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Compensation for Criminally Inflicted Personal Injury

Robert Childres*

I. INTRODUCTION†

I shall comment in some detail on two topical proposals for compensation to victims of criminally inflicted personal injury¹ and attempt to respond to the more salient criticisms of the idea of compensation.

In the United Kingdom reformers demanded and eventually obtained, from the government of then Prime Minister Douglas-Home, a scheme of compensation for criminally inflicted personal injury.² New Zealand not untypically preceded England in the statute books with a better program.³

When the proposal was aired in America, critics shifted the question from personal injury criminally caused, to crime generally, and attacked the idea of compensating losses caused by crime.⁴ No proponent nor statute advances anything so sweeping. Expenses and lost income⁵ from disabling or fatal personal

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†Author's Note: Professor Edmond Cahn, a brilliant colleague until his tragic death, much clarified my thought on the question of compensation. Professors Norman Dorsen and Charles Ares have contributed significantly to my articles on the subject, and Mr. Robert Cordle very capably assisted in the preparation of this paper.

1. Those of Senator Ralph W. Yarborough, S. 2155, 89th Cong., 1st Sess. (1965) [hereinafter cited as "S. 2155"]; and the State of California; CAL. STAT. ch. 1549 (1965). I have previously commented on the programs in England and New Zealand in Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. REV. 444 (1964).

2. Compensation for Victims of Crimes of Violence, CMDND No. 2323, (1964) [hereinafter cited as BRITISH WHITE PAPER].

3. Criminal Injuries Compensation Act, Act No. 134 of 1963 (N.Z.) [hereinafter cited as "NEW ZEALAND Act No. 134"]; see Cameron, *Compensation for Victims of Crime: The New Zealand Experiment*, 12 J. PUB. L. 367 (1963). My evaluation is argued in Childres, *supra* note 1, at 455-71.

4. Mueller, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 218 (1959); Inbau, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 201 (1959).

5. Income should be read broadly to include lost services of, e.g., a wife,

injury demark the outside limits of compensation proposals.⁶

All compensation proposals and programs exclude criminally inflicted damage to property. They do so because: (1) most property lost or damaged through crime is recovered;⁷ (2) theft of or damage to property never causes the disaster or social dislocation which frequently accompanies serious injury to the person; (3) in America, property is and may be expected to be more frequently and thoroughly insured against losses caused by crime than is the person;⁸ (4) fraudulent claims of property loss would be virtually impossible to prevent; and (5) a program of compensation for criminally inflicted damage to property might be prohibitively expensive.⁹

The report of the Longford Committee in England supports the exclusion of property from the English program in similar terms:

The person whose goods are stolen often has them restored to him when the thief is caught. The far greater frequency of offences against property entitles the State to assume that owners will seek some protection through insurance. The same assumption cannot easily be made in the case of crimes of violence, since the victim's risk is more remote, and the need for personal protection through private insurance is less obvious in a civilised community. Furthermore, the hardship caused to the victim of violent crime is far greater than, and in a different category from, that which is suffered by the victim of theft or malicious damage. The community should be concerned more with loss of life and limb than with loss of property. A purely practical justification for including crimes of violence and excluding property crimes is that the latter give far greater opportunities for fraud.¹⁰

II. THE YARBOROUGH PROPOSAL

The program embodied in Senator Ralph Yarborough's bill,¹¹

but narrowly to restrict compensation to monetary loss, and that with a maximum limitation. See generally Childres, *supra* note 1, at 462.

6. See BRITISH WHITE PAPER § 22; NEW ZEALAND Act No. 134 § 19; S. 2155 § 303. The only caveat necessary is the question of "compensating" losses suffered through pain and suffering.

7. The F.B.I. estimates that 52% in value of all property stolen in 1964 was recovered. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 103 (1964).

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

9. It has been argued, I think seriously, that such a program would cost \$20,000,000,000 a year. See Mueller, *supra* note 4, at 230.

10. JUSTICE, BRITISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE 4 (1962) [hereinafter cited as JUSTICE].

11. S. 2155.

discussed by the Senator in this symposium,¹² is essentially the New Zealand scheme adapted to the District of Columbia, the federal territories, and the maritime jurisdiction. I shall comment first on provisions of this bill which successfully counter objections to the idea of compensation, and then comment on those provisions which seem to me wrong.

A. THE PROBLEM OF THE CULPABLE VICTIM

Professor Henry Weihofen of the University of New Mexico School of Law has written the best statement of the problem of the culpable victim:

[T]he victim all too often is not wholly innocent. He is likely to be the "activating sufferer." A system of compensation would have to distinguish between truly innocent and not-so-innocent victims. It would call for an integrated approach, a much more careful examination than has yet been made of the interdependence of personality and culture. If a compensation system were adopted before such examination, its administration would almost certainly soon force such examination to be made. . . .

The various categories of cases we have mentioned, in which the victim in one way or another precipitated the crime, add up to an appreciable part of the total—perhaps one fourth of all violent crimes. The premise from which we are inclined to start in our mental construct of crime, that of an aggressive wrongdoer acting upon an innocent and passive victim, is therefore untrue in about one case out of every four.¹³

The victim who may be said to be partly responsible for his injury presents a real problem for a program of compensation. In discussing this problem one should first distinguish what we may call family violence from other forms of criminally inflicted personal injury. The Senator excludes intra-family injury from his program, thereby eliminating a large part of the culpable victim problem.¹⁴ However, I think the intra-family problem can be solved without going so far.¹⁵

When considering the general question of the culpable victim, one can produce visions of women yearning for rape, of society

12. Yarborough, *S. 2155 of the Eighty-Ninth Congress—The Criminal Injuries Compensation Act*, 50 MINN. L. REV. 255 (1965).

13. Weihofen, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 209, 217 (1959).

14. See S. 2155 § 304(c). The English also exclude intrafamily injury. BRITISH WHITE PAPER § 17. Interestingly, Senator Yarborough copies the New Zealand provision prohibiting compensation for pain and suffering in intrafamily cases, but New Zealand allows compensation for expenses and lost income in such situations. NEW ZEALAND Act No. 134 § 18.

15. See text accompanying notes 31–32 *infra*.

compensating mobsters, or of people claiming compensation after losing a fist fight.¹⁶ Some such people would undoubtedly receive money, but this fact should deter our compensating the more legitimate victim only if the problem cannot be kept within reasonable bounds. The question is, therefore, how great is the difficulty apt to be. Those who emphasize the magnitude of the problem can produce arguments that the difficulty will be substantial only by lumping compensation for loss of property with compensation for personal injury.¹⁷ Leaving property aside, it seems clear that not many people would risk broken legs or smashed skulls for a few weeks off the job with pay. A compensation scheme with proper safeguards could prevent most of these people from succeeding. But proper safeguards require careful structuring of the statute to minimize the opportunity for fraudulent claims.

The Yarborough proposal, following the New Zealand statute, adopts the exclusionary standard — whether the victim directly or indirectly contributed to his injury or death.¹⁸ While this provision would be sound if linked with proper safeguards against fraud, it would yet be subject to two limited criticisms. First, consideration of the question is limited to *whether* to make an award. Clearly, it should also be considered in determining how much money should be awarded. There is no reason to tie the commission's hands to an all or nothing question; it should have authority to reduce, as well as to exclude awards. Secondly, this standard is faulty in that it may be construed to make relevant only those acts involved directly in the injury. A broader standard, similar to that adopted in England, seems preferable: "To what extent was the victim *responsible* for his damage?"¹⁹ "Responsibility" is more easily read to include such things as participating in gang warfare than is "contribution."

B. RELATION TO THE CRIMINAL LAW

At least two attacks on compensation have been based on its asserted interrelation with the criminal law. Professor Mueller argues that ". . . the proposal is definitely objectionable as detrimental to effective criminal law enforcement. . . . When criminal law enforcement caters too much to loss compensation and too

16. See Weihofen, *supra* note 13, at 210-12.

17. See Mueller, *supra* note 4, at 229.

18. Compare S. 2155 § 301(d), with NEW ZEALAND Act No. 134 § 17(3).

19. See BRITISH WHITE PAPER § 15.

little to strategic prevention, lawlessness is bound to result."²⁰

I do not believe that anyone else has ventured the argument that compensation will increase crime. It should be kept in mind in connection with all of Professor Mueller's arguments that "the proposal" he refers to is not that actually advanced by proponents of compensation but is the proposal to compensate losses from *all* crime, which he develops as the straw man for his negative comments. As to crime involving property, especially, as he says, "shady dealings,"²¹ his arguments seem to me to contain a certain amount of good judgment.

But the argument that compensation will increase criminally inflicted personal injury requires a premise that people will be encouraged to risk or to cause death and disability because the victim or his dependents may receive limited compensation for monetary losses. Professor Mueller himself has so far refrained from squarely stating that premise.²² I do not think there is any reasonable basis for any such assertion, and in the absence of any evidence to support it, the problem seems to disappear.

Professor Schafer suggests that reparation by the criminal should replace punishment as the cornerstone of our correctional procedure.²³ I am not clear whether he considers this proposal relevant to the current controversy about compensating victims, but he has asserted it in this context and the question must therefore be examined.

The idea of substituting reparation for punishment in the criminal law is an intriguing one even for the noncriminologist. But it is for the moment a notion to be much further examined and elaborated by the criminologists before it can move into the realm of current political questions. If ever the decision is made to implement this theory, the overlap with compensation must be worked out with care, just as the overlap between compensation and contemporary programs of restitution as a condition of probation²⁴ should be carefully worked out. For the foreseeable future, however, Professor Schafer's argument exists in too theoretical a world to justify any such attention.

Neither the Mueller nor the Schafer argument is troublesome, therefore, unless one posits a more basic involvement between

20. Mueller, *supra* note 4, at 231. See also Mueller, *Should Society Pay Crime's Victims?*, THE ROTARIAN, Sept., 1965, pp. 23, 25.

21. Mueller, *supra* note 4, at 231.

22. *Ibid.*

23. Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243 (1965).

24. Note, *Restitution and the Criminal Law*, 39 COLUM. L. REV. 1185 (1950). See generally RUBIN, THE LAW OF CRIMINAL CORRECTION 198-202 (1963).

compensation and the criminal law than can be justified. The Yarborough proposal makes clear the lack of connection with the criminal law. The compensation machinery is entirely separate from possible or actual criminal proceedings.²⁵ An award establishes merely that a criminally inflicted personal injury has occurred, not that some particular person committed a crime. Criminal intent, vital to almost all crime, is properly declared irrelevant to criminally inflicted personal injury.

C. EXCLUSION OF RELATIVES OF THE "OFFENDER"

A highly questionable provision in Senator Yarborough's bill provides:

No compensation shall be awarded if the victim —

- (1) is a relative of the offender; or
- (2) was at the time of the personal injury or death of the victim living with the offender as his wife or her husband or as a member of the offender's household.²⁶

The language is basically that of the New Zealand statute,²⁷ but with the very important difference that New Zealand allows compensation for expenses and lost income, excluding only that for pain and suffering. Senator Yarborough excludes compensation altogether from criminally inflicted personal injury within the family.

It is at least questionable whether such a sweeping exclusion should become law before its desirability or necessity is established in practice. Two arguments are advanced in behalf of the exclusion: (1) collusion would be an especial problem within the family; and (2) the offender might otherwise benefit from his criminal act.

Collusion is a general problem to be met by denying compensation to those "responsible for" their losses²⁸ and by strict procedures aimed at reducing the number of successful fraudulent claims. But the risk of collusion within the family seems no greater than in cases of claims based upon offenses committed by a stranger with no witnesses. When we concentrate on the fact that we are talking about personal injury, the argument reduces itself to the question—will the Commission be able to distinguish

25. Though the Attorney General may request the Commission to suspend its proceedings in light of a current or imminent trial. S. 2155 § 301(f).

26. S. 2155 § 304(c).

27. NEW ZEALAND Act No. 134 § 18(2).

28. See S. 2155 § 301(d); BRITISH WHITE PAPER § 15; NEW ZEALAND Act No. 134 § 17(3).

between accidental or self inflicted injury, and injury caused by the assault of another? To this question, the family relationship seems irrelevant. If not irrelevant, it would seem that collusion would be less of a problem within the family; one would be more likely to attempt to turn an accident into an assault by a stranger than by one's spouse.

We are left with one argument for excluding relatives of the offender from compensation: the offender must not be benefited. This argument raises a technical question: can we design a program which allows innocent relatives to receive compensation while preventing offending ones from receiving any benefit? If in the course of a quarrel between parents, for example, the father attacks the mother and is killed, could the children receive compensation without the mother being benefited personally? I believe this to be the toughest question raised by the benefit argument, but I believe it can be answered affirmatively. Expenditures on behalf of the children would have to be supervised very carefully by the agency, but this is not an insurmountable difficulty.

D. RIGHT OF APPEAL

The New Zealand statute restricts the right of appeal to questions of jurisdiction.²⁹ Senator Yarborough eliminates the right altogether,³⁰ thus following the English lead.³¹ I see no reason for this departure from American administrative law practice.³²

E. HEADS OF DAMAGE AND LUMP SUM AWARDS

The remaining defects in the Yarborough scheme flow from his conception of administrative agencies as judicial bodies—little courts on their own.³³ This seems the only explanation of Senator Yarborough's provisions for heads of damage and form of award.

1. *Heads of Damage*

One need not employ ancient notions to describe what should

29. See NEW ZEALAND Act No. 134 § 16.

30. In the speech introducing his bill, Senator Yarborough said, ". . . there will be no right of appeal." 111 CONG. REC. 13534 (daily ed. June 17, 1965), and there is none. See S. 2155.

31. See BRITISH WHITE PAPER § 12.

32. See generally Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769 (1958).

33. See generally FULLER, *THE MORALITY OF LAW* 170-84 (1964).

be compensable. All proposals aim, with some maximum limitation, at expenses and lost income.³⁴ In addition however, Senator Yarborough would allow compensation for "pain and suffering."³⁵ Of course, pain and suffering cannot be compensated. When the victim is dead, it is impossible even to salve his injured feelings with a money payment (the notion refers to the victim's, not his dependents', feelings). Pain and suffering makes little enough sense in the common law; it makes none at all in state compensation to victims of criminally inflicted personal injury.

2. *The Lump Sum Award*

The Yarborough bill provides for the payment to be determined at the time of the hearing, and for awards not exceeding 25,000 dollars, presumably to be paid at once.³⁶ As with pain and suffering, this makes sense only by analogy to the common law. When disability is the subject, a projection of lost income can be made on a reasonable basis, though the extent and duration of disabilities are far from certain questions. But where death is the subject, the lump sum does not bear any reasonable relation to prospective loss. Compare the losses of the wife who remarries one month after receiving an award for the death of her former husband with that of the wife who never remarries. By predetermining damages, one virtually insures that there will be no close relation between the amount determined and losses thereafter suffered. Compensation must be in the form of payments periodically disbursed and under constant review if it is to bear any close relation to damages suffered.³⁷

F. ADMINISTRATIVE PROCEDURE

Senator Yarborough's bill states little about administrative procedure. Specifically, there are no provisions for reports by or on behalf of the victims to the police, reports by the police or prosecuting attorney to the agency, or medical reports to the agency. These are unfortunate omissions.

34. See, e.g., JUSTICE 35-44; Childres, *supra* note 1, at 462-64. "Lost income" is read to include lost services, when relevant, but is otherwise read strictly as pecuniary loss.

35. S. 2155 § 303(d), following NEW ZEALAND Act No. 184 § 19.

36. S. 2155 § 304(b). See also § 206 (2).

37. For more complete argument of this position see Childres, *supra* note 1, at 462-70.

III. COMPENSATION IN CALIFORNIA

California is the only state yet to enact a compensation program.³⁸ Unfortunately, the quality of the reform fails to meet the spirit. The program is the worst enacted anywhere, and is also worse than any other proposal I have seen. I shall suggest five defects which in sum render the program almost totally defective, even harmful in the sense that it deceptively claims to have met an important need.

A. ABSENCE OF DECISIONAL CRITERIA

The California legislature directed its welfare department to determine, *inter alia*, "criteria for [the] payment of . . ." compensation (unfortunately denominated "aid"), "if there is need of such. . ."³⁹ The legislature added that the criteria "shall be substantially the same as those provided for aid to families with dependent children."⁴⁰ I am no expert in California welfare law, and therefore venture no judgment on the analogy between victims of criminally inflicted personal injury and "families with dependent children." But anyone, including the California welfare commission, is entitled to ask in what situations and for what injuries people are entitled to receive "aid." The problem is made more acute by the elimination of the property qualification common to American welfare programs. "Need" is declared a prerequisite, but how can it be a prerequisite if there is no "property qualification"?

B. EXPENSES

An integral and often crucial provision of any compensation program should be the immediate payment of extraordinary expenses incurred because of the injury.⁴¹ Inexplicably, California ignores, and appears to prohibit compensation for expenses.⁴²

C. POLICE REPORT

There is no requirement that the victim report his injury to the police within a definite period. Nor are the police or the prose-

38. CAL. STAT. ch. 1549 (1965).

39. *Ibid.*

40. *Ibid.*

41. See BRITISH WHITE PAPER §§ 19-27; NEW ZEALAND Act No. 134 § 19(c).

42. The appendage to the welfare scheme would seem to require this.

cuting attorney required to submit an opinion as to the criminality of the conduct causing the injury. These two provisions are of great importance to administrative efficiency and to the prevention of fraudulent claims.⁴³ Additionally, there is no period beyond which all claims would be invalid.⁴⁴ These omissions are undesirable.

D. COMPENSATION AND THE CRIMINAL COURTS

The California statute provides:

Upon conviction of a person of a crime of violence resulting in the injury or death of another person, the court shall take into consideration the defendant's economic condition, and unless it finds such action will cause the family of the defendant to be dependent on public welfare, shall, in addition to any other penalty, order the defendant to pay a fine commensurate in amount with the offense committed.⁴⁵

Among the many objections to this provision are:

(1) The court obtains this new power only if the subject matter is a "crime of violence"; there is no definition of this phrase.

(2) The "fine" should be commensurate with losses suffered rather than with "the offense committed," if it is to be a legitimate part of a compensation program.

(3) There is no reason for the judge to know, and every reason for the compensation agency to know, the extent of the damage the victim and his dependents have suffered and are likely to suffer.

(4) Compensation and recovery from offenders are not criminal questions and should be determined by the compensation agency or by the civil courts.⁴⁶

E. COMPENSATION AND THE POOR LAWS

The above defects flow in part from an inexplicable, all-encompassing flaw: the equation of compensation for criminally inflicted personal injury with the poor laws, usually referred to in political and polite circles as the welfare laws. It is important to emphasize

43. See BRITISH WHITE PAPER § 14(b).

44. See NEW ZEALAND Act No. 134 § 17(4); S. 2155 § 304(a).

45. CAL. STAT. ch. 1549 (1965).

46. Proceeding in the civil courts, S. 2155 § 401. Proceeding by administrative decree, NEW ZEALAND Act No. 134 § 23; allowing restitution only at the hands of the victim, BRITISH WHITE PAPER § 28. See Childres, *supra* note 1, at 465-67.

that welfare laws spring from a different problem. They fulfill a different function, deal with a discrete class of people, and in every detail stand unrelated to the reform first advocated by the late Miss Margery Fry.⁴⁷

The California statute is an unfortunate one, and it seems highly unlikely that the welfare department will be able to mold it into a decent program.

IV. GENERAL PROBLEMS

A. INTRODUCTION

Except for the California plan, the proposals and programs suggest an administrative agency of three or five members.⁴⁸ The Commission is given reasonable discretion and freedom from the strict procedural rules thought to be necessary safeguards in courts of law. It is to this framework that I will refer in discussing several objections to compensation proposals.

B. COST

We now have evidence that the cost of compensation will not be great. In its first eleven months (to July, 1965) the British agency made grants totalling 232,234.80 dollars;⁴⁹ in 18 months, New Zealand has paid out 4,888 dollars.⁵⁰ The California program, for its first year, is restricted to expenditures of 100,000 dollars.⁵¹ These figures prove nothing, but are persuasive that we are talking about small sums of money. In an age when workmen's compensation premiums in New York alone exceed 250,000,000 dollars a year,⁵² and when state budgets to protect minority groups from discrimination exceed 1,500,000 dollars annually,⁵³ the cost of compensation for criminally inflicted personal injury, seen in proper perspective, becomes small indeed.

For the moment, the question should be allowed to rest here.

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

48. Five members, BRITISH WHITE PAPER § 9; three members, NEW ZEALAND Act No. 134 § 4(2); JUSTICE, at 57 (requiring at least one woman); and S. 2155 § 201(a).

49. Worsnep, *Compensation for Victims of Crime*, 11 EDITORIAL RESEARCH REPORTS 685, 691 (1965).

50. *Id.* at 689.

51. CAL. STAT. ch. 1549 (1965).

52. Gellhorn & Lauer, *Administration of the New York Workmen's Compensation Law*, 37 N.Y.U.L. REV. 564, 601, (1962).

53. NEW YORK REDBOOK 40 (1963-64).

Factual demonstrations which show that some proposals in some areas cost very little are more persuasive than arguments to the contrary. The British experience would indicate that the cost of a compensation program will not be prohibitive.

C. FEDERAL-STATE RELATIONS

As with any proposed reform in this country, some critics have raised the tired banner of antisocialism, meaning in this context fear of the federal government.⁵⁴ This banner is irrelevant to compensation for criminally inflicted personal injury, because the proposal is primarily for the states. It is designed for the federal government only with respect to the District of Columbia, the federal territories, and the maritime jurisdiction.

D. BUREAUCRACY

Compensation will not greatly increase the bureaucracy of any state. The three man commission should act primarily on reports prepared by the office of the relevant prosecuting attorney. I have set out elsewhere, as have others,⁵⁵ procedures to minimize the agency's work load. The proposed reform is too small, and the level of expenditure too low, to provoke fears of bureaucratic monsters.

E. FRAUDULENT CLAIMS

We need not take the position that fraudulent claims must be entirely eliminated before compensation can be justified. We can establish the probability that fraud will be a marginal problem only; more cannot be fairly asked. But the problem must receive more attention than is provided by Senator Yarborough or the State of California.

(1) The victim or someone in his behalf must report the injuring conduct to the police within a brief period, say four weeks, if the injury is to be compensable.

(2) Upon being instructed by the police, the victim or his dependents must file a medical report. The cost should be borne by the agency, whether or not compensation is allowed.

54. Mueller, *Should Society Pay Crime's Victims?*, THE ROTARIAN, Sept. 1965, pp. 23, 24-25; Inbau, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 201 *Passim* (1959).

55. See BRITISH WHITE PAPER §§ 9-18, 23-27; NEW ZEALAND Act No. 134 §§ 4-16; S. 2155, §§ 201-203, 205-208; Childres, *supra* note 1, at 464-70.

- (3) Filing a false report or colluding therein should be a crime.
- (4) The agency should be empowered to recover awards fraudulently obtained, plus a penal sum.

V. CONCLUSION

This paper leaves open many questions which I have discussed previously.⁵⁶ Governor Rockefeller of New York has appointed a three man committee to produce a draft statute to provide compensation in that state.⁵⁷ Hopefully this committee will produce a scheme for compensation capable of serving as a model for other states.

56. Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. REV. 444 (1964).

57. N. Y. Times, Oct. 24, 1965, p. 1, col. 5.

