

The Role of Victim Compensation in Rebuilding Victims' Lives

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Introduction

In recent years victim compensation in the United States has often been viewed as a step-child in the world of victim services and assistance. It emerged independently, operated for many years separately from service networks, and seemed to address different issues and problems. In reality, the evolution of victim compensation was a key factor in the victim assistance movement. Part of the problem in perception might be traced to the fact that much has been written through these years about structure and function of victim compensation. But little attention has been paid to the fact that victim compensation is a form of victim assistance in meeting financial, physical, emotional and social needs of victims, and has played a vital role in victim recovery. Even less attention has been paid to the possible role victim compensation can have in future victim assistance efforts. This paper will address the role of victim compensation in meeting victim needs by first sketching a brief history of the evolution of the philosophy of justice that currently shapes both victim compensation and the criminal justice system; second, looking at the symbolic value of victim compensation for victims; and third, examining the role of victim compensation as an alternate forum of justice for victims.

In this analysis, experiences from both the United States systems of state compensation and the European systems of compensation will be discussed. A heavy emphasis will be placed on the European experiences since they present some different perspectives on compensation (viewed both as an adjunct to the criminal justice system and in terms of state compensation programs) that help to underscore the vital relationship between victim compensation and victim assistance in meeting the needs of victims.

Evolution of Compensation and Justice Principles

The idea of providing reparations to victims of crime through civil redress – either through restitution from offenders to victims or state compensation programs – has a long history of support. In ancient Babylonia, the Hammurabi code specifies that:

“If a man has committed robbery and is caught, that man shall be put to death. If the robber is not caught, the man who has been robbed shall formally declare what he has lost . . . and the city . . . shall replace whatever he has lost for him. If it is the life of the owner that is lost, the city or the mayor shall pay one maneh of silver to his kinsfolk.” (Sections 22-24)

In the early Common Law of Middle England, if a man was murdered, the man's family was entitled to a werguild of four pounds. Gradually, however as the criminal justice system was separated from civil proceedings, state reparations began to subside

and the state became primarily responsible for imposing punishment based not only on harm done to individual victims but also harm done to the king or feudal lord. (1)

As Marvin Wolfgang noted in 1965: “The victim of a crime has historically and almost universally enjoyed the right to reparations. This right was confiscated by the state in the form of fines without due consideration for the victim” (2)

The trend that Wolfgang was noting began changing almost fifty years ago to a large extent due to the work of Margery Fry, the late English penal reformer who called for a revival of the victim’s importance and to more effective remedies for victims such as state compensation programs. Ever since that time state compensation programs have become commonplace throughout much of the Western world and have become established in all fifty of the United States. There has been a great deal of research and discussion surrounding the implementation of compensation programs, focusing on such issues as the funding of such programs, victim eligibility for benefits, types of benefits to be covered through compensation, and procedures for distribution of benefits.

There also has been some discussion of the goals of victim compensation. Initially there was little agreement on what the goals should be defined. Two early authors reflecting upon major justifications suggested four principal goals: “social welfare, social contract, symbolic, and instrumental.” (3)

Interestingly, each of these justifications was used in those early years for responding to the needs of victims. Initially, the social welfare goal was one of the most commonly cited, particularly in the United States. It is reflected in former Justice Goldberg’s comment: “In a fundamental sense, then, one who suffers the impact of criminal violence is also the victim of society’s long inattention to poverty and social injustice...” (4) It is also reflected in early legislation in which compensation was established as a “matter of grace,” not a matter of right. (5)

The second theory for state compensation programs was based on the social contract stemming from Jeremy Bentham’s argument:

“Has a crime been committed? Those who have suffered by it, either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity when its protection has not been effectual.” (6) The thinking was that a person’s natural right to avenge wrongs done to him or her should be subordinated to society’s larger interest in serving as the individual’s protector from harm, or, failing that, as the instrument of consistent and fair-minded justice. Still, society may not justly “steal” one’s natural right of self-protection or vengeance, but rather it must either perform as a protector or pay as avenger.

While this justification has never been completely embraced – since it would imply a legal argument to compensate all victims of crime as well a legal obligation to fully compensate for all damages – it has to considerable extent become the basis for

arguments today that seek compensation as a partial source of a justice response to victims. It is significant that virtually all state compensation laws in the United States include a *right* to compensation. Denmark, England, Wales and Scotland also consider that “a victim of a violent offence in principle has a *right* to state compensation.” (7)

The third possible justification scheme was based on the symbolic value of victims. This is probably the least examined issue raised by compensation. In the early years of modern compensation, it was often rejected as demeaning to victims since it would serve as a placebo in place of “real” and effective reparations that could help victims recover financially. However, as this paper will argue, the more that is learned about the emotional aftermath of victimization and role of social response, it may still be one of the most valuable effects of compensation to many victims.

The fourth goal of compensation addressed the instrumental functions within the criminal justice system that compensation would serve. There was an early notion that state compensation programs would encourage participation by victims in reporting crime, assisting with investigations, and participating in prosecution. There has been little evidence that this is the case. If victims do not want to participate or cooperate, then they do not apply – indeed *may* not apply – for compensation. There may be a few victims for whom the financial inducement was enough to sustain their cooperation – “sustain” since the crimes against all potentially eligible victims were known to the police, which usually mean the victim reported the crime and thus were initially cooperative. Yet, there is only rare anecdotal evidence that a victim continued to cooperate with the justice system to preserve their compensation right.

As programs have become well established and increasingly efficient, it would seem that the four possible goals for compensation in 1974 have really been reduced to two. The first is to serve as a source of symbolic social recognition for victim suffering and the second is the need to respond to victims in a just, expeditious, and equitable manner.

Victim Compensation as Symbolic of Social Response

Victim needs for reconstructing their lives have been articulated as fourfold: financial, physical, emotional, and social. In terms of victim compensation, the first two needs overlap, since compensation may provide the financial resources to get the appropriate health and mental health treatment.

Financial needs are perhaps the easiest to define, although they may represent one of the biggest issues for from a victim’s perspective in terms of equity and fairness. It is rare that a victim of crime does not suffer certain types of out-of-pocket costs. Even in so-called minor crimes such as theft, breaking and entering, or vandalism, there are usually costs associated with property replacement, repair, or clean-up. There are often major financial losses in crimes of fraud, arson, burglary, or motor vehicle theft. However, with a few exceptions, most state compensation programs in the United States and Europe limit recovery to personal physical injury crimes. If the criterion of being a

victim of a violent crime is met, then the following losses are routinely included: medical expenses and costs for rehabilitation; loss of earnings, income or support; funeral or burial costs; childcare and transportation costs; psychological counseling. In Europe most countries offer some kind of compensation for property damage, although it is usually compensation for property damage connected to violent crime or stolen goods. Some countries go beyond this. Denmark, Finland, France and Sweden will compensate for stolen goods even if there was no violent assault involved. Finland, France and Sweden do so if the loss causes exceptional financial hardship and France will also compensate if it causes exceptional psychological hardship. (8)

Many victims view this distinction as unjust even as they may recognize the budgetary limitations that a state compensation program may have. If compensation is perceived as a right and an obligation by the state to victims due to the lack of the ability of the state to protect, then that lack of protection is equal in all types of crime.

Another important issue in addressing financial need is whether that need should be construed to include addressing pain and suffering. If a compensation program is conceived as serving as an alternative or supplement to civil litigation, it would seem some compensation is due victims for pain and suffering (as it is, for example, in England, Wales, Belgium, France and Hawaii). These are non-pecuniary, immaterial damages. However, they can certainly be useful in helping victims address certain negative effects of victimization such as physical pain or illness apart from actual physical injury or loss of expectation of longevity of life. It is arguable that these consequences of crime may have as much long-term impact on some victims as more direct financial or physical consequences. It is also arguable that the symbolic value of dealing with these issues through some type of compensation helps to confirm the commitment of society to victim assistance as a whole. (9) The central role of “pain and suffering” in determining the extent of tort liability in America’s civil justice system underscores its recognized legitimacy.

The basic problem confronted by most compensation programs in addressing financial needs is that they usually don’t cover all costs – and no costs at all when dealing only with property or financial crimes. In addition, most programs that do address things like loss of income and support or pain and suffering all put limits – arbitrary limits, a tort lawyer would argue – on such compensation. Finally, from a victims’ perspective, it is not unusual that different victims may receive different levels or awards and therefore feel like they were treated inequitably.

Yet if compensation is viewed as having symbolic value, some type of financial remuneration may underscore that symbolism, even if the amount is significantly less than expenses. On the other hand, if it is to be seen as a source for serious reimbursements to forestall economic hardship – but if those reimbursements are delayed or denied – then victims could suffer a sense of further victimization. In other words, every such program has the potential of being a failure both symbolically and practically from the victim’s perspective.

To appreciate the victim's perspective, it is well to remember that the victim's emotional and psychological needs relate to the trauma of victimization. That trauma is characterized by an immediate crisis reaction to the shock of the criminal violation and followed in many cases for weeks or months with re-experiencing the victimization. Fear, anger, confusion, frustration, guilt, shame and grief are often hallmarks of the immediate crisis reaction. Virtually all victims of serious crime suffer these reactions, although the intensity of those reactions varies considerably. Some victims go through only a few hours or days of reactions to the victimization. Others may suffer Acute Stress Disorder that can last for two to four weeks. Still others may have a range of long-term stress reactions including Post Traumatic Stress Disorder, Depression, Dissociative Disorders, and the like. These reactions often cause additional physical reactions and illnesses reinforcing to some extent the argument for compensation for pain and suffering.

Victims may feel estranged from their families, friends, and communities. They often suffer a diminishment of self-esteem. They may feel powerless and helpless when they relive their memories, and perceive overwhelming challenges in their new lives. The trauma itself creates a rupture in the victims' lives – between their past, their present, and their future. Reintegration of their lives requires of them to acknowledge the victimization, to try to understand its consequences, and to receive validation from those around them. It should be noted that not all victims are traumatized, so the needs may not always be present. But for those who are, the need for someone to understand and respond can, if not met, be debilitating.

In this light, victim compensation programs can serve as a source of acknowledgement and validation when victims are treated compassionately. Victim compensation personnel, when properly trained, can respond to victims who may be in crisis when they call. They can affirmatively respond to the sense of victimization that someone is experiencing, even if there has been no offender apprehended or prosecuted. They can give victims the feeling that they are being heard. From this perspective, the rules and benefit levels of a particular program may prove less important than the way it is administered.

Yael Danieli underscored the value of this in outlining goals and recommendations for victims of human rights abuses. The first goal she stated is the:

“Reestablishment of the victim's...value, power...and dignity, [through]...reparation...accomplished by compensation, both real and symbolic.” (10)

Social needs following victimization are based on the need to regain a sense of community. The estrangement discussed above is not only based on victims' feelings of isolation because others cannot understand what happened, but also on the fact that society tends to stigmatize victims as time goes on after a tragedy. Most cultures and communities rally around victims after particularly traumatizing experiences; that was clearly evident in the outpouring of volunteers, resources, money, and other aid in the aftermath of the terrorist attacks of September 11, 2001. Yet as months go by,

divisiveness begins to tear part the supportive context, both among victims and survivors as well as among the helpers. The communities that seemed so resilient in the immediate aftermath of the attack find their own emotional resources depleted and the psychological needs of the victims may come into conflict with other needs. The consequence can mean that victims' traumatization is extended and compounded.

“When victims' helplessness persists ... the trauma is unlikely to result in the mobilization of external resources, in restitution, or in the meting out of justice. Because of the lack of validation and support, traumatic memories are more likely to continue to prey on the victims' minds, and to be expressed as anger, withdrawal, or otherwise disrupted and disrupting behaviors.” (11)

The stigmatization of the victims is manifested not only through occasional vilification of them or attributing negative attributes to their behavior but also the development of a conspiracy of silence in which their experiences are minimized or ignored. Nobel Laureate Elie Wiesel hated the silent indifference that he and other victims of the Holocaust endured.

“At the risk of offending, It must be emphasized that the victim suffered more and more profoundly from the indifference of the onlookers than from the brutality of the executioner. The cruelty of the enemy would have been incapable of breaking the prisoner; it was the silence of those he believed to be his friends — cruelty more cowardly; more subtle which broke his heart. There was no longer anyone on whom to count...It poisoned the desire to live...If this is the human society we come from and are now abandoned by — why seek to return?” (12)

If victim compensation is seen as a proactive symbolic program of social response, it can foster a communal determination to place the victims' plight at the top of the social agenda rather than at the bottom of it. Indeed, in a few countries, compensation is offered for “moral damages or for the violation of the personal integrity.” (13) These damages are usually limited to personal crimes or particularly heinous crimes. The types of crimes they address could be regarded in some parallel sense to what is called in the human rights context “crimes against humanity.”

The problem is that throughout much of the Western world, in both Continental justice systems and in Common Law systems, compensation programs have not risen to this challenge.

Victim Compensation as an Alternative Forum for Justice

In looking at victim compensation as a forum for justice, it is important to examine briefly some concepts of justice. As was mentioned in the introduction, the evolution of criminal justice as it is known today went from a compensatory system where the victim was at the center of the process to one that could be called a penal system where the criminal is at the center of the process. The primary function of the

system is not one of “making the victim whole” but of punishing or rehabilitating the offender.

The consequence of this change is that to a large extent the victim is not involved in the system except as a witness. In the majority of European countries, this has resulted in the fact that “compensation” is really a form of restitution and, depending on the nation, the frequency and amount of compensation is very modest. Reference to the European practices is important because they bear on both the philosophical concepts of justice and on the structure of state compensation as an alternative forum of justice.

In some countries the victim joins the proceedings as a civil party, indeed, with the right to have an attorney look after those civil interests during the course of the criminal trial. In others, the question of compensation is left to the prosecutor and the judge. A few countries use a hybrid model that includes a choice for victims to join the proceedings or leave the question of compensation up to the prosecutor and judge. In all the countries using these two different models of “compensation,” compensation is tied to what happens to the offender. This means that victims whose offenders are not identified are not generally eligible for compensation. That fact, along with a general reluctance of judges to institute compensation, has meant that most European compensation legislation is not implemented, or reaches only a handful of victims.

For this reason, “state” compensation schemes have been developing to supplement or provide compensation. European countries are currently in the process of signing and ratifying the European Convention on the Compensation of Victims of Violent Crime that was established in 1983 and entered into force in 1988. (14) Just as in the United States, the programs differ significantly on the issues of benefits, eligibility and the like. (15) The purpose of the Convention is to develop plans for state compensation to crime victims and to establish minimum standards for those programs.

Even though the compensation/restitution programs in Europe have not generally been found highly successful, it can be argued that using state compensation programs as forums for justice with an emphasis on “making the victim whole” could be a more effective alternative for many victims. Victims get a hearing on their victimizations. They have an opportunity to receive reparations more quickly (particularly when the system is not dependent upon the involvement of the offender.) And they have received a sense of empowerment, validation and integration into the social order.

The different compensation types in Europe also provide a good background for evaluating whether it makes any difference to victims who provides the compensation – the offenders or the government.

The advantage of providing compensation through a state compensation program is the possibility of expeditious case disposition and relatively speedy reimbursements of losses. It also demonstrates social concern. That does not preclude the use of offender fines and penalties rather than government revenues as a source of funding, at least if the fines and penalties are sufficient to meet the financial needs of the victims. Nor does it

preclude a policy of “payment up front” where the government takes on the responsibility of distributing the funds and then collects on compensation or restitution orders as a form of reimbursement to the state compensation fund. Either of these policies still holds offenders accountable to the extent possible but leaves the issue of collection to the government.

While some victims might want the person who attacked them to be personally responsible for paying reparations, it would seem that most victims would prefer compensation as quickly as possible. A system that combines fines, penalties and government revenues to meet the needs of victims might be most appropriate. The idea is not new. E. Ferri recommended the establishment of a fund out of the fines levied which would be used to pay general compensation in 1917. (16)

A final issue in the discussion of the use of victim compensation as an alternative forum for justice is perhaps the most complicated. How is a system devised that will be equitable for all victims, or even all victims who are deemed eligible for compensation? Currently, in the United States there are grave inequities from jurisdiction to jurisdiction. Some such concerns arise from the different types of victims who are eligible for compensation. Others arise from the different types of benefit structures or even the amount that is available for compensation.

It is of particular note that the “federal compensation program” established for the victims of the terrorist attacks of September 11, 2001 has been perceived by many victims as a demeaning and unfair. (While technically not a compensation program but rather like a civil indemnity fund, it is criticized based on its compensation benefits and distribution processes – and its “compensation” name.) This perception is shared by some of the victims of the attacks as well as by thousands of victims who were not victims of the attacks but whose loved ones were shot and killed on the streets of some city, or whose daughters were raped, or whose family members were assaulted or murdered – none of whom were able to get compensation at anywhere near the amounts offered to the September 11 victims.

The European Union is taking steps to try to standardize certain elements of the compensation programs in Europe to overcome such inequities through the Commission of the European Communities. (17) It may be worthwhile for those of us in the United States to look more carefully at similar issues. For all the potential symbolic value of compensation, that value is lost if there is no faith in the fairness and justice of the programs.

Conclusion

State compensation programs were the first generation of modern victim services. For a variety of reasons, they were often heavily criticized in their infancy. Many people resented the overtones of welfare programs that were associated with them. Others found the bureaucratic procedures overbearing. Benefits were limited. Eligibility criteria were much more stringent than they are today. There were lively discussions over whether the

government had a legal obligation to compensate victims or whether it simply an issue of morality. Many of these issues are still being addressed. But, ten years ago, a distinguished victimologist, Jan J.M. van Dijk made these observations:

“Existing state compensation schemes in North America, Australia and North West Europe have not prevented the development of other services for victims, which shows that fear about their negative consequences may have been unwarranted. During the Eighties, state compensation schemes have actually provided in the financial needs of increasing numbers of victims with severe injury. These developments suggest that state compensation schemes perhaps deserve a more favorable judgment by the victims’ movement than they presently get. The question will have to be addressed how state compensation schemes can be made to work more effectively as part of a comprehensive victim policy.” (18)

References

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3. D. Chappell and L. P. Sutton. "Evaluating the Effectiveness of Programs to Compensate the Victims of Crime," in *Victimology: A New Focus, Volume II, Society's Reaction to Victimology*, I. Drapkin and E. Viano, eds. Lexington Books: Lexington, MA (1974).
4. A.J. Goldberg. Preface: Symposium on Governmental Compensation for Victims of Violence. *Southern California Law Review* 43 (1970)
5. Cf. New York Executive Law #620 (McKinney's, 1972)
6. *The Works of Jeremy Bentham*. New York: Russell and Russell, 1962, p. 589
7. E. Hoegen and Mario Brienens, *Victims of Crime in 22 European Criminal Justice Systems*. Wolf Legal Productions: The Netherlands (2000)
8. *Green Paper on Compensation to Crime Victims*. Commission of the European Communities. Brussels, Belgium, (2001)
9. Cf. *Green Paper on Compensation to Crime Victims*. Commission of the European Communities. Brussels, Belgium, (2001)
10. Y. Danieli. "Introduction, History and Conceptual Foundations," in *International Handbook of Multigenerational Legacies of Trauma*. Y. Danieli, ed. Plenum Press: NY. (1998)
11. A.C. McFarlane and B.A. Van Der Kolk, "Trauma and Its Challenge to Society," in *Traumatic Stress*. B.A. Van Der Kolk, A.C. McFarlane and L. Weisaeth, ed. The Guilford Press: NY (1996)
12. E. Wiesel. *A Jew Today*. Vintage Books: NY (1979)
13. E. Hoegen and Mario Brienens. *Victims of Crime in 22 European Criminal Justice Systems*. Wolf Legal Productions: The Netherlands (2000); Countries addressing moral damages include Belgium, Denmark, Finland, France and Sweden. In the Netherlands, compensation awarded for immaterial damages seem to include both pain and suffering and moral damages. Luxembourg includes moral damages within pain and suffering.
14. Twelve Member States of the European Union have signed the Convention: Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Nine of those States have ratified and entered the Convention into force: Denmark, Finland, France, Germany, Luxembourg, Netherlands, Portugal, Sweden and the United Kingdom.
15. Cf. E. Hoegen and Mario Brienens. *Victims of Crime in 22 European Criminal Justice Systems*. Wolf Legal Productions: The Netherlands (2000)
16. E. Ferri, *Criminal Sociology*. Little, Brown: Boston. (1917)
17. Cf. *Green Paper on Compensation to Crime Victims*. Commission of the European Communities. Brussels, Belgium, (2001); Discussion Document from Hearing of March 21, 2002 on the Commission's Green Paper on Compensation

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18. J.J.M. van Dijk, "Towards a Research-Based Victim Policy Report of the General Rapporteurs, Part II," in *International Faces of Victimology*. S. Ben David and G.F. Kirchhoff, eds. WSV Publishing: Monchengladbach, Germany, 1992