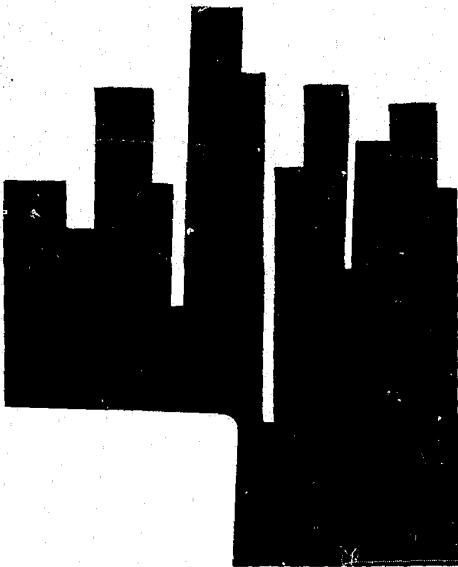




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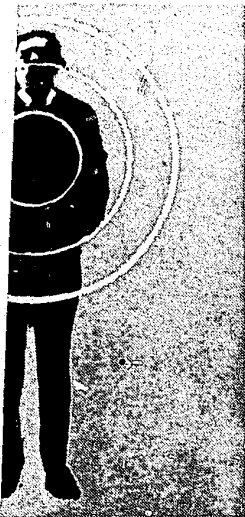
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Number 2



The Criminal,
Society, and
The Victim

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The Criminal, Society, and The Victim

*by Gerhard O.W. Mueller
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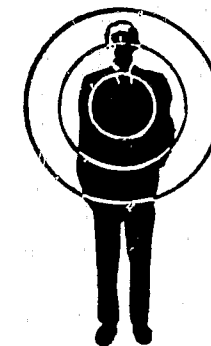
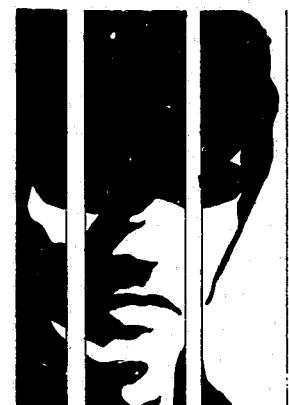
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Introduction

A crime is an unlawful act or omission in respect of which the state might use its coercive authority to redress some social harm.¹ Society has a general interest in restraining the perpetrator, deterring him and others who are like-minded, and exacting an appropriate punishment for this disturbance. While the individual harmed by a crime shares these broad objectives, his most immediate need is compensation for the harm he has personally suffered.

¹On the difficulties of defining crime see Glanville Williams, "The Definition of Crime," *Current Legal Problems*, 8 (London: Stevens, 1955), pp. 107-130.

This need has, however, gradually become subordinated to the interests of society both as a matter of criminal policy and of penal philosophy. An oft-quoted adage notes, "The victim became the Cinderella of the criminal law."² He has been left largely without redress for the harm suffered. Supposedly, the punishment of the perpetrator assuages his wounded feelings and dampens his desire for revenge.

Unfortunately, modern penology's emphasis on rehabilitation--rather than punishment--of the offender has weakened even these dubious grounds for what might formerly have been considered satisfaction to the injured. Thus, a movement has gradually risen, one that aspires to provide a balance more favorable to the victim through direct compensation for the harm he has suffered. Although few would question the desirability of this objective, any radical realignment of the respective interests between the individual and society demands a critical appraisal of the means by which it might best be effected.

²Stephen Schafer, *Compensation and Restitution to Victims of Crime* (2nd ed.; Montclair, N.J.: Patterson Smith, 1970), p. 8.

Historical Foundations

History shows that criminal law developed out of civil law, that public justice was substituted for private vengeance in the interests of peace and social control.³ In the earliest phase of socio-political development, remedies for harm suffered were essentially personal. It was only later, with the growth of the modern notion of the state, that the government appropriated what were formerly the rights of the private citizen in the interests of the community as a whole.

At first, the individual had been allowed to seek his own satisfaction: restitution, compensation, or simple vengeance. Later, these rights were regulated and formalized by the state so as to limit their exercise and, theoretically, to prevent divisive feuds and the exploitation of the weak by the strong. Thus in the early common law were found the bote and wergild, compensation to the victim or his family; later came the wite, or price exacted by the king or overlord for facilitating this indemnification in regular form.⁴

³For the development of the common law, see S. F. C. Milsom, Historical Foundations of the Common Law (London: Butterworth, 1969), pp. 353-374.

⁴Clarence Ray Jeffery, "The Development of Crime in Early English Society," Journal of Criminal Law, Criminology and Police Science, 47, n. 6 (March-April, 1957), pp. 655-657.

Next, the fine paid to the state replaced the reparation, which would have gone to the individual.

As in comparable systems, the growth of state interest was accompanied by a gradual connection between redress and punishment. This emerged through the creation of the so-called bootless crimes, acts considered to be so heinous that no pecuniary compensation could restore the disturbed social equilibrium; the offender had to pay with his blood.

The same tendency took place in the procedural field, trial by battle giving way to trial by jury with limitations on retaking of personal property. By the late middle ages, the individual harmed in any way was compelled to seek recourse in the law rather than take matters into his own hands.

Our common law heritage has distinctively molded the treatment of victim compensation in one important respect. As the procedural separation of the civil from the criminal law became complete, the notions of redress and punishment were also pulled apart; the rules, administration, and consequences of each branch of law became compartmentalized and exclusive. In general, however, the interest of the community became paramount. Whenever the act complained of was treated as a crime, the civil action for damages was postponed until after the trial, conviction, and delivery over for punishment of the transgressor. Practically speaking, this resulted all too often in denial of any personal satisfaction to the victim.

Renewed awareness of the primary interest of the victim in some personal redress for the harm he has suffered dates from the middle of the 19th century. Nevertheless, it was not until the second half of the present century that these ideas began to crystalize and take on a modern, practical form under Anglo-American common law.

Compensation: Present Status

If we discount altogether any element of satisfaction in the apprehension, control, and retribution that society exacts from the malefactor, there are two broad alternatives for victim compensation.

First, is the civil action for compensation, which recognizes the harmful character of the act or omission and gives to the person wronged an enforceable right to the restitution of his property or a pecuniary equivalent. The direct relationship between the victim and the offender is preserved so that the latter is required by state authority to make amends for his wrongdoing. Clearly, the effectiveness of this remedy is primarily dependent upon the ability of the offender to pay or make

restitution. Where there is physical damage to the victim and the offender is indigent, an independent civil action may have no value at all by way of redress and could even involve the victim in further hardship. Furthermore, the civil law is subject to extensive delays, which discourage the litigant where the prospects of real redress are remote.

Account must be taken also of other obligations owed by the wrongdoer, because the rights of the victim might have to be postponed until the others are satisfied. Last, but not least, under Anglo-American common law, the victim must almost always bear the expense of initiating and sustaining his claim. The state is content merely to hold the scales of justice evenly between the wrongdoer and the wronged.

The second alternative for victim compensation might be termed compensation on the insurance principle, whereby the victim is indemnified by a private or state agency upon proof of the harm suffered. Such compensation is not dependent upon the ability of the offender to pay, nor is he necessarily brought into any direct relationship with his victim for the purposes of redress. This type of victim compensation is the direct outcome of the modern concept of social security. Its precursors were workmen's compensation for industrial accidents and diseases and compulsory third-party insurance for drivers of motor vehicles.⁵

⁵On compulsory third party insurance for drivers of motor vehicles, see J. E. Starrs, "A Modest Proposal to Insure Justice for Victims of Crime," Minnesota Law Review, 50, n. 2 (December, 1959), pp. 154-166.

The insurance principle clearly has many advantages from the victim's point of view. Compensation is generally rapid and adjusted to his needs; and the amount is dependent upon a carefully calculated, actuarial scale instead of difficult doctrine or judicial precedent. Moreover, the victim is spared the procedural ordeals of a trial of his cause as well as the psychological trauma of a further confrontation with the person who has injured him. There are additional benefits in that the victim is spared further expense simply to secure his due; also, the element of private vengeance is wholly removed from the issue.

Even those ordinarily opposed to public welfare can have little basis for objecting to compensation for harm that the state has been unable to prevent, after assuming this obligation through its police powers.⁶ The only immediate practical consideration is the source of money to pay for such compensation.

Of more long-term concern, however, is the effect that such an impersonal system of victim compensation might have upon our penological processes. There is a very real difference between reparation as a civil alternative and reparation as an integral part of the penalty under criminal law. Many countries have now established victim compensation authorities for the determination of claims, but it is too early to assess their effects upon our traditional forms of social control.

⁶G. O. W. Mueller, "Compensation for Victims of Crime: Thought Before Action," *Minnesota Law Review*, 50, n. 2 (December, 1965), p. 218.

Alternative Proposals

The chief interest here lies in translating these objectives into practical procedures that have a realistic possibility for success under the principles of modern penology. Several alternatives are suggested in this digest. It should be noted that the models which are discussed here are all designed to function in a western-type democracy and that radically different socio-political systems probably would render these models invalid. Thus, in a totally socialist state, the political entity deems itself responsible for all medical expenses and the restoration or replacement of property damaged by criminal activity. Since both free or prison labor belongs to the state, there is no need to allocate a portion for victim compensation. These models would likewise be unsatisfactory under a socio-political system which has decriminalized much of what is now criminal and has substituted arbitration and compensation to adjust the interests harmed by the wrongful act.

Consequently, the recommendations which follow are restricted to the scenario of the western-type democracy, mainly the United States.



Restitution For Probation

This proposal would give to the victim an absolute right to compensation without his having to initiate any further proceedings. The assessment of the compensation takes place either in the original proceedings or during some continuation where the victim or his heirs or designees are properly represented. The victim has what might be considered a lien upon the offender's future liberty for the sum awarded. In addition to serving as a form of guarantee, the lien is a source of satisfaction to the victim, since he can see the relationship between adjudication of his own claim and disposition of the individual who has harmed him.

This alternative is also highly valuable from a penological point of view, in that it motivates the offender to work for an early release while focusing his attention on the harm he has caused. He is forced to come to terms with the consequences of his anti-social behavior, because his liberty is put in the balance against his willingness and/or ability to make amends for his harmful acts or omissions.

He is thus made to think about his victim in the most direct way and to see the reestablishment of the victim's position as a part of his own

rehabilitation.⁷ The victim, on the other hand, has no opportunity for the exercise of vengeful feelings, inasmuch as his interest is limited to receiving the just compensation due to him.

The more obvious merits of this proposal are, however, counterbalanced by some equally apparent disadvantages. The effectiveness of this alternative is dependent to a great extent upon the offender's ability to give redress; it clearly favors the rich and willing over the poor and willing. If there is to be any real penological value, this alternative must be significantly related to the offender's ability to repay. Unfortunately, this has a direct relationship to the degree of the victim's satisfaction. Another disadvantage stems from the fact that the victim is unlikely to benefit greatly where parole has to be substantially delayed for other reasons. In every case, the value of relaxing parole conditions to benefit the individual victim will have to be weighed against the public safety.

This alternative will also be less valuable to the victim in the case of relatively short sentences or where the offender had some special motive for denying compensation to the victim regardless of the consequences.⁸

⁷Victim compensation is also important to society in general, for as Del Vecchio points out, it is "a sign of imperfect development in the ethical conscience in society itself," where an offender is placed in good standing without having made just reparation. (Giorgio Del Vecchio, "The Problem of Penal Justice: Imprisonment or Reparation of Damage," *Revista Juridica de la Universidad de Puerto Rico*, 27 [1957-1958], p. 80-81).

⁸Schultz makes the point that: "Parolees who have served as part of their sentence in confinement are very resistant to paying restitution." (LeRoy G. Schultz, "The Violated: A Proposal to Compensate Victims of Violent Crime," *Saint Louis University Law Journal*, 10, n. 2 [Winter, 1965], p. 244).

Nevertheless, such cases should be relatively unusual. On the whole, this alternative should benefit the victim, providing the offender can be motivated to work for a significantly earlier release than he might otherwise expect.



Portion of Fine To the Victim

A radical revision of the penal laws is essential if this proposal is to become a viable alternative from the victim's point of view. It will involve abandonment of much of our retributive thinking, so as to make imprisonment a measure of social control of last resort.

The economic sanction as a rehabilitative measure must be designed to bring home to the offender the price charged for his transgression and must give him an increased awareness of his responsibilities to the individual he has harmed. At present, the offender who pays a fine experiences no such awareness, since he knows that the victim cannot benefit directly from the fine. Its payment, therefore, is nothing more than an impersonal inconvenience to the offender; and it cannot be claimed that there is any general deterrence value.

The modern destination of a fine can only be explained by its history. Considering that there is no logical or penological justification for the retention by the state of the entire sum levied upon the offender, the victim should be properly compensated from that sum, whenever it is penologically appropriate that a fine be levied.⁹

The reader should note that this alternative would require another change in our current penal philosophy, which usually limits economic sanction to the less serious crimes. Thus, society would have to accept the fine in all cases except where a security measure is necessary in the interests of public safety.

One interesting point frequently overlooked is that although the state does not give preference to compensating the victim who is a private individual, the opposite approach is evident when the state is the victim. For example, the law in taxation matters is less concerned with punishment of the offender than with assuring that he replaces the loss which the treasury has suffered by his default.

Whenever possible, this same principle ought to motivate the criminal law so that the prime consideration is the redress or reparation by the offender of the harm he has caused through his unlawful conduct. This is not only good penal policy and conducive to a proper measure of rehabilitation, it also is an effective alternative for the victim.

⁹Ferri recommended the establishment of a fund out of the fines levied, which would be used to pay general compensation. (Enrico Ferri, *Criminal Sociology*, [Boston: Little Brown, 1917], p. 513).

If this type of reparation is to be effective, fines must be much more realistically adjusted to take account of the harm suffered by the victim. Under certain circumstances, payments will have to be made by installments, with the payment secured against such of the offender's property as can be attached.¹⁰ If the system of fines is to be tied to the concept of reparation for the harm actually caused, the amount to be levied in each case must be at the discretion of the court. The decision should be based on circumstances of the case rather than on any predetermined sum laid down legislatively.

This would involve still another alteration of our penal philosophy, which ordinarily demands a fixed and certain penalty in keeping with the concept of individual and general deterrence to the proscribed acts. It would seem sufficient that the prospective offender knows he will be required to compensate the victim in full for the harm he has caused, that the sum will be collected by the state in the form of a fine.

The obvious drawback to this proposal is that it again favors those with the ability to pay over those without this economic advantage. An extension of the fine system, thus, is open to the objection that it would allow some to "buy their way out" of a sentence involving deprivation of liberty.

¹⁰Stephen Schafer, "Restitution to Victims of Crime - An Old Correctional Aim Modernized," *Minnesota Law Review*, 50, n. 2 (December, 1965), p. 252.

Day Fine System

This is a form of correctional labor, wherein the defendant performs work in the appropriate amount and payment passes to the victim. Adopted by many jurisdictions throughout the world,¹¹ the day-fine system is a particularly valuable device where the general economic level of the community would not permit a realistic fine to be levied on a majority of offenders.

The fine is assessed in a judicial proceeding and duly converted by operation of law into terms of day labor, which the offender performs either in an institutional or open setting. At present, day-fines do not directly benefit the victim in any way, since the fruits of the offender's labor accrue to the state. What is proposed is that the system be modified so that the victim might become the direct beneficiary of the offender's labor.

¹¹Schafer, *Compensation and Restitution*, pp. 127-128.



There are a number of advantages to such a proceeding. It would guarantee some degree of compensation to the victim in those all too frequent cases where the harm caused is far in excess of the offender's economic ability to offer realistic reparation. It would also assist in establishing a meaningful relationship between the offender and his victim, which could become a useful feature of the offender's rehabilitation, if it is properly managed. Without further proceedings, the victim would receive this compensation by installments from the administrative department responsible for the correction of the offender.

One point should be noted: the success of this alternative is dependent upon suitable and remunerative work being available.



Attachment of Prison Earnings

This alternative gives the victim an enforceable lien, in an amount fixed at the time of sentence, upon the earnings of the offender while the latter is incarcerated. It is an easily administered scheme involving the victim in no expense

to collect the compensation awarded him in the criminal proceeding. Such attachment of earnings is not uncommon in civil proceedings and has its counterpart in family law, where the dependent's interests may be enforced by these means.¹²

There are no logical obstacles to the extension of this concept to the field of victim compensation. The order for attachment could issue out of the criminal court at the instigation of the victim, who is independently represented. As an alternative, the prosecutor might be charged with this duty in all cases where the victim did not enter an independent appearance for this purpose.

This proposal depends upon the offender having earnings that can be attached and can only function effectively when the offender is adequately remunerated for his labor while incarcerated. Such a system must be coupled with an inducement to the offender to continue working, notwithstanding that the fruits of his labors are substantially taken from him. Thus, gainfully laboring to compensate his victim might be made a condition of parole or sentence remission or a further reduction of the sentence imposed by the court.

¹²Johnson observes: "Attachment of wages is not a 'controversial device' in the U.S.S.R.; on the contrary it is regarded as a normal method of executing civil judgment." (E. J. Johnson, "Compensation for Victims of Criminal Offences in English and Soviet Law," *Current Legal Problems*, 17 [London: Stevens, 1964] p. 146).



Attachment of Non-Institutional Earnings

This is a variation on the last alternative and has the advantage of leaving the offender at liberty, where his capacity to make reparation in the assessed amount will generally be greater. While there are precedents for the civil attachment of non-institutional earnings, considerable difficulties must be faced in the administration of such a scheme.¹³

The attachment and collection of the sum awarded to the victim requires the cooperation of the employer, who may be unwilling to accept the burden of such an obligation. Moreover, in certain instances, it may be highly prejudicial to the legitimate interests of the offender that his employer become aware of the attachment of his earnings for a criminal matter. Anything which might cause the offender to lose his employment is not merely in the nature of an additional penalty but is contrary to the best interests of victim.

¹³For example, the English *Maintenance Orders Act*, 1958 (6 & 7 Eliz 2, c. 39). See *Law Notes*, 77, n. 9 (September, 1958), pp. 222-223.

Here, again, it is necessary that such an arrangement be made a condition of probation, thereby providing an inducement for the offender to continue to meet his obligation. The victim's compensation might be further guaranteed by a condition in the sentence that loss of liberty would follow willful default, with the obligation carried over in the form of attachment upon prison earnings. It is also apparent that the offender would have to be allowed to retain a higher proportion of his earnings under these alternatives than if he were in prison.



Combining Civil and Criminal Proceedings

The same event can, theoretically, give rise to both criminal and civil liability. However, Anglo-American common law has traditionally dealt with this dual liability in separate courts, with distinctive judicial procedures and at different intervals of time. The civil remedy has generally been postponed until adjudication of the criminal case. It is interesting to note that the European Continental model, which was adopted with some modification throughout Latin America, treats of both matters in a single proceeding. This has both advantages and disadvantages when measured against our system.

The chief benefit is one of procedure rather than substance. The victim generally finds it easier and less costly to establish his interest and make his claim in a single proceeding where the state is primarily interested and is prosecuting with all the resources at its disposal.¹⁴ The Continental model thus gives the victim no greater right to compensation, but does make his exercise of the right easier.

The combination of civil and criminal proceedings is most favorable to the victim in those instances where he is not even required to appear in court and incurs no expense.¹⁵ In some jurisdictions, the prosecutor is charged with the duty of pursuing the victim's right of compensation; and this benefits the victim when the task is performed fairly and conscientiously.¹⁶ Furthermore, he always has the right to appear if he is dissatisfied with the amount claimed by the prosecutor. The compensation is assessed by the court in passing the criminal sentence and the judgment is executed by the same procedure as any other independently obtained civil award.

¹⁴ Collin Howard, "Compensation in French Criminal Procedure," Modern Law Review, 21 (1958), p. 393.

¹⁵ This was a defect of the French system where the plaintiff first had to pay into court a sum estimated to cover all the fees of the proceedings, including registration of the judgment. (Howard, "French Criminal Procedure," p. 390).

¹⁶ See, for example, the Swedish Code of Judicial Procedure, chapter 22, section 2.

On the other hand, disadvantages also exist in this proposal. Simplicity and effectiveness of procedure in litigating the victim's cause matter little if the judgment cannot be satisfied. After all, as with any civil judgment, real value to the victim lies in the offender's ability to carry out the awarded payments.

Another disadvantage in this system is that proof of the civil claim is dependent upon proof of the crime; if the court decides there is no crime, the victim's claim to compensation must fail.¹⁷ This raises the question of different standards of proof in civil and criminal proceedings in Anglo-American courts.

This alternative also has the potential for damage to the community. Experience has shown that where the victim has the right of appearance to demand compensation--despite his legal inability to initiate prosecution in many European and some U.S. jurisdictions--there is a tendency to abuse the criminal process by coercing the offender into satisfying the civil claim.¹⁸ This practice, therefore, tends to interfere with the legitimate objectives of criminal law and constitutes a subordination of the public interest to the satisfaction of the victim's personal claim.

¹⁷ This is the effect of provisions such as Article 19, Spanish Penal Code.

¹⁸ See H. H. A. Cooper, "The Law Relating to Sexual Offences in Peru," American Journal of Comparative Law, 21, n. 1 (Winter, 1973), pp. 97-98.

Still, the combination of the civil and criminal proceedings is both fair and economical, if it is subject to proper safeguards.¹⁹ If the court believes that the perpetrator has sincerely repented, that he wishes to make amends, and that he will not be a danger to society, punishment through enforced victim compensation would be a viable alternative.

The court should always have power to order restitution, either on its own motion or on that made in the current proceedings by the victim or by the prosecutor on his behalf.



Private Insurance

It should be observed that most discussion of the insurance principle in relation to victims of crime has been largely confined to personal injuries resulting from violence.²⁰

¹⁹ A good, modern example in English law is afforded by the Criminal Damage Act 1971. See Alec Samuels, "Criminal Damage Act 1971," Criminal Law Review, October, 1971, p. 564. The court may on its own initiative award compensation after hearing the defendant, and the award is recoverable as a fine.

²⁰ On this generally, see the very complete treatment by Starrs, "A Modest Proposal."

There is no principle of law which would impede the extension of insurance protection to the victims of violent crime whose personal property has been destroyed or damaged. After all, personal property has long been covered by private insurance and the principle is too well settled to merit much discussion.

For the victim who possesses a policy, private insurance is a true alternative to criminal proceedings, even though satisfaction of his claim may depend upon other factors. These might include criminal prosecution before the appropriate law enforcement authority or establishment in a criminal proceeding of the commission of a crime by a known defendant.

The principal advantages of this alternative are: (1) an ability to satisfy immediately the victim's claim to compensation without reference to the means or desires of the offender; (2) the voluntary nature of this insurance, which enables the victim to safeguard himself according to his means and the value of the interest to be protected; and (3) the comparatively uncomplicated nature of the claims procedure.

Disadvantages stem from the nature of insurance itself, which generally results in unequal coverage. Thus, any voluntary scheme would entail excessive costs in high-risk areas, would probably necessitate an exclusion clause, and would almost certainly omit more people than it would cover. There is also a major concern "that compensation will dull the victim's cooperation in the prosecution of the offender."²¹ This argument is equally applicable to public or private insurance.

²¹ Ibid., p. 308.

However, the experience of such private insurance schemes as are in force indicates that this aspect need cause little apprehension if there are appropriate safeguards. For example, where property has been stolen and a claim is made against private insurance, there is generally insistence that the matter be duly reported to the police. Insurance company regulations usually also specify that the victim must cooperate with the authorities to locate the stolen property and bring those responsible to justice.

The fear that compensated victims will not cooperate in criminal prosecution of the offender is an anachronistic attitude in Anglo-American law. It stems from a time when law enforcement was much weaker and a prohibition against the compounding of offenses was as necessary as was the paid informer for purposes of social control. That no such need currently exists is apparent from studies of other systems which permit termination of the criminal case once the offender makes restitution or just reparation.²²

The real benefit of public or private insurance for the victim would result from separating the right to compensation from adjudication of the criminal act--in particular, from the identification, trial, and disposition of the offender himself. Many are victims of unknown, unapprehended offenders; the harm they have suffered is real and cries out for indemnification.

²²See, for example, Article 379, Greek Penal Code.

Although it is easier to meet that need through private insurance, where a precedent in practice already exists, there is no logical reason why the principle should not be extended to public insurance.



Public Insurance

Enrico Ferri set forth the basic social defense thinking when he wrote: "The State must indemnify the individuals for the harm caused them by crimes which it has not been able to foresee or prevent."²³ Once this obligation is accepted, the burden of providing material satisfaction for the victim passes from the offender to the state; and all that remains for consideration is procedural mechanism for meeting this obligation.²⁴

Niceforo Garofalo, a contemporary of Ferri, averred that: "It will be a long step in advance when the State comes to regard as a public function the indemnification of the person injured by criminal delict."²⁵

²³Ferri, Criminal Sociology, p. 514.

²⁴On this generally, see the concise statement by J. Ll. J. Edwards, "Compensation to Victims of Crimes of Personal Violence," Federal Probation, 30, n. 2 (June, 1966), pp. 3-10.

²⁵Niceforo Garofalo, Criminology, (Boston: Little, Brown, 1914), pp. 434-435.

Many nations have courageously taken this step, albeit with some hesitation and reservations; practice rather than theoretical considerations limit the outright acceptance of this obligation.

Advantages of this approach for the victim are obvious. He can receive prompt administrative adjudication of his claim and equally prompt payment of compensation by a state agency. In an age accustomed to the administration of welfare matters by such agencies, neither the principle nor the procedure ought to be of great concern. The real problems are:

- (1) Who is to finance such a scheme of public insurance against harm resulting from crime?
- (2) What risks are to be covered? Is the scheme to cover all crime and to take account of the victim's contribution to the harm he has suffered, or is it to be restricted--as in all enacted schemes--to harm caused by personal violence?
- (3) What will be the law enforcement and penological consequences of the extensive, independent indemnification of victims of crime?
- (4) Is compensation to depend upon apprehension and/or trial and conviction of the offender?

Although satisfactory answers to the foregoing would eliminate the most basic problems, there are others. For example, any public insurance scheme would probably depend--at least in part--on funding through general taxation. This is the essentially political aspect which gives rise to the greatest criticism.

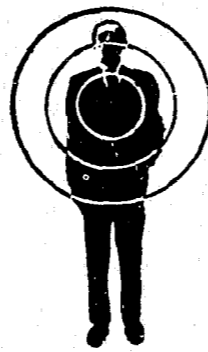
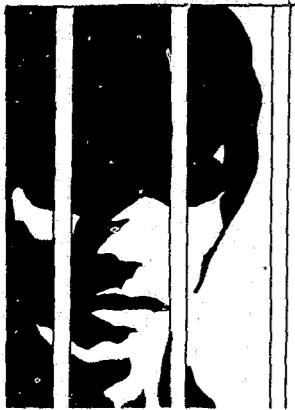
It is true that the fund could be serviced in part from fines,²⁶ but contributions made by offenders would be disproportionate. Moreover, those who suffered a term of imprisonment would ordinarily not contribute despite the fact that their offenses had been of the most serious nature.

As with most of the alternatives discussed, the effectiveness of the offender's contribution is once again primarily dependent upon his means. To counteract this drawback, a meaningful contribution to such a fund could be exacted from the offender through a proper scale of remuneration paid for institutional labor.

Existing public insurance schemes are restricted to the compensation of the victims of certain violent crimes. Practical penological considerations appear to advise utilization of this alternative for victims who have suffered personal injury without regard to the formal elements of that crime. This approach would safeguard adequately the interests of the largely "forgotten" victim to whom other alternatives in the matter of compensation are substantially ineffective or unavailable.

Little serious work has been done on the penological consequences of public insurance, so that predictions concerning the results of such legislation would be quite hazardous.

²⁶This was suggested by Ferri. Apart from the fact that experience shows that fines themselves would never suffice without recourse to general taxation, as Schultz ("The Violated," p. 243), points out: "Crimes of violence are not ordinarily committed by the rich."



Still, the limited experience in this field does not warrant fear of an accelerated crime wave. Nor is it likely to promote indifference by the victim in assisting the state's prosecution of the offender. One predictable drawback is likely, however. This would involve the absence of a proper link between the offender and victim in the matter of reparation. This omission could be overcome by preserving the personal obligation through a contribution to be exacted from the offender according to his means and capacity to satisfy it.²⁷

Compensation ought not to be dependent upon the apprehension of the offender and the legal proof of the crime out of which the right to compensation arises. Such a feature would deprive many of the most needy of any compensation at all. Should one fear that fraudulent claims might be encouraged by this omission, there are adequate safeguards in the existing law. Experience with existing insurance statutes indicates that spurious claims are generally easy to detect. Fraudulent claims under this proposal are, therefore, likely to be few.

²⁷This is the solution opted for by New Zealand law. See also Edwards, "Compensation to Victims," pp. 9-10.

Post Criminal Trial Monetary Adjustment

The final alternative presented here is the administrative assessment of victim compensation in a separate proceeding following the trial of the criminal issue.²⁸ The proceeding could be conducted with great informality, would consist mainly of hearing written representations and reports, and would focus exclusively upon the amount of compensation to be awarded. This procedure would be based on the principle that all criminal actions give rise to a right to indemnification and that only the question of amount has to be determined. The cost to the victim would be relatively small; and the inconvenience in participating in two proceedings would be reduced to a minimum.

²⁸What is proposed here is essentially a modification of the California scheme. See Willard Shank, "Aid to Victims of Violent Crimes in California," *Southern California Law Review*, 43, n. 1 (1970), pp. 85-92. See also Paul F. Rothstein, "State Compensation for Criminally Inflicted Injuries," *Texas Law Review*, 44, n. 1 (November, 1965), pp. 38-54.

Conclusion

A distinguished criminologist once stated: "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."²⁹ The alternatives described in this digest are, therefore, neither original nor radical. They are simply a modern adjustment of interests between the community and the individual which must be made, and made effectively, in order that a proper social balance be achieved.

If the insurance principle is to be a major option in effecting these purposes, it is essential that a new penal philosophy be adopted and that a proper contribution be exacted from the offender. He must make amends more effectively than before, rather than have the community bear the burden of making amends for him. There must be preserved a clear link between crime and reparation, so that the offender does not become

²⁹M. E. Wolfgang, "Victim Compensation in Crimes of Personal Violence," *Minnesota Law Review*, 50, n. 2 (December, 1965), p. 240.

indifferent to the consequences of his unlawful activities and the community does not become alarmed at the burden it must assume.

Consideration should also be given to combining the civil and criminal process effectively in the manner of the Continental model, with the state assuming some responsibility for pressing the civil claim right up to execution. One should, however, realistically assess the disadvantages that will accrue along with the benefits from this proposal. For example, it will certainly require a radical rethinking of many traditional common law concepts, including different standards of proof in civil and criminal cases..

Additionally, French experience has shown that elimination of the element of private vengeance is difficult, that it might even be exacerbated by allowing the victim use of the coercive apparatus of criminal law for private redress. It may be that in this instance the connection between reparation and punishment has been brought too close. Some compromise solution which retains the advantages of the traditional Continental model may have to be devised.

It should be clear at this point that a combination of one or more of the suggested alternatives may be required to reconcile satisfaction of the victim with society's interest in protecting the larger community. Any attempted solution should be simple and effective and ought to be available at little or no cost to the victim. Questions of form should not be allowed to override the substance of the victim's claim.

Even more important, there must be a real prospect of material satisfaction if these alternatives are to have any practical value for the victim.³⁰ The means to satisfy the judgment must always exist if this is to be more than a paper victory--hence, the peculiar value of the insurance principle from the victim's point of view.

It is perhaps better to view the real problem of victim compensation not in the light of alternatives but rather as an adjunct to the proper administration of criminal justice. The main purpose of criminal justice is recognized as the restoration of the social equilibrium in all its aspects, individual and collective, following the disturbance by the criminal act. It follows that principles enunciated herein can be favorably combined to establish a satisfactory balance between the public and private interests and to ensure a prompt and effective remedy for the individual victim.

³⁰The Home Office working party acutely observed: "There could be no effective recovery from the offender unless prison earnings were raised to a level approximately that of normal wages outside prison." H.M.S.O. Cmd. 1406 (1961), p. iv. See also, Schultz, "The Violated," pp. 244-245.

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