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THE CASE FOR CREATING COMPENSATION PROGRAMS TO AID VICTIMS OF VIOLENT CRIMES

James Brooks*

I. INTRODUCTION

Modern day criminal injury compensation programs date from 1963. More than a decade of study and interest in Great Britain preceded New Zealand's program adoption in 1963 and Great Britain's in 1964. Subsequent adoptions include those of New South Wales, Queensland, South Australia, Western Australia, Northern Ireland, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario, Quebec, Saskatchewan, California, New York, Hawaii, Maryland, Massachusetts, New Jersey, Georgia, Alaska, Illinois, Delaware, North Dakota, and Washington. In addition, Nevada and New York City have adopted partial compensation schemes called "citizenship" or Good Samaritan programs which compensate only for bodily injury or death which results while the victim is endeavoring to prevent the commission of a crime or is assisting in law enforcement, and Rhode Island has passed legislation for a compensation program that will become operational only in the event that the United States Congress passes a bill to provide grant-in-aid funds to help finance the program.

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Compensation to victims of crime is a new suggestion in the sense that it represents a recent and still current attempt to meet what is felt to be a societal need. There are the goals of maintaining and restoring the victim and/or his dependents and of achieving social stability. These have been recurring goals in considerations of other social insurance programs. They all represent an attempt to secure "mutual protection against a risk which is reasonably certain for the large group though uncertain for the individual, through the pooling of fixed contributions so that the cost of the average risk applies to each member of the group." Crime compensation programs have been financed, for the most part, by group payment through taxation. The incidence of crime being what it is, this results in some income transfers among the socio-economic classes in society. Further, the adoption of public programs to provide for the compensation of victims of crime has its roots in the kinds of social welfare legislation that have been generally adopted. The establishment of public programs to compensate victims of crime can be seen as an extension of those social insurance programs adopted earlier to enable people to better meet some of the hazards inherent in life. Provision has not yet been made to extend public assistance to help meet all of these hazards. The programs here under consideration represent another step in that direction.

Of special interest to social scientists is the theoretical place and role of these programs. One aspect of this concern is the relationship between the state and the individual. Some of the questions for which answers are sought here are: What has been the relationship between the state and the victim of crime? How and why has this relationship come to be what it is? Why has this relationship been criticized for failing to provide adequately for the victim of crime? Who have the critics been and what have their contentions been? What are the chief factors that have accounted for the receptivity given these critics and their persuasive efforts?

A variety of reasons supporting the creation of criminal injury compensation programs has appeared. Some reasons for opposing such programs have also been offered. Here, attention is directed to these propositions, pro and con. They are categorized and given attention individually. There is inevitably some overlapping in the structuring of

such categories and in attempts to differentiate completely various allegations, statements of support, rebuttals, and counter contentions. The statements issued, the articles authored, and the recorded verbalizations are often composites of substantiations. Within these limitations, the themes and contentions offered by supporters and opponents of these programs will be presented, scrutinized, and evaluated.

II. THEORETICAL REASONS—AFFIRMATIVE

A. Society Prohibits the Individual from Effectively Protecting Himself and Then Defaults on Its Responsibility to Protect Him. It Therefore Has the Duty to Compensate the Victim.

Probably the most common argument for a compensation program of the scope considered here is that the state denies certain individual actions that might be thought of as self-protective, and then fails to halt crimes of violence. According to Margery Fry, “[t]he State which forbids our going armed in self-defence cannot disown all responsibility for its occasional failure to protect.” Since Miss Fry is generally given credit for being the originator of modern day compensation plans, her popularization of this rationale gave it an early start in claiming the attention of those sympathetic to her goals and hopes.

One of the first, and certainly the most prestigious, of the American supporters of compensation plans to adopt Miss Fry’s justification for compensation plans was Arthur J. Goldberg, then United States Supreme Court Associate Justice. He contends that “[t]he victim of a robbery or an assault has been denied the ‘protection’ of the laws in a very real sense, and society should assume some responsibility for making him whole.” Other prominent supporters of compensation plans, including former United States Senator Ralph W. Yarborough of Texas and former United States Representative Abner J. Mikva of Illinois have based their support upon the same kind of contentions.

There is the implication in this line of reasoning that, if left alone by the state, the individual could protect himself. That the individual was ever able to do this seems to be denied by the contentions that governments were established, for one reason, to better protect the

Whether any government could do this absolutely seems doubtful. Whether being a victim necessarily depends upon government "defaulting" its obligations also seems doubtful, at least to many. Those who entertain such doubts, but who also support compensation programs, have usually preferred other rationalizations.

B. By Appropriating the Fine to Itself and Incarcerating the Convicted Criminal the State Effectively Denies Any Remedy to the Victim of Crime.

There are a multitude of difficulties here, occasioned in part by changes in criminal and civil law never evolving to the point of adequately ministering to the needs of the victim of crime. The reality, almost universally, is that "[o]ne rarely finds an instance in which the victim of a crime can be certain to expect full restitution. . . . Where there is no system of state compensation, civil procedure and civil execution generally offer the victim insufficient compensation."8 "There are crimes which are not torts, and vice versa, but it is impossible to imagine a crime of violence which is not also a tort."7 Although the victim of tort has recourse to a civil suit from which can issue an award for damages, practically speaking, this affords no effective remedy. There are several reasons for this. First there is the chance that the tort-feasor will not be apprehended. The victim of crime is dependent upon the state to apprehend the criminal. In many cases there is no apprehension. If there is apprehension, there are other problems that make recovery most unlikely, for "unhappily, those who have a propensity for violence, all too often turn out to be men of straw [without funds]."8 Another difficulty is that "not only does the state fail to help financially the victims of crime, it actually makes it harder for them to secure reparation by incarcerating the offender, making it virtually impossible for him to honour any civil judgment that might be rendered against him."9 Before even this civil judgment of questionable value is rendered, there is yet another problem for the victim of crime and perhaps for the community as well:

8. Id. at 685.
It has long been a shortcoming of our system that the victim of tort in his action against the tortfeasor frequently is not even entitled to rely on the probative value of the tortfeasor's prior criminal conviction for the same conduct, so that the victim incurs the full expense of a complete civil suit, unless he can sue in forma pauperis, or with legal aid, in which case the community at large bears an unnecessary expense.\(^\text{10}\) In addition to the above-mentioned expense, the victim “will have to go through all the anxiety of two processes: the criminal case, where he must appear as a witness, but whence the fine will go to the State, and a civil court, to which he must take his claim for damages.”\(^\text{11}\) Another reason for the convicted or acquitted person not having funds to pay a civil judgment is that if he has had funds there is a good chance of their being exhausted in his waging his own defense in the criminal case. Thus it seems that with any combination of realities that might face an individual who has been a victim of crime, his chances for recovery from the offender make it practically impossible for him to gain compensation from the offender.

“The premise that either the government assists the victims of crime or they suffer the consequences alone,”\(^\text{12}\) seems to be substantiated if reliance is placed upon existing civil remedies.

C. The State Has Focused Its Attention and Relief on the Criminal to the Effective Exclusion of the Victim of Crime. Expenditures Have Been Directed Toward the Criminal and Not the Victim.

There are several different reasons advanced for tying compensation programs to this justification. Some arguments reflect a general awareness of modern day penal theories; all reflect a conception of public monies being spent for various aspects of penal programs. Those who advance this proposition are for the most part seeking what they perceive to be a balancing of concern shown by the state to the criminal and to the victim as well. “A committee appointed by Governor Rockefeller to help draft recommendations on this subject contends that compensating the victims of crime is a corollary to providing rehabilitation and other social services to the perpetrators of crime.”\(^\text{13}\) Most of the

\(^{10}\) Mueller, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 218, 234 (1959) [hereinafter cited as Mueller].


\(^{13}\) N.Y. Times, Jan. 18, 1966, at 36, col. 1. *See also* remarks of Aaron J. Broder,
pleas founded upon this sort of reasoning are neutral in the sense that an effort is being made to get what is perceived to be fair treatment by the state for the victim of crime. Thus, United States Senator Mike Mansfield of Montana, on introducing Senate Bill 750 to provide compensation for persons injured by certain criminal acts, supported his bill by suggesting that "[t]his is a time for Congress to demonstrate to the people of America that it is as interested in the problems and suffering of victims of criminal acts as it is in protecting rights of accused criminals." The same position has been taken by former United States Senator Ralph W. Yarborough. This argument for affording what is thought to be more equitable treatment by the state for the victims of crime appeals to the instinct for justness. It certainly emphasizes the unevenness of the practices and procedures that have evolved in terms of criminal and civil procedures which now are available to the criminal on the one hand and to the victim on the other.

In some instances however, relating or supporting compensation programs in this equalization context seems to reflect a bitterness that what is considered to be so much has been provided by the state to the criminal. It seems that except for the existence of state assistance or programs for the criminal there would probably be little interest in the fate of the victim, at least so far as sponsoring government programs for his benefit are concerned. This seems to contain the implied criticism that too much is being done for the suspect and the criminal; however, there are those who contend otherwise. That public expenditures to support penal programs actually benefit criminals is also a contention that has been challenged.

It is interesting that some support for victim compensation programs is being generated by a desire to improve the state of penal reform. Lord Longford, who chaired the Justice Society Committee, and whose early study and report on compensation to victims of crime attracted much attention, has taken the position "that the general public will not be ready for adequate treatment for criminals until they are satisfied that victims are receiving proper care. 'We must defeat the

President of the New York State Association of Trial Lawyers, directed to a New York study committee, in N.Y. Times, Jan. 15, 1966, at 17, col. 3.
16. 113 Cong. Rec. 11,905 (1967).
idea that penal reformers are putting criminals before the victims.' \(^{20}\)

This is somewhat akin to the recommendations of the British administrative outline of a compensation plan which became known as the White Paper.\(^{21}\)

It can be seen that we have a strange amalgam of support which focuses its attention on the relative expenditures directed toward the criminal and the victim. The emphases and ultimate goals or desires within this group or among these supporters are different, but all are concerned with realizing through state compensation programs what is felt to be more equitable public consideration for the criminal and the victim.

D. The State Has a Moral Obligation to Aid the Innocent Victim of Violent Crime. It Is "Right" that the State Attempt to Minister to the Needs of the Victim.

Does the state have a moral obligation to aid the innocent victim of violent crime? Many people seem to think that it does. For some of these people, compensation as a prescriptive necessity stems from their inclination toward a certain philosophical disposition. They perceive a "wrong." Compensation by the state is the curative "right." An exemplification of this attitude is found in the remarks of the Earl of Longford, speaking in support of a compensation program for Great Britain:

Why are we so sure by now that the State ought to accept special responsibility for the victims of violence? One answer, if there were time, would be to take a whole string of individual cases and challenge anyone to deny that in these cases the community ought to provide some compensation where it is not provided at all, or at any rate, to provide much more generous compensation.\(^{22}\)

The utterly gruesome case history is of course not the exclusive ploy of the "moral obligationist," but it can be used with telling effect and it is difficult to counter. Urging state concern for the Good Samaritan, it has also been suggested that the state ought to compensate him due to its moral obligation to do so.

There are many people who support compensation programs due to this genuine, sincere feeling or attachment to the concept of moral

\(^{20}\) The Times (London), Jan. 6, 1970, at 8e.
\(^{21}\) 247 PARL. DEB., H.L. (5th ser.) 8 (1964).
\(^{22}\) 245 PARL. DEB., H.L. (5th ser.) 247 (1962).
obligation. There are others who no doubt align themselves with this proposition simply as a matter of convenience. They support state compensation programs perhaps without having articulated their reasons in their own minds. They are aware of what they feel to be a need. They accept the proposition that the state should somehow offer its resources to remedy these needs. For some it is a short step from having this concern for the victim to accepting the thesis that the state has a moral obligation to compensate the innocent sufferer of criminal attack.\(^{23}\)

There is another plane of support for the “moral obligation” thesis. For the most part, this group apparently is seeking to avoid making compensation from the state to victims of crime a legal right which the victims could then demand. So long as compensation is a moral right, it remains something that the state \textit{ought} to do but not something that the state \textit{has} to do. Thus the state can create a compensation program because it should. The base upon which a compensation plan is founded also has potential administrative ramifications. If compensation payments are awarded as a matter of grace, as contrasted to the victim having a legal claim upon the state for compensation, then the administrative procedures, especially appeals procedures, can possibly be quite different.

When consideration of a compensation plan was introduced for discussion and consideration in the House of Commons and House of Lords, Labor took the stand that the victim should have a legal right to compensation from the state. The Conservatives supported the position that the state should not have a legal liability but that the state does have a moral obligation to compensate victims of crime. The result was that Great Britain’s compensation program does not make payments on a legal but on an \textit{ex gratia} basis.\(^{24}\) Because of the advantages that accrue to the state as a result of having more flexibility in determining administrative handling and disposition of claims from crime victims under an \textit{ex gratia} scheme, Great Britain’s lead has been followed by some other jurisdictions, including New York and Maryland, in the creation of their compensation plans.\(^{25}\)


\(^{24}\) N.Y. Times, Feb. 21, 1965, § 6, at 20.

\(^{25}\) The British compensation program, established by administrative act on an \textit{ex gratia} basis, incorporated the view that external review of compensation board decisions is undesirable and excluded such review altogether. Judicial review of the British Criminal Injuries Compensation Board came about in 1967 when three judges of the
There may be a moral responsibility involved. There most certainly is a conception that there is a moral obligation for the state to compensate victims of crime. Also, it may be thought that there may be decided administrative advantages for a legislature to conclude that "moral obligation" is the appropriate base for a state-financed compensation program.

E. In a Democracy No Theoretical Justification of Absolute "Rightness" Is Necessary to Adopt a Compensation Program. A Demand for a Service from the State Needs No Theoretical Justification for the State to Assume a New Role. This Might Be Called the "No Justification" Theory.

In this area of compensation to victims of crime there is also a striving to achieve something of benefit to the public interest. There is general agreement that a program to compensate victims of crime would be in the public interest. Is it sufficient justification then to establish such a program because it is felt to be advantageous to the public interest? Does not such a program require sound theoretical support to justify it as being substantively sound? No, say many people who wholeheartedly support such compensation programs. For them it is sufficient that a need exists and that the state has the capacity to meet it. This need will simply have to compete with other needs in the political process through which resources are allocated. Some needs will be met; others will not. Thus, there will be many forces moving the state to act in a particular way at a particular time and what the state comes finally to do will depend upon the competition and success of these competing forces. "The public interest is what comes out of the competition of the open market. The test is procedural, not substantive." There are those, including some of the most articulate supporters of compensation plans, who base their support on this thesis. Among them is Rupert Cross, one of the early advocates of compensation to victims of crime:

Divisional Court unanimously ruled that the court has power to quash decisions of the Board. See Regina v. Criminal Injuries Compensation Board ex parte Lain (1967), 2 ALL E.R. 770. In this case, no error was found in the Board's decision and it was upheld, but the court's power to review such decisions was clearly stated. It may well be that when there are challenges of provisions that bar external review in other jurisdictions, the statutory language barring judicial review will not in fact prevent courts from exercising judicial review there also. See also Governor Rockefeller's Conference on Crime 188 (1966); Md. Ann. Code art. 26A, §§ 1-17 (1973), as amended, (Supp. 1975); N.Y. Exec. Law §§ 620-35 (McKinley 1972), as amended, (McKinney Supp. 1975-76).

Speaking for myself, I am content to do without theoretical justifications for compensation of victims of violence. After all, these are questions of public welfare and they should be determined by public opinion. Human needs account for the most of the Welfare State, and its evolution has nothing to do with tortuous lines of reasoning such as those I have mentioned. If there is a widely recognized hardship, and if that hardship can be cheaply remedied by state compensation, I should have thought that the case for such a remedy was made out, provided the practical difficulties are not too great. 27

A generally shared public perception of need, the acceptance of using the state as the means to alleviate this need, engaging in the competition of the political process for an allocation of revenue, being successful in this struggle—these are the things that should matter. In the democratic context of these actions and decisions there will be sufficient "rightness" attaching to the outcome, whatever that might be.

On the other hand, without a prescriptive theoretical foundation, other decisions that will have to be reached if a compensation plan is adopted may be more worrisome. Will payments be made as a matter of legal right or on an *ex gratia* basis? This can become very meaningful because of the necessity to accommodate the bureaucracy to a new function. It may make it more difficult to justify, except on grounds of expediency, the allowance or denial of appeals, for example. In other words, the lack of a theoretical justification still leaves one with difficult questions to answer whereas a theoretical justification pretty well carries with it a mandate for handling subsequent considerations.

III. THEORETICAL REASONS—NEGATIVE

A. It is Impossible to Justify Directing State Attention to This Narrow Need. It Is Theoretically Impossible to Single Out the Victims of Violent Crime to the Exclusion of Other Hapless Victims of Misfortune in Society.

This opposition to compensating victims of crime does not view such compensation as an undesirable or unneeded undertaking, but rather as highly desired. The opposition in the face of the desirability of compensating victims stems from the objection to singling out victims of crime for compensation and neglecting other objects of concern. There is a demand for a comprehensive effort to relieve misfortune in

general. But, unless such general treatment is forthcoming, there is opposition to partial relief. This attitude is typified by the following remarks:

When one first confronts a proposal to alleviate the suffering of victims of crimes of violence, all his humanitarian instincts are aroused. Reflection, however, forces him to ask: "Why alleviate the suffering of victims of crimes of violence and not, for instance, that of the farmer who while working in his field, is struck by lightening and rendered a helpless invalid?" The question is not an easy one to answer. It is not enough to say "First things first," or "One thing at a time." By what criterion may we justify the priority implicit in such a response?²⁸

These contentions seem to be true. There is no arguing with the position that a victim of misfortune has needs independent of the particular cause of his misfortune. Resolution of the dilemma bewilders those who are sympathetic to victims of general suffering and misfortune and who desire to have public programs to encompass and provide for all such cases.

For the most part, those who at first find themselves frustrated by such propositions as this are able to rationalize themselves out of their perplexity. Others never conceive of their efforts to secure compensation programs only for victims of crimes of violence as representing contradictions. It depends upon the disposition of the individual and his conception of the problems and alternative solutions as to whether or not he will be discomfited in urging what others view as being inadequate. It would seem that the objections raised above have been effectively countered through rebuttals based upon several premises. One is that

²⁹. Id. at 208.
mental defect. In fact, consistency in this one area would amount, it is suggested, to a departure from usual practice.

On compensation to victims of crimes of violence, there are those who want to keep the door shut. Some want to keep it shut until it can be opened all the way to admit all classes and cases of need. Others want to keep it shut because if opened partway, to admit at present only victims of crimes of violence, it may be opened wider in the future. Others want to open it partway now, so that it may be opened wider in the future. Compensation to victims of crimes of violence has thus been referred to by some as the "thin edge of the wedge." There is, as well, some sociological support for not having to choose between all or nothing. It is suggested that a middle ground can just as logically be chosen.

The concept of objective justice, no less than the concept of truth, finds its intermediate state, which leads toward the objective sense of "justice," in social behavior. In the field of criminal law, as well as in all other regulations of life, the correlation between guilt and expiation, merit and reward, service and counter-service, is first, evidently, a matter of social expediency or of social impulses.30 By proceeding from this reasoning, there is no inconsistency in advancing along what might be criticized as a piecemeal approach. In fact, it would only be through partial solutions later complemented with other partial solutions that a point would be reached ultimately when societal needs will have been comprehensively met.

There is also the pragmatic view to begin with a compensation plan limited to victims of violent crime. If it is thought desirable to enter this area by showing public concern for sufferers of misfortune in general, be realistic; begin where you can, and expand where you can, as it is expedient to do so.

Another point of view, similar to the above, yet different, is that if one is interested in realizing comprehensive public consideration of social needs it would be best to make a beginning with a compensation program of the scope being considered here. Alternatively, if one is interested immediately in attaining compensation for victims of violent crimes, urging, initially, too ambitious a program may lead to the defeat of a modest program that might achieve passage on its own. Arguing

thus, it is not compromising one's principles to push first for what some critics may view as too restricted a program.\textsuperscript{31}

There is one other component to be considered: public opinion. Some do not feel that public opinion would support, initially at least, a compensation program that would encompass more than public aid for the victim of violent crime. "While I am convinced," said Ian Percival, "that public opinion supports this scheme in relation to personal injuries, I do not think that it would be prepared to see the scheme extended to claims in respect of damage to property, however logical a case one might be able to make out for such an extension."\textsuperscript{32} This is the conclusion also reached by the Earl of Longford who was chairman of the Justice Committee that early considered compensation to victims of crime. He suggests that crimes of violence, in particular, have more impact upon public opinion than other types of crimes or other misfortunes that might befall one. "I suggest," he said, "that the strong popular feeling which we in our different ways seem to share, the emotion behind this reform, is a mixture of sympathy for the victim and indignation concerning the outrage. . . . [C]rimes of violence . . . tend to arouse more sympathy and indignation than other crimes do."\textsuperscript{33}

Since one is dependent upon a favorable public opinion when attempting a new public undertaking, it would seem difficult to justify withholding support due to the objection that a limited initial effort that encompasses only compensation to victims of violent crime is philosophically without merit. This kind of objection, while one can be sympathetic with the position, seems most likely to delay eventual programs of the type those who hold this view proclaim to desire. They may hold their "principles" intact, but it would seem less likely that they will ever see materialize the kinds of programs they desire.

B. It Is "Wrong" to Foster Creeping Paternalism and Therefore Weaken Individualism by Having the State Aid Victims of Violent Crime from Public Funds.

There is a theoretical objection by some people to creating a program to compensate victims of crimes of violence based upon a general objection to what they might call the expansion of the welfare

\textsuperscript{31} See remarks of Alan Fitch, speaking in favor of such a strategy, in 694 Parl. Deb., H.C. (5th ser.) 1173-74 (1964).

\textsuperscript{32} 694 Parl. Deb., H.C. (5th ser.) 1229-30 (1964).

\textsuperscript{33} 257 Parl. Deb., H.L. (5th ser.) 1390 (1964).
This does not represent a specific objection to a crime compensation program but considers such a program as another adjunct of undesirable expansion of governmental activities. This objection stems from a particular conception of individual-government relations and from what it is believed will foster self-help, rugged individualism, and strengthen one's "moral fiber." A crime compensation program, it is held, will not only make no positive contribution to the development of these qualities but will be an impediment to their development and realization. At this date, since numerous public programs of a welfare nature already exist and since it does not seem likely that there will be a wholesale repeal of them, this objection largely becomes a "hold the line" plea.

To say that since we have cared for or compensated the other groups we should therefore proceed to compensate victims of violent crimes is to indulge in the kind of thinking that could lead us into an abandonment of all notions of individual responsibility and a resort to complete dependence upon governmental paternalism. The sociological decadence that could come from that kind of thinking might be far worse than the economic consequences.

This seems to be a suggestion that it is better that the crime victim should alone suffer his economic losses than risk general social decadence resulting from a compensation program. By suffering such consequences he would apparently be making a contribution to the general welfare despite those consequences possibly being personally disastrous to him. That the general welfare would be served in this way seems doubtful. It is because the economic consequences of being a victim of crime most always must be borne by the victim that "programs granting public compensation to victims for physical injuries from violent crimes have aroused increased interest in recent years. . . . In the absence of such programs victims generally suffer losses that are not compensated in any way." It is suggested that it is in society's interest to strengthen the individual. Can this always be done by ignoring the individual and letting him fall back upon whatever personal resources he can muster?

The President's Commission on Law Enforcement and Administration of Justice thinks not: "The Commission believes that the general principle of victim compensation, especially to persons who suffer injury in

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35. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 41 (1967).
violent crime, is sound and that the experiments now being conducted with different types of compensation programs are valuable."

C. Restitution Is a Preferred Action. By Involving the Criminal He Too Can Be Rehabilitated and Made an Asset of Society.

Restitution and compensation are alike in that they both have as an objective the reestablishment of the victim of crime to a state he enjoyed prior to becoming a victim of crime. They differ primarily in the allocation of responsibility for achieving this reestablishment of the victim.

Restitution differs in that it allocates the responsibility to the offender. The restoration or reparation of the victim's position and rights that were damaged or destroyed by the criminal attack become, in effect, a part of the offender's sentence. It is a claim for restitutive action to be taken by the criminal and is, in essence, penal in character and thus represents a correctional goal in a criminal process. Finally, the procedure of compensation calls for application by the victim for payment by society; restitution calls for the decision of a criminal court and payment or action by the offender.

The emphasis of restitution is thus markedly different from compensation in that it stresses correctional goals probably more than making the victim whole again. Compensation is viewed by those who favor restitution as offering fewer total societal benefits than restitution. They also realize that society's concern and sympathy lies more with the victim. This concern and sympathy for the victim, if met through a compensation program, could well neutralize effective efforts to rehabilitate the offender. Restitution is thus viewed more as a total curative package than compensation. It seeks to make the victim whole again through state-enforced efforts on the part of the offender. As might be expected, those who favor restitution and its correctional emphasis are pretty much forced to become opponents of compensation since compensation does not focus its interest upon the offender. In considering the pros and cons of restitution versus compensation, it has been noted:

A rather more subtle argument against victim-compensation is that it intervenes between the offender and the victim, and that a sound policy of criminal rehabilitation would demand that the criminal and not the state should bear the

36. Id. at 47.
burden of restoring the victim as best as possible to the condition he was in prior to the criminal event. Persons holding this view usually demand vastly increased prison vocational programs, with inmates receiving wages equivalent to those prevailing in regular society. From these wages they would pay for their room and board, and would pay for all other services associated with their incarceration. They could also furnish support for their dependents on the outside. In addition, those expenses reasonably related to their criminal behavior would be deducted from their earnings and forwarded to the victim for his use. In this way, it is believed, the offender would come to a better and deeper understanding of the consequences of his behavior as these have been visited upon other human beings. 38

The goals of those who favor restitution are certainly laudable. There seems to be some doubt, however, whether these goals could or would be realized through a program of restitution. The detractors suggest that the contentions made by those who favor restitution depend upon a lot of things happening that are not likely to happen and even if they should happen are not likely to produce the state of affairs that would yield the results desired. 39

The potential ability of a restitution program to meet the needs of the offender and the victim is in addition affected by other factors. One of these factors is the attitude of the offender toward restitution. It has been suggested that “parolees who have served a part of their sentence in confinement are very resistant to paying restitution; they make the same mistake as the rest of society does by inferring the offense was against the collective whole and not against the individual victim. Convicts often speak of paying ‘their debt to society.’” 40 Whether this attitude, which is a reflection of society and its attitudes, can be changed so that restitution might work or be changed through participating in a restitution program seems open to question. But there are other difficulties that make the likelihood of achieving a successful restitution program doubtful. These include the realities of the work schemes available to prisoners and the obstacles that lie in the path of being able to expand these schemes so that restitution would be possible. 41

41. See id. at 245, where Schultz notes that “no prison in the United States has been
difficulties and the almost insuperable problems in resolving them have caused some of those who were at first attached to restitution to abandon it to support compensation.\textsuperscript{42}

There are those who still champion restitution as representing a more desirable alternative than compensation, but they do not constitute the mainstream of those who now support efforts to restore the victim of crime. They also recognize the drift of former support away from restitution programs toward compensation plans.\textsuperscript{43} But, the attachment to restitution has not altogether died. Restitution retains many supporters and is occasionally embraced unexpectedly. In Great Britain, which has an operating compensation program, it was somewhat surprising to find the Bar Council Subcommittee on the Penal System recently supporting restitution.\textsuperscript{44}

But the fact remains that most criminals who inflict injury upon their victims have no funds and reparation, or restitution by the criminal is made virtually impossible by the type of work programs and wages afforded the criminal in the usual prison setting. Work-release programs that would enable the prisoner to earn an income equivalent to what he could earn if he were not a prisoner are not yet a reality in many instances. Accounts of the usual situation have been reported in the news media recently, accompanying reports of prison disturbances. In New Jersey's newest and most modern prison "the budget allows only 45 to 58 cents a day, depending on the job."\textsuperscript{45} Striking prisoners at the New Mexico State Penitentiary included in their list of demands the "payment of the minimum wage ($1.60 an hour) for all work done in the prison."\textsuperscript{46} This demand may seem low, but not in contrast to the status quo: "[I]nmates who work on the grounds or in the prison industries of data processing, Key punch and furniture refinishing earn 15 cents an hour."\textsuperscript{47} The inadequacy of resources makes it highly improbable that the criminal can be made to compensate his victim

\textsuperscript{43.} See S. Schaefer, Compensation and Restitution to Victims of Crime 113 (2d ed. 1968).
\textsuperscript{44.} The Times (London), Nov. 30, 1968, at 2e.
\textsuperscript{47.} Id.
through either the civil or criminal processes. Practically, the victim has small chance of ever receiving compensation from his attacker.

It may be that the present difficulties which effectively preclude restitution from being successful will someday be overcome. For the present, however, to alleviate hardship to the victim of crime we must look elsewhere for a solution.

IV. "Practical" Reasons—Affirmative

A. Compensation Programs Will Result in a Greater Public Awareness of the Costs of Crime and Will Stimulate Increased Public Support for Law Enforcement to Reduce These Costs.

Some members of the public who are not particularly moved by theoretical considerations of the obligation of the state to the victims of crime nevertheless support compensation programs. This support allegedly rests upon "practical" results that are anticipated to accrue from a compensation program. There is also a different kind of "thin edge of the wedge" consideration to be taken into account here. It was mentioned above that a compensation program of the scope that would encompass or provide initially only for victims of violent crimes is supported by some who favor general compensation for a wider variety of sufferers of misfortune. They view a compensation program that would apply only to victims of crimes of violence as a prelude to an expanded program. Here, compensation programs to aid victims of crimes of violence are supported due to the desire to open the door to broad-fronted attacks on the root causes of crime. This group of supporters is deeply concerned with correcting and abolishing the "social cesspools" that are believed to foster criminal behavior.

It is felt that one way in which to enlist general public support for fundamental reforms designed to remove the basic causes of crime is to make the public aware of the costs of crime and to have the public share those costs.48 This thrust against crime derives from the incorrect belief that crime can be stemmed by emphasizing law enforcement, conviction, and punishment. The more correct approach would be, it is said, to emphasize the prevention of crime by attacking the social maladies that generate crime. It is felt that short-run economies in this problem area can only lead to long-run diseconomies and perhaps to the destruction of

society itself. It is suggested that it is in society's self-interest to give its attention and its financial support to effacing social blights that bear civil noxiousness.

B. Compensation Programs Will Benefit the Police by Bringing to Their Attention the Commission of More Crime Because the Victims Will Be More Cooperative in Assisting the Police.

Regardless of what one might think about the validity of the law and order emphasis heard today, and the place of the law enforcement establishment in the scheme of things in general, there is no denying the fact that the task of police is made more difficult by lack of public cooperation. Those sensitive to the needs of police for more cooperation from the public have given their support to compensation programs. There is an expectation that such programs will tend to foster better working relationships between the public and the police. "One possible by-product of a compensation scheme is better co-operation with law enforcement officials in apprehending the offenders. They can be aided by an early report of the offense . . . ."49

Not only is an early report helpful, it is essential that there be a report. It appears that in more instances than one might imagine, there is never a reporting of major or minor crimes.50 This widespread failure to even report crimes to the police becomes serious when it becomes the rule rather than the exception. The way that a compensation program might remedy this problem is that "compensation of a victim is invariably tied closely by legislation to the victim's cooperation in reporting the criminal offense promptly and contributing to the fullest possible extent in arriving at a solution."51

In many instances, the victim, even though he may have been seriously injured in a criminal attack, feels that he has more to lose than he could possibly gain in reporting the crime to the police. By getting involved by going to the police, not only will the victim be faced with the near certainty of not receiving any compensation regardless of whether or not the offender is ever apprehended, he will also face the

50. In the United States twice as many major and minor crimes occur than are reported. See P. Ennis, Criminal Victimization in the United States: Report of a National Survey 13 (1967). This report of a research study was submitted to the President's Commission on Law Enforcement and Administration of Justice.
probability of losing whatever time the state thinks necessary should it need him to testify if the offender is apprehended and brought to trial.

As things now stand, there is often insufficient incentive for the victim to come forward and make his injury officially known. In fact, if some sort of public-spirited feeling or personal desire to see vengeance wrought prompts the victim to deliver himself and his complaint to the police, the chances are good that he will regret his decision should he become entwined in the interminable judicial process that will most likely leave him where it found him, minus whatever time and anguish may have resulted in the state's search for "justice."

"Why bother?" Why, indeed? While such a response might be tied to dereliction of social or civil duty, for the individual who may have already suffered loss of income as a result of not being able to work following a criminal attack it is simply more realistic not to risk losing more time off the job by pressing a grievance. To correct this problem, there would have to be better incentives than now usually exist to cause the victim to want to report his case to the police. "If the victim of a crime had the opportunity of receiving financial aid from the state, he might report a crime that otherwise he might not have. Consequently, the profit motive might operate here, as it does elsewhere in society, to stimulate better law enforcement."52

At any rate, it would appear to be advantageous to the state to consider the needs of the victim of crime as well as the needs of the state, particularly in criminal prosecutions, if the state desires the cooperation of the victim. For the reasons considered, programs to compensate crime victims would seem to favor the development of this cooperation.

C. Democracy Will Be Strengthened by Restoring Victims of Violent Crime to Their Former State. This Represents a Logical Extension of the Welfare State's Interest in the Well-Being of Its People.

There is considerable concern about the possible consequences for society in neglecting its members who are the innocent victims of crimes of violence. Those who are anxious about the health of democracy fear that a societal indifference to the individual's pain and suffering can only be damaging. It cannot be known for sure but considerable speculation is taking place as to just what kinds of societal defaults

might collectively undermine public confidence in America’s public institutions. In this respect, compensation programs to aid victims of crime are seen as a constructive effort to exhibit responsibility. As such, these programs are a complement to other similarly motivated efforts.\(^{53}\)

Making the victim whole again as “an object of public good” was also stressed early by Jeremy Bentham.\(^ {54}\) It has been suggested as well that one of the chief advantages of a crime compensation plan is “the psychological effect on the community produced by the very fact that there is such a scheme in existence.”\(^ {55}\) The creation of such a program stands as an expression of general interest in the well-being of the individual.\(^ {56}\) Both in the short run, where the state has a need to be notified of crime, and in the long run, where the state needs the support of the public, it is contended that compensation to victims of crime will make a contribution toward the realization of these needs. The give-and-take relationship, it is suggested, should be reciprocal between the individual and the state.\(^ {57}\) The approach favored by Professor Norval Morris, Professor of Law and Criminology, Director, Center for Studies in Criminal Justice, University of Chicago,

is to recognize that crime is endemic in our society and that it is only proper for a society so organized that crime is endemic to share the burden which is by chance imposed on particular, unfortunate individuals. The analogies with workmen’s compensation and with compulsory third-party motor vehicle insurance are of some relevance; perhaps a closer analogue is the extensive medical and social welfare provisions of the Veterans Administration legislation by which the community shares in the loss to the individual who has suffered for us from the external aggression of war. We should likewise share the loss to those who suffer for us from the internal aggression of crimes of personal violence.\(^ {58}\)

The discrepant lack of a program to compensate victims of crime logically becomes the concern of those who consider its enactment as a


\(^{54}\) J. BENTHAM, THEORY OF LEGISLATION 317 (1904).


correlate to other manifestations of state concern. Regardless of the causes attributed to the increase in crime, it seems plausible that the increase arises from some kind of social failure, at least in the context of American cultural values and expectations. It could be contended that society's lack of interest in the victim of crime represents an unfortunate compounding of society's lack of interest in the conditions that spawn crime.

For some, the state would be defaulting its felt obligation to establish and maintain a comprehensive system of justice should it fail to include adequate provision for the victim of crime. After having had experience administering a compensation plan, Walker Carter, chairman of Great Britain's Criminal Injuries Compensation Board, has concluded that "no-one who is called to deal with those cases in which a blameless victim has been seriously disabled, sometimes for life, or with those cases in which the elderly and infirm have suffered injury and shock, can fail to feel deeply what a worthwhile part is played in the full administration of justice by the power to award compensation."

V. "PRACTICAL" REASONS—NEGATIVE

A. The State Already Provides Sufficient Remedies to Victims of Violent Crimes. Civil Actions in Tort Can Be Brought.

There is a general feeling that civil tort actions against the criminal-tortfeasor offer almost no hope for adequate relief to the victim of crime. First, as considered above, the offender must be apprehended before a civil suit can be brought. Sometimes the offender is not identifiable. Even if he is identifiable, he is not always caught. If he is caught and should have any funds, the chances are good that his defense in his criminal case will exhaust them. If he is convicted as a criminal and incarcerated, realities of penal practice preclude his being able to pay any judgment that might be won by his victim in a civil suit. In a sense then the state may be considered responsible for some of the obstructions to recovery in a civil case.

62. CRIMINAL INJURIES COMPENSATION BOARD, FIRST REPORT, Cmd. No. 2782, at 7 (1965).
It is very difficult to imagine finding anyone who would contend that present remedies for the victim are adequate, but tort actions have a tradition and there is some attachment to the process. It is suggested by some that there is nothing wrong with the tort action itself; what is lacking is the usual deficiency of the criminal-tortfeasor's funds to pay a judgment. Support of civil actions for tort does occur with recommendations to modify the present reliance upon the financial assets of the offender. In effect, the state would step in to make the payment when the offender is unable to do so. "All that the State can be asked to do," according to M. R. Egerton, writing a note of dissent in the *Justice Society* report, "is to see that the judgment which has been obtained against a criminal, or which it is reasonably satisfied would have been obtained against a criminal, is met."63 This would leave the victim either to go through a civil case, secure a judgment, and have the state pay it, or to omit the civil suit and negotiate a settlement with the state. This recommendation then does not leave one far removed from a state compensation program. Basically, the state would be doing the same things, and in either manner, due to the fact that at present remedies available to the victims of crime are glaringly inadequate.

**B. Private Insurance Is Available to Anyone Who Desires to Protect Himself from the Financial Consequences of Criminal Violence.**

There are various suggestions that have been made that seek a remedy to the difficulties under consideration here through private insurance coverage of risks, including that of criminal assault. Some of these suggestions are a little wide of the mark or fail to appreciate the distribution of burdens incident to crime. "Since anybody can purchase protection against any imaginable tort injury from a local insurance broker by simply consulting the 'yellow pages,' dialing the right number and sending a check, the sole remaining question seems to be whether we should have socialized, i.e., government operated, insurance, or whether we should continue to rely on free enterprise."64

The socialism-free-enterprise argument clouds a multitude of relevant considerations. This contention that private insurance is adequate to meet present needs represents primarily a hope that would seem to have little chance of realization. It is, of course, not because we have

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relieved upon private insurance to take care of crime victims, but in spite of such reliance, that we still have the unsatisfactory plight of the victim.

There are several reasons why private insurance has not met the need. One difficulty is that those most likely to become victims of crime are financially least able to purchase insurance protection. So, while insurance is available in the sense that if one has the price demanded by the insurer he can purchase a policy, it is not available in the sense that those most likely to become crime victims can afford to purchase a policy. That the cost is prohibitive to those who most need protection is indirectly admitted by one who supports private insurance as a preferable alternative to public compensation programs. Another difficulty is that

unfortunately, many existing life and accident policies are written so that benefits are excluded where the death or injury of the insured is the result of any violation of the law or the illegal or intentional act of any person. Even without such specific disclaimer, "accident" or "accidental means" have been interpreted to preclude double indemnity or any recovery at all for injuries or death caused by another's criminal act.

Not only do those who are most likely to become crime victims not purchase private insurance due to the prohibitive cost, they "quite frequently belong to a population stratum which can least afford the economic loss from crime." It would seem that adequate relief for the victim of crime must be sought elsewhere than via private insurance protection, things being what they are at present.

Efforts have recently been made to offer budget policies to see whether it might be feasible to meet at least part of the needs being considered here through private insurance coverage. The Old American Insurance Company of Kansas City, Missouri, launched an advertising campaign in late 1971 for violence indemnity policies. "At a cost of $12 a year, a policyholder injured in a crime of violence can collect up to $5,250 to cover medical expenses. If the insured is killed, Old American will pay his beneficiary $10,000." This campaign was aimed particularly at elderly city dwellers. This violence indemnity policy was test-marketed in only a few states west of Ohio. If the policy proved to be a success in these states, Old American anticipated offering the policy to
residents of other states."70 There was, however, so little interest in the policy that marketing attempts were very abbreviated and have by now been discontinued. "Apparently the public just wasn't ready for such a policy."71

C. Compensation Programs Would Simply Foster Fraud.

One of the reasons for limiting the coverage of compensation programs to the effects of criminal injuries to the person has been the concern about fraudulent claims and unwarrantable payments. This is a legitimate concern and in framing and administering a compensation program, consideration should be given this matter.

Some think that since crime compensation programs are still experimental it would be best to narrow the scope of coverage to first meet needs that are most pressing. It so happens that this objective coincides with the type of coverage that is believed to be least subject to fraud. As compared to other types of losses for which the state might seek to compensate, such as property losses, personal injury is believed less subject to falsification. Nevertheless, the potential for mischief captivates the attention of some and perhaps results in their overemphasizing the likelihood of chicanery.

While a victim compensation plan might help some innocent victims of crime, it might give even more help to the undeserving. Think of the pretexts some citizens might use to extract "easy" compensation money from the government. Many accidents that occurred in private, for instance, could be passed off as anonymous assault. A person who was willing to lie could claim that he had been psychologically maimed during a midnight holdup—which never took place. There is even the possibility—as suggested by occasional wartime instances of soldiers inflicting minor wounds on themselves in order to evade battle—that people would deliberately injure themselves in order to collect a check from the government.72

But there is no basis for anyone to expect to receive a windfall from any of the crime compensation programs that have been put into operation. Their aim is to restore the victim of crime, as near as possible through a monetary compensation, to the state that he enjoyed

72. Senior Scholastic, Apr. 8, 1965, at 11.
prior to being victimized. Since the amount of the payment is an equivalence of loss there is no incentive, certainly, to injure oneself in an effort to achieve unjust enrichment. Nothing of the kind seems likely to occur. Not many people desire a stay in the hospital or the experience of recovering from a wound enough to injure themselves or to have others injure them.

As for the other suggestions of ways in which fraudulent claims might originate, it would seem to be possible to counter them through proper administration of the program. "[T]he mere fact that crimes may be staged or simulated is not a sufficient ground for barring recovery by victims of 'honest' crime. The remedy lies rather in establishing an efficient machinery of investigation and in stringent requirements of proof." 73

It is not as though governments have never undertaken programs which involved monetary payments upon a showing of injury. There are multitudes of activities where the potential for fraud exists. It is most desirable to prevent fraud and to punish fraud when it occurs, but this has been the business of government for centuries. It is germane to note that problems of fraud or attempted fraud have occasioned no mention of difficulties for those jurisdictions that presently administer crime compensation programs.

D. Criminals and Criminal Acts Would Become More Numerous Due to the Neutralization of Any Sympathy for the Potential Victim that Otherwise Might Exist Without State Aid for the Victim.

Professor Gerhard O. W. Mueller of New York University Law School, in testimony before a New York state committee hearing on compensation to victims of crime, "warned of a possible increase in crimes of violence if a proposal to compensate the victims became law. He said the proposed legislation might reduce a criminal's 'inner hurdle' against committing crimes on the theory that 'nobody really got hurt.' He was the only one of five witnesses opposed to such legislation before the committee." 74

Professor Mueller has based his opposition to compensation to crime victims, because of his belief that these consequences would follow such programs, largely upon his projection of findings that thefts

74. N.Y. Times, Jan. 15, 1966, at 17, col. 3.
of property occur to some degree because of the feeling that “insurance will take care of it.” “We do know,” says Mueller, “that by easing the lot of potential victims, we decrease the perpetrator’s moral qualms about his proposed crime, thereby increasing the likelihood that he will commit it, and we increase the extent to which, consciously or unconsciously, the potential victim will expose himself to the risk of becoming a victim.”

For the reasons mentioned above, so far as compensation to victims of crime is concerned, there is little reason to suppose that an individual will court personal injury so that he might be mended at public expense. The attempted analogy of the person who might be careless with insured property and the encouragement of carelessness in the protection of one’s person by enacting a crime compensation program does not appear to be valid. In fact, there would likely be no discernible impact at all. As for the other point, that of weakening the offender’s “moral qualms” about committing a crime of violence, there is no evidence that indicates that a calculation of the future state of well-being of the victim is made by the offender to cause him to commit or not to commit the crime.

IV. Conclusion

These, then, are the propositions, pro and con, that have thus far been put forward in the considerations and deliberations concerned with the creation of criminal injury compensation programs. When they are presented in the future, and claims are made and stands are taken, the various contentions of the partisans considered here will hopefully assist in their review and appraisal.

Prospectively, legislation to create criminal injury compensation programs is either being considered or will be considered by the Federal Government of Canada, Finland, France, Germany, Florida, Minnesota, Missouri, North Carolina, Pennsylvania, Vermont, and the United States Congress.76