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Compensation for Victims of Crime: Thought Before Action

Gerhard O. W. Mueller*

I. VICTIM COMPENSATION: POPULAR FANCY OR RESEARCH GOAL?

Public interest in problems of crime seems as unpredictable as Caesar's pleasure in pardoning gladiators. By no known processes is it ascertainable why the public interest focuses today on the issue of capital punishment, tomorrow on the narcotics problem, and then on cruelty to children. Three things however, are certain: (1) the choice of topic for public focus bears little relation to the objective significance of the problem; (2) the amount of public attention bears little relation to the likelihood of success in solving the problem; (3) the magic power of the public's interest diverts the energy of those persons knowledgeable in matters of crime away from issues which deserve more immediate attention.

Vying for prime attention of the uninitiated, entertainment hungry public is victim compensation, which has the potential to make capital punishment and the "battered child syndrome" appear dull. Virtually unknown only ten years ago, it has already made its appearance on the postmidnight radio talkathons, the popular magazines,¹ and the Sunday supplements.² The very question — why not pay the victim of crime? — seems appealing to anyone with a social conscience.

We are, however, faced with considerable social risks if a topic as serious and significant as victim compensation becomes the playball of public emotions and possibly even a premature political campaign slogan. The issue of victim compensation should not be resolved emotionally or politically until its implications have been ascertained academically. Victim compensation is a problem crying for a solution, but even Americans are not capable of solving a problem until its dimensions are known. All avenues of approach must be explored and the social consequences of suggested changes in the status quo should be projected and analyzed.

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1. *E.g.*, Childres, *The Victims*, Harper's Magazine, April 1964, p. 159.

2. Hussey, *Britain Pays the Victim of the Crime*, N. Y. Times, Feb. 21, 1965, § 6 (Magazine), p. 19.

It is not expected that the problems of victim compensation will be solved by the publication of this symposium.³ Rather, it is our objective to circumscribe the grand outlines of the problem in an attempt to direct subsequent research and ultimate socio-political action.

II. VICTIMOLOGY AND VICTIM COMPENSATION

Modern criminalists and criminologists had been conditioned to think of crime as the disturbance or destruction of a social value by a perpetrator, who, upon conviction, becomes a convict. It was as if only two parties were involved in crime — the perpetrator and society. A felonious assault was conceived as an attack upon the peace of society, whether the individual attacked condoned the attack or not. It mattered little whether he forgave, for conceptually speaking he was not the victim of the attack. Society was aggrieved and society alone could redress the wrong with penal sanctions.

This conceptualistic view of crime, which persisted for so long, was finally shattered in 1948, when Hans von Hentig *discovered* the victim. Professor von Hentig "inaugurated a new trend in sociological criminology: that of fact skepticism and historical realism."⁴ In his book, *The Criminal and His Victim*, Professor von Hentig stated: "That the victim is taken as one of the determinants [of composite causations of crime], and that a nefarious symbiosis is often established between doer and sufferer may seem paradoxical. The material gathered, however, indicates such a relation."⁵ This recognition of the sociological-psychological significance of the victim had immediate academic repercussions. "Victimology" acquired international criminological interest, and became the subject of solid scientific inquiry.⁶

Nearly all researchers found the victim to play a dual role; one inviting compassion — the obvious, official, overt role; an-

3. The contributors to this symposium, with the exception of Senator Yarborough, participated in a panel discussion on the topic held at the Joint Congress of the American Academy for the Advancement of Sciences, and the American and Canadian Societies of Criminology, in Montreal, Canada, during December 1964. It was at this time that the idea of collecting and publishing the papers there presented to serve as a point of departure for future research was put forward.

4. MUELLER, *ESSAYS IN CRIMINAL SCIENCE* 52 (1961).

5. VON HENTIG, *THE CRIMINAL AND HIS VICTIM* iii (1948).

6. See, e.g., WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* (1958); Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J. CRIM. L., C. & P.S. 1 (1957).

other inviting blame — the hidden, heinous, heuristic role. But it was more than a decade after von Hentig's "discovery" that specific scholarly attention in America was directed toward the compassion arousing sphere of victimology. In 1958, the *Journal of Public Law* published a symposium issue on victim compensation to which seven leading British and American criminalists contributed their thoughts.⁷ The occasion for the symposium was a challenging *feuilleton* published in *The Observer* (London) in 1957 by the late English magistrate and social reformer, Margery Fry.⁸ Despite Miss Fry's urgent and sincere pleas, a majority of the contributors to the symposium responded with statements which were, to put it mildly, extremely cautious.

Two years later Dr. Stephen Schafer published in England the first hard-cover book in point to appear anywhere, a scholarly work entitled *Restitution to Victims of Crime*.⁹ The work was "a multi-nation comparative study of compensation methods and systems for victims of crime, with a concise analysis of the restitutive concepts of punishment and the punitive concept of restitution. . . ." It was a book which "made it easier . . . to come to an intelligent solution . . ."¹⁰ While more positive in spirit than the majority of the *Journal of Public Law* articles, Dr. Schafer's book did not conclude with a call for immediate action. He envisaged a solution only within the vast complexes of the aims of the penal law itself.

III. THE CONCEPT OF VICTIM COMPENSATION

The advocates of victim compensation use the term "compensation" in the sense of payments by a government agency to persons injured by a criminal agency. Most proponents limit their proposals to compensations for *personal* injury. This limitation is neither inherent, nor natural, and, in addition, seems to possess a great number of crimino-political disadvantages.¹¹

All proponents have had difficulty in dealing with the crime as an underlying occasion for victim compensation. It would

7. Inbau, Miller, Montrose, Mueller, Silving, Williams & Weihofen, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 191-253 (1959). G. Williams and J. L. Montrose are from the United Kingdom; F. E. Inbau, F. W. Miller, H. Weihofen, G. O. W. Mueller, and H. Silving are from the United States.

8. Fry, *Justice for Victims*, *The Observer* (London), July 7, 1957, p. 8, col. 2, reprinted 8 J. PUB. L. 191 (1959).

9. SCHAFFER, *RESTITUTION TO VICTIMS OF CRIME* (1960).

10. Mueller, *Book Review*, 54 L. LIBRARY J. 188 (1961).

11. See text part V *infra*.

seem necessary to prove that somebody has committed a crime before a person claiming to be its victim is entitled to compensation. Yet, if compensation depends on proof beyond a reasonable doubt that a crime has been committed, a majority of victims would remain without compensation. A lesser degree of proof increases the possibility of fraudulent claims, but does complete the analogy to tort actions: Every crime by which a citizen suffers a loss is also a tort. If the civil rather than the criminal burden of proof were employed, the terminology "compensation for victims of crime" would no longer seem appropriate. Instead, "tort loss compensation" would be a more accurate title.

Tort loss compensation has always been available *de lege lata*, through damage actions. But the high percentage of judgment proof tortfeasors has prevented many victims from being compensated. In this light the proposals for crime (tort) loss compensation are really calls for insurance schemes which assure payment to tort victims. However, inasmuch as such insurance contracts are already available,¹² the propagation of crime loss compensation is really a call for compulsory governmental insurance,¹³ comparable to workmen's compensation, social security or medicare. Every citizen would be automatically insured and his "premiums" would be paid from taxes. Thus, the prudence and imprudence of the insured, his loss record, etc., would have no relation to the amount of the premium.

Victim compensation in this sense, unrelated to premiums and risk factors, is a novel idea. Rudimentary forms of victim compensation date from the Code of Hammurabi,¹⁴ but the idea as explained above has not caught on prior to its recent introduction in New Zealand, and on a smaller scale, in England. Naturally, the experiences of these two countries are being closely observed.

IV. THE ECONOMIC NEED FOR GOVERNMENTAL CRIME LOSS INSURANCE

If Margery Fry is at the root of all current proposals for victim compensation schemes, and she is, then it was a single episode

12. See Starrs, *Private Insurance for Victims of Crime*, 50 MINN. L. REV. 285 (1965).

13. This reasoning has been regarded as language of "rhetorical rather than intellectual content . . ." Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. REV. 444, 454 (1964).

14. For discussions of earlier forms of compensation schemes, see generally Mueller, *supra* note 7, at 228; Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L., C. & P.S. 303 (1955).

involving a man blinded as a result of an assault in 1951 which prompted her first proposals for a vast governmental crime insurance scheme. It would seem that any tampering with so delicate yet formidable machinery as that of the administration of criminal justice would require a broader basis than a single episode.

How many people suffer irreparable harm as a result of crime, and what is the extent of that harm? By "irreparable" I mean harm which is not compensated by customary insurance schemes, public funds, or charity, or which with due diligence, could not have been provided for by the utilization of such existing means. By harm, I mean damage to person, property, liberty, honor, etc., not caused by the victim's own action but by criminal agency.¹⁵ (I am fully aware of the difficulties involved in defining cause.) We must have answers to these questions and those answers must suggest a major defect in our society before further inquiry will be meaningful. Presently we do not know the answers. Conceivably, we might find that not a soul is in the "irreparable" category because every victim of crime either:

(1) obtains first aid; (2) obtains charitable reparation; (3) obtains insurance benefits of one form or another; or (4) could or should have insured himself.

We would anticipate finding a considerable number of persons in category four. However, we may also find that a significant number of people are unable or unwilling to join Blue Cross, Blue Shield or some other group insurance covering personal injury, or to contract for property insurance coverage.

If two citizens with equal incomes suffer the same criminal harm, but one is insured, while the other drives a more expensive car, why should the thrifty citizen be no better off than the non-thrifty person? Still, we are likely to find that many persons are utterly unable to insure themselves privately against personal injury or property loss through crime because they are in the category of the temporarily or chronically unemployed.¹⁶ Such a finding should lead us to staunchly support sound antipoverty programs which aim to elevate the unemployed-uninsured into

15. It is one of the purposes of this symposium to rescue a significant social problem from political clutches. Failing to do this we would expect sides to immediately be taken along the lines of liberal and conservative, government v. private enterprise, etc. Clearly, these arguments become far more emotional than factual if not preceded by solid academic research.

16. In making this examination difficult problems of drawing fine lines would be anticipated. Many persons would be found incapable of insuring their house against fire, or insuring their mink coat against theft. Are the subjective factors motivating these individual actions to be weighed also?

the category of the employed-insured. Such programs might also eliminate that amount of criminality customarily attributed to idleness and poverty.

V. SOCIAL DUTY AND MONETARY COST

The advocate of governmental crime loss insurance is likely to argue that the rationale of governmental crime loss insurance is not economic, but political: the state (meaning citizens and taxpayers) failing to protect a citizen against criminal violence, has a social duty to pay the cost. This argument, however, cannot be limited to crimes against the person. It applies with equal vigor to harm to property, or honor, etc. For example, explosion damage to property which is the result of criminal violence by anti-integrationists or labor goons, may be as hurtful to the victims as a lacerated skin, or a broken wrist.

In short, any equitable compensation scheme, so it seems to me, would have to cover the total amount of loss through crime. But figures on that are scarce. Estimates range into the billions of dollars. To that total we would have to add the cost of administering the insurance scheme. A private insurance company or the Government would have to budget in expenses for paying clerks, adjusters, investigators, and security personnel, and overhead in addition to victims. If the Government wants to parallel the operations of a private insurance enterprise, it must similarly bear administration costs, including the totality of the cost of the administration of criminal justice. On this figure, however, we are totally in the dark. The National Council on Crime and Delinquency, utilizing methods of estimating developed by the National Commission on Law Observance and Enforcement,¹⁷ as well as F.B.I. figures, has estimated the annual cost of crime in the United States to amount to approximately seven per cent of national income, or \$20,000,000,000 for a typical year about a decade ago.¹⁸ Before proceeding any further we would be well advised to learn a bit about the actual crime cost so that intelligent projections regarding a governmental crime loss insurance scheme could be made. Unfortunately, it was not until quite recently that the first responsible blueprint for a scholarly study of the cost of crime was unveiled, revealing enormous complications.¹⁹

17. 12 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (The Wickersham Commission), *THE COST OF CRIME* (1931).

18. N.Y. Herald Tribune, Sept. 24, 1957, p. 19, col. 4.

19. Martin & Bradley, *Design of a Study of the Cost of Crime*, 4 BRITISH J. CRIMINOLOGY 591 (1964).

Of course, a figure of seven per cent of gross national product as the basis of a national crime insurance scheme is inflated, as it reflects costs already borne by the community. The taxpayers are already *paying* (out of taxes) for that part of this total figure which entails pure criminal law enforcement activities. We would have to bear as additional items only:

- 1) the cost of the total amount of harm caused by crime;
- 2) the administration of the new insurance scheme, including an army of new federal law enforcement personnel which would be placed into areas of local law enforcement to make their federal assessments. To that extent, we would have to duplicate (on the federal compensation side) the existing law enforcement machinery (on the criminal justice side).

I shall here ignore the question of the amount of federal control over local law enforcement which the new federal (insurance) interest would entail in every crime of state and local jurisdiction. But even this new tax burden might be quite considerable. To suggest that a "small government agency, newly created, should administer the program . . ." ²⁰ is, I think, somewhat humorous. Perhaps it was meant to be satirical. An agency of government which may have to deal directly or indirectly with a potential seven per cent of gross national product, is not likely to remain a "small government agency." ²¹ But even if a small governmental agency were to be created for the avowed purpose of administering a thrift program, one might doubt the wisdom of turning to the federal government for providing such a scheme which would only parallel existing private schemes. Naturally, one could just nationalize (or socialize) an important segment of the insurance industry. But before doing so, the proponents of such a plan should deliver proof that, all factors considered, the economic advantages would outweigh the economic disadvantages.

VI. BEHAVIORAL IMPLICATIONS AND ALTERNATIVE PLANS

Contemporary criminology has become relatively sophisticated on the question of crimes precipitated or induced by the victim. Nonetheless, we are far from knowing all the psychological ramifications of the victim-perpetrator relationship. ²² Before initiating a compensation program we must know a great deal more about

20. Childres, *supra* note 13, at 464.

21. The reader should keep in mind, however, that I am talking about crime insurance, not just criminal-violent harm insurance.

22. The effects of government insurance on personal carelessness in protecting oneself, for example, would have to be explored.

this relationship than we do now. Professor Wolfgang explores this problem in his article.²³

The most alarming aspect of the current debate on victim compensation among noncriminologists is the almost total lack of concern for alternatives. Thus far, only those forms of victim compensation which have failed in the past and are bound to fail in the future,²⁴ such as tort actions against criminal perpetrators,²⁵ have been suggested as alternative solutions. Another rejected scheme is the prototype of victim compensation, Hammurabi's famous code section applicable to foreigners harmed by robbery.²⁶ One alternative of recent vintage provides that restitution may be a probation condition.²⁷ This is potentially a very important provision.

Both Professor Schafer and Professor Wolfgang have adverted to the possibility of, or perhaps the need for, such a new synthesis of the aims of penal law. The new synthesis simply adds the "concept of personal reparation by the offender to the victim, to the concepts of deterrence and reformation." The result might be "a new therapeutic element [which] would help to reduce further criminality."²⁸

Our penal system, in fact, relates the severity of punishment (or the threat thereof) not just to the needs of deterrence, rehabilitation, and neutralization (measured in years and days) deemed requisite for a given offender or offender type, but also and very

23. See Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223 (1965).

24. I do find it odd, however, that courts and researchers alike seem to have overlooked the availability of statutory remedies which might at least have provided occasional financial help for victims, e.g., N.Y. PEN. LAW, § 512-b. Section 512-b provides:

A person injured by the commission of a felony, for which the offender is sentenced to imprisonment in a state prison, is deemed the creditor of the offender, and of his estate after his death, within the provisions of the statutes relating thereto.

The damages sustained by the person injured by the felonious act, may be ascertained in an action brought for that purpose by him against the trustees of the estate of the offender, appointed under the provisions of the statutes, or the executor or administrator of the offender's estate.

25. Tort actions fail, of course, because convicts as a class are notoriously poor, a few white collar criminals to the contrary notwithstanding.

26. HARPER, CODE OF HAMMURABI §§ 23, 24 (2d ed. 1904).

27. This provision has been enacted by the State of New York. N.Y. CODE CRIM. PROC. § 932(j).

28. Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J. CRIM. L., C. & P.S. 1 (1957).

prominently to the amount of harm caused. Only that explains, for example, the long term sentence imposed on the murderer who acted emotionally and is unlikely to repeat his offense, as compared with the short term sentence for the thief who is likely to repeat his crime. In the past we have measured this "harm" much more in emotional-retributive terms, than in terms of compensable injury. Might it not be possible, however, to reinterpret the harm yardstick, to translate it, so to speak, from a retributive value (without giving up the retributive idea entirely) into a compensation value? In short, is it possible, as part of our correctional system, or as a rehabilitative aim, to require a convict to engage in useful labor, perhaps rated at the market value of his service, payment for which is then transmitted to the victim of his crime as compensation?

CONCLUSION

With some pessimism I have attempted to point out the enormous difficulties, in terms of behavioral unknowns, which stand in the way of implementing any victim compensation schemes. Yet, thoughtful assessments by responsible criminologists herein, suggest that we are perhaps capable of moving forward from research thought to research action, and ultimately, to implementation.

I should like to conclude my introductory remarks on a note of optimism, cognizant of a myriad of difficulties which only exhaustive subsequent research can identify and attempt to overcome. Keenly aware of the great penological significance of victim compensation, the authors of this symposium hope that it will preface extensive academic inquiry. Since rehabilitation was admitted to the aims of penal law two centuries ago, the number of penological aims has remained virtually constant. Restitution is waiting to come in.

