property but also goods such as life, liberty, health, and reputation.⁸ A person who is deprived wrongfully and permanently of his or her ability to work and who receives no compensation for this loss is surely a victim of greater injustice than a person who, for example, is unjustly underpaid by \$3,000 a year for the work that he or she does.

Although we may wish to postulate a right to compensation from

6. Calabresi sharply separates the reduction of accident costs from justice and then finds that justice has little content as a goal but is merely a sort of background constraint. CALABRESI, *supra* note 3, at 24-26.

7. See Nozick, *supra* note 1, at 155-60.

8. See note 1 *supra*.

the state in cases in which there is no individual who is obligated and available to provide compensation—for example, for victims of unapprehended criminals—the obligation to compensate normally falls on individuals and not on the state. When one's shortcoming results in an unjustifiable loss to another, the primary obligation to compensate will fall on the injurer. This is a consequence of the fact that a person's right to his holdings is a right against other people; they are obligated to refrain from harming, interfering with, or appropriating his holdings. If they do not refrain from doing these things they still are obligated, but the obligation is to restore, replace, or repair what was taken or damaged. Put another way, a person can incur an obligation to provide compensation if he wrongfully causes a substantial loss to another person. The reason for requiring such a person to compensate his victim is not, as a retributivist might contend, to make him suffer or to apportion his well-being to his deserts. It is rather to protect justifiable holdings against the invasions of others. If the offender must use a portion of his holdings in repairing the injury he caused, this is justified not retributively but in terms of the protection of holdings. The principle seems to be that losses in holdings that are necessary to meet one's obligations are not unjust. This principle has wider application than merely to the theory of compensation: no injustice results from having to give up some of one's justifiable holdings to meet one's obligations of charity or to meet one's obligations to support the public good in areas such as security, public works, and education. If I am correct in thinking that this principle is adequate to explain the justness of requiring offenders to compensate their victims, then no retributive principle, not even a weak one,⁹ is needed to justify the practice of compensation.

It might be objected at this point that it has not been explained why the offending *individual* should be obligated to pay compensation because the goal of protecting just holdings can be achieved by having government compensate injured individuals. Although an obligation to compensate the victims of one's wrongdoing now is viewed as one of the obligations that creates and supports a system of justifiable holdings, such a system would be possible without such obligations if government were prepared to compensate losses caused by wrongdoing. This objection seems well-founded in princi-

9. For a discussion of weak and strong retributive principles and their possible application to the morality of compensation see J. FEINBERG, *Sua Culpa*, in *DOING AND DESERVING* 217-19 (1970).

ple. Because I do not view compensation by the offender as an inherent requirement of justice but rather view its connection with justice as deriving from its role in preserving just distributions, any particular compensatory mechanism will have to be evaluated in terms of its effectiveness in doing this. Hence, if a system in which the state assumes the obligation to compensate can be shown (either generally or in a particular area) to be as effective as traditional methods in preserving just distributions, and if it can be shown that there is no injustice in the way in which it obtains the funds to do so, it will be equally acceptable on grounds of justice.

Insurance systems spread the cost of compensating accident victims over a large group of policy holders, thereby relieving a person who causes an injury by his wrongdoing or negligence of any personal liability. In accordance with the criterion just presented there is no injustice in such systems because they provide an alternative means for satisfying the requirement of justice that losses to innocent persons resulting from human shortcomings be compensated and because the systems collect the funds for doing this in a way that, presumably, is just. If, as a retributivist might contend, the goal were to make the offender suffer, relieving him of his personal liability would be unjust. But in my account there is no such objection to cost-spreading systems, even nonfault ones.

There are some problems, however, in using cost-spreading systems in dealing with deliberate wrongs, and I think this is why such systems operate mainly in the area of accidents.¹⁰ One problem is that in many cases of deliberate wrongdoing the offender profits from his offense, and in such cases the unjustifiable gain, as well as the victim's unjustifiable loss, is an injustice. Requiring the wrongdoer to compensate his victim often eliminates this unjustifiable gain while simultaneously eliminating the victim's unjustifiable loss. A cost-spreading system that ignored these gains would be deficient from the perspective of justice. A second problem is that a system requiring individuals to compensate the victims of their wrongdoing serves to deter wrongdoers (because wrongdoing is made less profitable) and hence makes the system of justifiable holdings more secure. For example, if a compensation system permitted criminals to suffer no bad consequences because of their evil deeds,

10. New Zealand has gone the farthest among common law countries toward developing a nonfault compensation system for all victims of accidents and crimes. See Palmer & Lemons, *Toward the Disappearance of Tort Law — New Zealand's New Compensation Plan*, 1972 U. ILL. L. FORUM 693.

one could object that the deterrence of crime, and hence the protection of justifiable holdings, would suffer. This objection would be based on considerations of justice as well as considerations of utility. These problems can be avoided, however, if cost-spreading systems are supplemented with mechanisms, such as a system of fines and penalties, for eliminating unjustifiable gains and for deterring potential offenders. Hence there is no reason, in principle, why systems that spread all of the costs of wrongdoing and negligence could not be compatible with justice. Such systems have some advantages from the perspective of justice because they provide an effective means of compensating all victims of wrongdoing and negligence (who survive) by not making the satisfaction of the victim's claim to compensation depend on the apprehension of the offender or on the offender's ability to pay.

COMPENSATION AND UNJUSTIFIABLE HOLDINGS

An effective system of compensation will make a just distribution more secure, but it also will make an unjust distribution more secure. Compensation by itself will not create a just distribution. Although I am prepared to allow that one aspect of justice may be the provision of security for reasonable expectations, people's expectations may be secure in orderly but terribly unjust societies. A consequence of my account of the link between justice and compensation is that compensation is required by justice only when the holding it restores was held justifiably.

In most societies many aspects of the existing distribution are unjust — people have goods to which they have no right, and lack goods to which they do have a right. In this kind of situation the practice of compensation may restore to a person something that he or she had no right to, thereby preserving the injustice of the original distribution. That systems of compensation often have this result is one reason we sometimes find them morally troublesome, even if we allow that the system of compensation nevertheless serves to protect reasonable expectations arising out of the existing distribution and allow that it often would be difficult or impossible for judges and juries to make sound judgments about the justifiability of particular holdings.

Restoring to a person a good of which he was deprived by someone else's offense will promote justice only if his holding of that good was justifiable. This contention is similar to the principle that a person who comes before a court of equity must come with "clean hands." But merely refusing to restore a good to its original holder seldom

will promote a just distribution. If *A* holds a good unjustifiably, and if *B*, who also has no claim to the good, deprives him of it through wrongdoing or negligence, neither compensation nor non-compensation will award the good to its rightful holder. The only way of creating a more just distribution is to take the thing away from both of them and return it to its rightful holder; this, however, is often difficult or impossible. This kind of action is not normally taken by courts, but it sometimes is done informally on a small scale by individuals and very crudely on a large scale when governments undertake programs of redistribution.

In any distribution, however unjust, there will be some justifiable holdings that people have such as their lives, health, and basic personal possessions, and hence in any distribution compensation can promote justice by protecting these holdings. In practice, however, there are many holdings that are difficult to classify as justifiably or unjustifiably held. Because of the difficulty of determining whether particular goods are held justifiably, great deference is allowed in our practice to whether a person has a *legal* right to a good and to whether there was anything legally wrong with the way in which he acquired it. If there is no legal basis for saying that someone else should hold the good rather than he, his holding is apt to be viewed as both legally and morally acceptable. Furthermore, a good may not retain its tainted character when it is passed on through a legitimate transaction. If, for example, a rich swindler pays his maid fair wages out of his wrongfully acquired funds, this does not undermine the maid's right to the money. Other transactions, such as inheritance, may have a different character, however. If *A*'s father grossly underpaid *B*'s father during a long period of service as an employee, and if as a result *A* is rich because of his inheritance and *B* is poor because his father had no means to provide him with an inheritance or anything else, we may feel that *A* has a moral obligation to compensate *B*. Many historic injustices to groups are analogous to this example and thus seem to raise issues of justice in compensation.¹¹

Although it is difficult to know how to deal with historic injustices, the analysis of justice in compensation presented here suggests that the requirements of justice in compensation are not separate from the requirements of bringing about a just distribution. "Distributive" and "compensatory" justice are not really separate categories.

11. This example is based on Kaufman, *Black Reparations — Two Views*, 16 *DISSENT* 317, 319 (1969).