St. John's Law Review

Volume 40
Number 1 *Volume 40, December 1965, Number 1*

Article 4

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COMPENSATION FOR THE VICTIMS OF CRIMINAL VIOLENCE

Introduction

Until recently, criminal law had been concerned almost exclusively with the offender, with his apprehension, punishment and reintegration into society. The injurious result of the offense has traditionally been disregarded, and the victim has been relegated to his private means and initiative to repair the damage caused by the crime. The victim ordinarily has a civil action against the criminal; but criminals as a group are notoriously judgment-proof. In 1964, Great Britain [1] and New Zealand [2] adopted plans to provide limited state compensation for victims of criminal violence. A similar plan for the District of Columbia has been introduced in the United States Senate.[3] It is the purpose of this note to examine the principle of state compensation of victims in its historical setting, to evaluate its validity in the American context, and to offer suggestions which might tend to improve any such plan.

The Evolution of Victim Compensation

Ancient society's taking of "an eye-for-an-eye" may be said to be the earliest example of victim compensation. The victim obtained his satisfaction by revenge, the wrongdoer being forced to endure a loss similar to the one he had inflicted.[4] The typical punishment in ancient times, multiple value restitution for the loss caused, was of a deterrent, not compensatory, nature.[5] In the Middle Ages, Germanic tribal custom and law emphasized *benefit* to the victim rather than *loss* by the wrongdoer, and "composition," a highly detailed system of financial responsibility for the consequences of violence, was developed. The amount of compensation varied according to the nature of the crime and the status of the victim. It was determined by the effect of the wrongful act and not by the offender's subjective guilt.[6] The clan, or family unit, shared the financial responsibility for the crimes of its in-

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[1] See Home Office, *Compensation for Victims of Crimes of Violence*, CMND. No. 2323 (1964).

[2] Public Act No. 134, 1963 (N.Z.) (effective Jan. 1, 1964).

[3] S. 2155, 89th Cong., 1st Sess. (1965).

[4] *Compensation for Victims of Criminal Violence, A Round Table*, 8 J. PUB. L. 191, 224 (1959) [hereinafter cited as *Round Table*] (Gerhard Mueller's view).

[5] SCHAFER, RESTITUTION TO VICTIMS OF CRIME 4 (1960) [hereinafter cited as SCHAFER].

[6] *Id.* at 5-6; *Round Table* 238 (Helen Silving's view).

dividual members and was the collector of, and sharer in, the compensation due its individual member-victims.[7]

Community control of the scales of compensation (exercised first in tribal assemblies), and the service the community-state provided in bringing about reconciliation by reparation, led it to demand a share of the compensation.[8] As the central power of the community increased, its share increased; gradually the payment of restitution to the victim was assimilated into a fine payable entirely to the state.[9] The disappearance of the comprehensive compensation of victims was given theoretical foundation by a growing acceptance of a more sophisticated view of criminal responsibility, which separated the consequence of the act from the guilt of the actor.[10] The distinction between crime (an offense against the state) and tort (an offense against the individual) became apparent in the law.[11] Emphasis was shifted to "the criminal, his guilt and his responsibility towards the abstract concept of society, and the victim [was] increasingly eliminated from [the procedure of criminal justice] and relegated to civil law remedies" against the offender.[12]

During the nineteenth century, certain reformers recognized that the situation was unsatisfactory, primarily because offenders as a group were unable to make reparation for the injury they had inflicted and victims had been forced to rely upon their private resources to repair the damage.[13] Concern for the victim was articulated principally by a group of Italian penologists, notably Ferri and Garofalo,[14] who enthusiastically advocated the establishment of a state fund, derived mainly from criminal fines and the profits of prison labor, to indemnify those victims who were unable to recover compensation from the wrongdoer.[15] They considered reparation rather than correctional punishment to be the aim of criminal justice, and they felt that the responsibility for compensating for damages should be withdrawn from the area of private initiative and made exclusively a public function.[16] Although sympathy for the victims may have been aroused by the publication

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[7] *Round Table* 204 (Frank Miller's view).

[8] SCHAFER 6-7.

[9] *Id.* at 6-8.

[10] *Round Table* 238 (Helen Silving's view); SCHAFER 8.

[11] SCHAFER 8, 11.

[12] *Round Table* 238 (Helen Silving's view).

[13] *Round Table* 205 (Frank Miller's view); SCHAFER 106-07.

[14] Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. REV. 444, 448 (1964). See GAROFALO, CRIMINOLOGY (Millar trans. 1914); FERRI, CRIMINAL SOCIOLOGY (Millar trans. 1917).

[15] *Round Table* 248 (Helen Silving's view). Secondarily, the fund was to provide compensation to those unjustly convicted of crime, likewise victims of the inefficiency of the state.

[16] *Id.* at 240-41. Childres, *supra* note 14, at 448-54.

of these ideas, the proposals themselves were almost universally rejected.[17]

The presently accepted means by which a victim must seek compensation for a criminal injury are the ordinary civil damage actions and the so-called "adhesive procedures," by which a court may award the equivalent of civil damages in the course of a criminal proceeding.[18] However, the tendency is to remove questions of compensation from criminal prosecutions, perhaps for fear that financial interests will interfere with justice in the process of conviction.[19] In practice, therefore, this remedy is relatively ineffective, and the victim is limited to a recovery in a civil action.

In 1957, the latest significant reform in the area of victim compensation was initiated in England by Miss Margery Fry.[20] She was prompted to act against a system which had forced a victim who had been beaten and blinded to settle for about seventy cents per week on a thirty-three thousand dollar tort judgment against his criminal assailants. She proposed a state program of compensation financed by general tax funds. Her idea caught the public imagination, and by August 1, 1964, Parliament had created a non-statutory tribunal which, on a discretionary basis, could make awards on claims of personal injury caused by violent crimes in England and Scotland.[21] New Zealand had also implemented a plan based on the British prototype,[22] and thus, two major nations became committed to a rather comprehensive concern for the long-neglected victims of crime.

The Implementation of Compensation: Britain and New Zealand

New Zealand has long had a reputation for advanced social legislation, due in part to its readiness to import and implement new ideas.[23] The New Zealand Criminal Injuries Compensation Act has the broad purpose of providing a limited measure of compensation to victims who have suffered injury from acts of violence defined in the statute, such as murder, assaults, woundings and violent sexual offenses. A tribunal of three members administers the plan and there is no appeal from its decision. The standard of proof is civil and the offender need not be present,

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[17] *Round Table* 241-42 (Helen Silving's view).
[18] SCHAFER 106.
[19] *Id.* at 12.
[20] Her proposal is reprinted in *Round Table* 191.
[21] See Home Office, *supra* note 1.
[22] *Supra* note 2.
[23] See Cameron, *Compensation for Victims of Crime: The New Zealand Experiment,* 12 J. PUB. L. 367 (1963).

even if identified. The right to compensation is independent of the offender's apprehension or conviction. Crimes against property are excluded, and there is a statute of limitations of one year.

The tribunal, in its discretion, may award compensation to the injured person or to anyone responsible for his maintenance.[24] The tribunal is directed to consider the behavior of the victim as contributing, either directly or indirectly, to his injury and to make corresponding adjustments in the amount of the award. Compensation may be awarded for (1) reasonable expenses actually incurred as a result of the victim's injury and/or death, (2) pecuniary loss as a result of total or partial incapacity to work, (3) pecuniary loss to dependents as a result of the victim's death, (4) pain and suffering of the victim, and (5) other loss reasonably resulting from the victim's injury and/or death. Recoveries are limited to about twenty-eight hundred dollars for pecuniary loss and expenses other than loss due to incapacity to work, to fourteen hundred dollars for pain and suffering,[25] and to a minimal wage to replace loss due to incapacity to work. Moreover, any benefits received from other official sources or from the offender himself must be deducted from the potential award. Provision is made for the recovery of all or part of the state award from the offender by discretionary action of the tribunal upon application of the Secretary of Justice.

The British non-statutory Criminal Injuries Compensation Board likewise has the discretionary power to make awards on claims for personal injuries caused by violent crimes.[26] In adjudicating possible recoveries, the Board adheres to standards substantially similar to those which govern the New Zealand tribunal. The British Board additionally requires that losses must amount to at least three weeks lost earnings—thus limiting compensation to cases involving substantial injury.

A Proposal for Federal Territories

Senator Ralph Yarborough has introduced a bill in the Senate of the United States[27] to provide compensation for victims of

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[24] *Id.* at 372. If the victim has died, compensation may be made to or for the benefit of his dependents.

[25] A recovery for pain and suffering was included for the benefit of the victims of sexual offenses who rarely incur pecuniary loss. Cameron, *supra* note 23, at 373.

[26] The British plan includes injuries suffered while aiding an officer making an arrest or while the victim himself seeks to prevent a crime. See generally Recent Legislation, *Great Britain Approves Compensation Program for Victims of Criminal Violence*, 78 HARV. L. REV. 1683 (1965).

[27] S. 2155, 89th Cong., 1st Sess. (1965). See generally 111 CONG. REC. 13533 (daily ed. June 17, 1965).

certain criminal acts; this proposal is applicable to the District of Columbia and to the maritime and territorial jurisdictions where the federal government exercises general police power. This plan, intended as a model for the states, would establish a three-man Violent Crimes Compensation Commission, empowered to order payment of compensation for personal injury or death resulting from one of the statutorily specified violent crimes.[28] The Commission would consider any relevant circumstances, including the behavior of the victim which might have contributed to his injury or death. Compensation under the proposal might be made in any manner deemed appropriate; however, payment could not exceed twenty-five thousand dollars. In its substantive provisions, the bill bears marked similarities to the prior legislation in Britain and New Zealand. Thus, the elements of compensable loss would include expenses reasonably incurred as a result of the injury or death of the victim, loss of earning power due to his incapacitation, pecuniary loss to dependents, and the pain and suffering of the victim. Any collateral benefits received from public funds would reduce the award, and the Commission would be able to recover at its discretion all or part of the award from the criminal offender.

Compensation in the United States

The remarkable degree of popular acceptance which the legislation in New Zealand and Britain has received is perhaps symptomatic of a submerged historic concern for people injured by crimes.[29] But would a state compensation system inspire such avid support from the citizens of the United States? American thinking on the subject is likely to be focused on three factors: the emotional appeal to support the family of a victim killed or severely disabled as a result of a criminal act; the cost of such a compensation program; and the possibility of replacing individual incentive and responsibility with a supplicant reliance on a paternalistic welfare state. How do these characteristic American points of reference correspond with the reality of a state compensation scheme, and in view of them, is such a plan feasible or even advisable in this society?

Should victims be compensated?

It must first be admitted that the present plight of the victim of crime is far from satisfactory. The victim's right to

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[28] *E.g.*, assaults, mayhem, indecent or obscene acts, kidnapping, murder, attempted murder, rape, attempted rape.

[29] Cameron, *supra* note 23, at 375; see also Childres, *supra* note 14, at 446-52.

common-law damages for the tort of the criminal is all but negated by the general impecuniousness of the criminal. The end result is that in the vast majority of cases the victim must himself bear the cost of curing the injurious result of the crime, and must be content with the emotional satisfaction that can be afforded by the punishment of the offender.

The traditional argument for state compensation, as articulated by Margery Fry, is that since the state demands that its citizens go unarmed into the streets, it should not disown responsibility for lapses in the protection it affords. The state is the heir of those familial units, the clans, which both demanded satisfaction for an outrage and shared in the responsibility for its occurrence.[30] But state compensation can be justified on much broader ground. Certainly, governmental institutions have largely failed to control the causes of violence and injury—minority group ghettos and other slums, dope addiction and organized crime, for example, are surely present to an alarming extent. If society is ineffective in destroying the recognized sources of crime, its minimal responsibility extends to repairing the human damage that results.[31] More generally, the community has a moral obligation to help those who are victims of misfortune, and to maintain a standard of well-being for its citizens.[32]

Considerations of cost

Modern finance is supported by sharing risks. Absent some supporting institution, it is usually futile for courts to require an individual to pay heavy damages. But every person is a potential victim of violent crime, so the supporting group which spreads the losses of such crime may extend to society itself. If it is agreed that the problem concerns every citizen, it then becomes apparent that victim compensation is a problem for which a solution can legitimately be sought at the governmental level. A pre-emption of private insurers would not necessarily imply that the system of victim compensation would be more expensive or less efficient than it might otherwise be—the contrary might well be true.[33]

In fact, so little attention has been devoted to victims in the past that there are no really reliable projections available as to the total cost of a comprehensive program. Some estimates have been relatively low,[34] however, and the initial information from the

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[30] *Round Table* 191, 193 (Margery Fry's view).
[31] Childres, *supra* note 14, at 455-57.
[32] *Round Table* 252 (Helen Silving's view).
[33] Childres, *supra* note 14, at 457-58.
[34] *Id.* at 470-71.

working plans indicates that the expense may be rather modest.[35] Several years will be required, of course, before any conclusions will have more than tentative validity. An experimental compensation program, dispensing limited awards, would seem the best answer to those who would raise the spectre of prohibitive cost. Vague intuitions without factual basis should not be allowed to override the real values to society which might flow from an effective victim compensation plan.

It has frequently been suggested, when the question of state involvement in victim compensation arises, that the monies necessary should come from the offenders themselves, either from a fund composed of the proceeds of all prison labor and fines collected by the state,[36] or by requiring the individual criminal by fine or prison labor to personally undo his wrong.[37] While the aim of such plans is to emphasize to the criminal the result of his offense, these systems have proved financially unstable and, in practice, have been substantially dependent on the public treasury.[38] Moreover, to demand personal financial restitution from the offender would relate criminal responsibility to damage done rather than to moral fault, and would constitute something very much like imprisonment for debt. Such a plan would interfere with the modern rehabilitative approach to penology, and with the utilization of criminal labor as a reward and device for resocialization.[39]

Compensation and "Paternalism"

The most serious threat to American approval of a victim compensation program is the popular fear that such a "socialistic" plan could "lead to a complete dependence on government paternalism." [40] In the United States we have come to rely primarily on individual or group responsibility for compensation of injurious wrongs. However, a program of compensation for victims of criminal violence is not necessarily "socialistic paternalism." The federal and state governments already administer special programs for victims no worthier than the victims of violent crimes. The public interest was found to require development of comprehensive workman's compensation programs; moreover, a vast system of veteran's compensation has been established. Cannot the victims of criminal violence be considered the victims of "internal aggression" (as veterans are victims of "external aggression")

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[35] See Hussey, *Britain Compensates Victims of Crimes,* N.Y. Times, Feb. 21, 1965, § 6 (Magazine), p. 23.

[36] See, *e.g., Round Table* 208-09 (Frank Miller's view).

[37] See SCHAFER 123-25.

[38] Childres, *supra* note 14, at 453.

[39] *Round Table* 245 (Helen Silving's view).

[40] See *Round Table* 219 (Gerhard Mueller's view).

and should they not be accorded treatment consistent with this status?

The advocates of individualism argue that crime prevention is the best "insurance policy," and that we must refuse to accept the present crime rate as inevitable. But compensation does not concede the crime rate, nor is it an alternative to vigorous professional law enforcement. Even with the best police force, the state could not prevent all crime, and the innocent victims, whatever their numbers, would still remain without any real means of reparation. Law enforcement seeks only to prevent crime; a compensation program would ameliorate its effects.

Fears of paternalism can be obviated, and, in fact, a sense of civic responsibility can be promoted where compensation programs are utilized wisely. If a prompt report of the crime were made a condition to eligibility for compensation, the police might be greatly aided in their investigation, and if, as in the British plan, injuries incurred in assisting in an arrest or in the prevention of crime were made compensable, individual citizens might be more willing to aid the police and/or other citizens in trouble.

Critical Standards

The area of victim compensation remains an uncharted cross-pattern of unknown factors. It is therefore essential that any initial steps be taken with the utmost caution and yet with sufficient flexibility to allow formulation of rules as factual circumstances dictate. The creation of a new tribunal, vested with broad discretionary powers, would endow the plan with the flexibility necessary. Such a tribunal could develop its own precedents, and could devise an appropriate method of conducting investigations and hearings.

The difficult problem of provocation by the victim is certainly one area in particular where the power to act with wide discretion on a case-by-case basis should be granted any Compensation Commission. Again, limiting compensation to those injuries which result from specified crimes would seem to be a mistake. A broad standard, such as "personal injury caused by violent crime," would seem to limit the scope of the program sufficiently, without excluding worthy but "unenumerated" victims. For example, no compensation could be allowed for personal injuries due to arson under the present federal bill. This is another instance in which the exercise of a discretion tempered by experience would be more profitable than the mere implementation of an arbitrary rule.

While a great latitude should be afforded any Compensation Commission in its substantive determinations, there is no strong policy which demands a similar discretion as to the amount of an award. Compensation can never be made to appear as a "windfall,"

lest it defeat its purposes. To discourage any attempt to defraud, it must be made clear from the outset that any compensation plan merely attempts to restore the victim to his former status—and nothing more.

It must be added that any tribunal established for maximum flexibility in the processing of a victim's claim should be carefully and simply constituted. The discretionary exercise of judgment would be impossible if a claim were routed through several levels of bureaucratic formality. At the outset, therefore, minor losses should be excluded from its purview, perhaps by establishing some reasonably minimal jurisdictional predicate comparable to the British three-week salary requirement.

Conclusion

The victim of a crime should be restored to his pre-crime status. The legal institutions presently in effect have failed in the great majority of cases to provide a means to effect such a restoration. This writer, therefore, advocates the adoption, on a state by state basis, of experimental systems of compensation for victims of criminal violence. If compensating authority is vested in tribunals with broad discretion, and if compensation is limited to the consequences of personal injury due to violent crimes, the major practical objections to such plans can be overcome. The material and psychological benefits which such plans would confer on the wronged victims are justification enough for their adoption.

Legislative Changes in New York Criminal Insanity Statutes

Introduction

Insanity has been a defense to prosecution for murder since the fourteenth century when the judiciary recognized that an insane defendant was not responsible for his actions because he lacked the mental capacity to formulate the vicious criminal intent which justified punishment.[1] Since that time the law has not kept pace

[1] Perkins, Criminal Law 738-40 (1957). For a concise history of the insanity defense see Judge Cardozo's opinion in People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915).