
National Roundtable on Victim Compensation

Exploring the Role and Future of Crime Victim Compensation

National Center for Victims of Crime

Some Thoughts on Compensating Victims

Peter H. Schuck
Yale University School of Law

Discussion Paper
May 2003



The Context of Compensation

From the earliest civilizations to the present day, the law has demanded that victims be compensated. Principles governing compensation can be found in the Code of Hammurabi, the Bible, the Talmud, the Koran, and every body of secular law on earth.

Even acknowledging the great antiquity of victim compensation, however, the subject's prominence in contemporary public debates is striking. Pick up a newspaper today and one is likely to read about lawsuits or legislation seeking reparations for a catalog of past and continuing injuries. The individuals and groups seeking compensation, moreover, are exceedingly diverse. They range from people harmed by accidents ("torts"), to the targets of conventional fraud or crime, to broad classes of individuals victimized by socially-inflicted, large-scale wrongs or atrocities. These last include, for example, the families of Holocaust victims, the descendants of slaves, comfort women, Braceros (Mexican agricultural workers in the U.S.), indigenous peoples, subjects of tyrannical regimes across the globe, sweatshop workers for multinational employers, and many others.

This vast expansion of compensation claimants in the U.S. is noteworthy in itself, but it is even more remarkable in light of several notable social and demographic developments that might seem to cut the other way. For example, we are a much wealthier society than ever before, and as the late political scientist Aaron Wildavsky famously put it, "wealthier is safer." The rates of violent crimes, as well as many non-violent ones, have declined sharply in most American communities during the last decade or two. Private and social insurance coverage for victims' pecuniary costs has increased significantly over time, although it remains far from universal or comprehensive. This expansion of insurance might be expected to reduce the need to turn to non-insurance sources for compensation.

Indeed, given these salutary changes, the continuing growth in compensation claims may even seem paradoxical. The paradox resolves, however, when one considers some other attitudinal and institutional developments. As American society has become safer and less violent, we have also come to regard the dangers that remain as that much more intolerable. The source of this insistent demand for what legal historian Lawrence Friedman calls "perfect justice" is doubtless complicated. Part of the explanation for this demand is surely the ever-higher social expectations generated by our higher levels of education and income. Two other developments, moreover, shape these public expectations – and are in turn shaped by them. A

highly competitive mass media has emerged whose ambition (among others) is to communicate real and imagined injustices to the public in the most dramatic, compelling, and disturbing forms. A second change, partly responding to the media and partly fueling it, is institutional in nature. Our contemporary legal and governmental systems have greatly extended the remedial structures of compensation in both private law (primarily through the tort system) and public law (primarily through civil rights and compensation statutes).

The sponsors of this conference have urged me to say whether I favor compensating the victims of crime. My answer is to ask what I think is the right question: *compared to what?* In order to answer this question coherently, one would have to consider many different possible risk management and compensation systems implicating controversial empirical claims, conflicting values, and complex institutional arrangements. I cannot begin to do this question justice in a short think piece intended to raise questions rather than to resolve them.

The Purposes of Compensation

In American society – indeed in *all* societies – compensating victims can serve a number of different public goals. As an analytical matter, we can usefully distinguish four such goals. These are (1) corrective justice, (2) deterrence of wrongdoing, (3) moral affirmation; and (4) distributive justice. Each of these compensatory purposes rests upon particular conceptions that desperately need clarification precisely because we use them so frequently and so loosely in public discourse. The most important of these conceptions are victim, injurer, and responsibility.

In addition to these analytical distinctions, there are others that do and should shape how we think about compensation. For example, one's claim for compensation may be as a matter of *legal right* (e.g., through tort law, social insurance, or private insurance contract), or may instead be a claim to the exercise of *discretion*, either by a discretionary public program or by a private philanthropy. Empirical questions also abound, including how well, along a variety of dimensions, victims are compensated by tort law as compared with insurance and (in the case of crime victims) special state compensation programs. RAND has conducted extensive studies to answer these empirical questions.

Government can pursue the four purposes – corrective justice, deterrence, moral affirmation, and distributive justice – through different policy instruments. But because each of these policy instruments entails distinctive moral, political, and administrative tradeoffs,

government's choices are inevitably controversial. In addition, the analysis of these purposes and of their policy implications may be affected by whether the victim in question was injured by a crime, by a non-criminal tort (all crimes are torts but not vice-versa), or by a non-tortious accident or illness (i.e., one for which there is no injurer who is liable for compensation).

1. Corrective Justice. The ancient ideal of corrective justice, which was most famously advanced by Aristotle in his *Nicomachean Ethics*, has attracted great interest in recent years among scholars and policymakers. Moral and legal philosophers like Ernest Weinrib and Jules Coleman have sought to explicate the distinctive claims that corrective justice makes, as well as the doctrinal and institutional features that a system of corrective justice must exhibit in order to vindicate those claims. Legislators routinely invoke the goal of corrective justice in advocating new compensatory arrangements for victims of crimes or of civil wrongs.

In its dominant formulation, corrective justice entails an intervention in the relationship between a wrongdoer and his victim, compelling the former to repair the harm that he has wrongfully imposed on the latter. In this sense, corrective justice is fundamentally backward-looking and restorative. It is a closed moral system that defines a victim as one who has been wrongfully harmed by another and the injurer as one who has caused this harm. Responsibility for corrective justice inheres in this relationship. Corrective justice imaginatively reconstructs the victim's situation before the wrong was committed, and seeks to recreate the status quo ante by restoring the victim, as much as possible, to the position that he would have occupied absent the wrong.

In our legal system, tort law is the main instrument for pursuing corrective justice. Tort law is a system of compensation administered by the courts in private litigation that is conducted largely according to common law principles subject to an adversary process. In tort law, the ideal of corrective justice requires wrongful injurers to compensate innocent victims. The two forms of wrongfulness are negligence (i.e., the creation of unreasonable risks of harm to others) and intentional harm. (Indeed, injurers who intentionally harm others or engage in aggravated forms of negligence may be liable for punitive damages (i.e., damages above and beyond what is needed to compensate for losses).

In several respects, however, the link between tort law and corrective justice – and hence compensation – has been broken, or at least attenuated. First, most accident victims do not seek compensation through the tort system at all because they are unaware of their rights, cannot

convince a lawyer to take their case, or for other reasons. Second, many of those who do sue in tort do not recover anything. This may be because they cannot prove the facts on which their legal claim depends, or because of certain “technical” rules of tort law that can prevent compensation of otherwise deserving victims. For example, tort law provides for immunities that categorically protect some injurers from any liability to their victims. Immunities enjoyed by charitable organizations, spouses, or other family members are disappearing but others – particularly governmental immunity for many wrongs committed by public officials – remain and constitute serious limitations on victim compensation. Another compensation-limiting doctrine is “contributory negligence,” under which a victim who negligently contributes to his own injury may be barred from recovering some or all of his losses.

A third disconnect between tort law and corrective justice is the fact that even those who are entitled to tort compensation for their injuries are typically paid not by the wrongdoers who injured them but by innocent third parties: the victim’s own insurer, the injurer’s liability insurer, or a social insurer (government). Fourth, even successful tort claimants must incur legal fees and other transaction costs that amount to one-third or more of their award, leaving them with significant uncompensated losses.

Finally – and most relevant to victims of crime – relatively few criminals are in a position to pay the victim damages, so any significant compensation must come instead from public and private sources. Private insurance is likely to cover certain out-of-pocket costs like health care, rehabilitative services, and disability-related wage loss, but will not cover pain-and-suffering, demoralization, and other non-pecuniary costs that crime victims often suffer. The same is true of social insurance. Only special programs for crime victims can compensate for such non-pecuniary costs.

The disconnect between tort law and corrective justice is not unique. Government compensation programs also break that link at many points. Disability compensation under Social Security, for example, is available only if the claimant has worked the requisite number of qualifying quarters and meets certain other criteria. Eligibility for Medicaid depends in some states on whether the structure of the claimant’s family, such as whether both parents reside with the claimant. In some states, unemployment insurance is not available to seasonal workers. These examples could easily be multiplied. Government programs that compensate victims only

compensate some victims; the excluded, moreover, are often similarly situated to the included with respect to their need for assistance.

2. Deterrence. Victim compensation serves not only the ideal of corrective justice but the social goal of deterring wrongdoing. By forcing injurers to bear the costs of their victims' losses – in economic terms, to “internalize the externalities” and thus price their misconduct efficiently – the duty to compensate creates an incentive for potential actors to consider in advance the harms their actions might cause, since those harms, should they occur, will now be chargeable to the injurer. Unlike corrective justice, the deterrence rationale for compensation looks forward to future decisions by future actors rather than to restoring an earlier state of affairs. Deterrence, then, is intended to create socially desirable incentives for future conduct – what economists call *ex ante* incentives.

Deterrence constitutes a vital function of victim compensation, for several reasons. If the deterrence is effective, it will reduce (indeed, in economic theory, it should eliminate) the amount of wrongdoing before harm is inflicted, rather than simply shifting the losses after they occur. But this is a very big “if.” For several reasons, deterrence is often weak or incomplete. Potential wrongdoers, like all of us, are sometimes irrational in the economic sense that they do not calculate the probabilities either of injuring someone or of being called to account; even if they tried to calculate in this fashion, they would usually lack the necessary information about the state of the law and the expected harm (magnitude of the risk times the magnitude of the harm if it occurs) of their action. Deterrence would fail even with a perfectly informed, wholly rational wrongdoer (if such exists) so long as he knows that the penalty discounted by the probability of being held liable is low enough relative to the benefits to him from his misconduct.

Compensation of victims is not the only way to achieve deterrence, and may not be the best way. In the tort system, the wrongdoer pays damages measured by the victim's harm, but this amount may not be the level of damages that will produce the socially optimal level of deterrence. Where the wrongdoing is a crime subject to fines or imprisonment, these criminal sanctions may (or may not) produce more effective deterrence than victim compensation. (This is especially true where the criminal, being insolvent, cannot pay damages and no governmental compensation exists). Other non-compensation deterrents to wrongdoing include administrative regulation of the risk, social ostracism of and adverse publicity about wrongdoers, public education about the conduct in question, etc. Indeed, depending on who is paying the

compensation, compensation may actually weaken deterrence, as I'll discuss below in the section on distributive justice.

3. Moral affirmation. Compensation does not merely help to restore the victim to the status quo ante (corrective justice) and to create incentives for socially desirable conduct in the future (deterrence). It also affirms certain moral facts about the incident: the wrongfulness of what the injurer did, and the total or relative innocence of the victim. Absent a duty to pay and a right to receive compensation, this moral accounting might be merely abstract. In contrast, the specific transfer entailed by compensation makes both the moral failure of the injurer and the moral claim of the victim unmistakably clear.

The clarity of this moral signal, however, partly depends on the source of compensation. If the payment comes from a government insurance fund, the signal is likely to be more muted and ambiguous than if it comes from the wrongdoer. The suggestion will be that the payment is simply the government's cost of doing business – the business of loss-spreading.

Compensation (or the lack of it) may also affirm other values. As Jack Rosenthal has noted, philanthropy instantiates the moral commitments of its donors; these commitments may include not only empathy but what Rosenthal calls (in the context of the 9/11 charities) the donors' "vengeful philanthropy." That this was a unique response to a particular detestable crime (i.e., terrorism) committed on American soil is further suggested by Jane Sigmon's point that the American victims of terror committed overseas have elicited much less generous donations. Compensation may also affirm donors' conception of moral community. For example, compensation to the 9/11 victims by private charities and government programs reflect a sense of national community, while most other crimes and torts do not.

4. Distributive justice. Compensation can do more than establish a just and moral relationship between injurer and victim, as in corrective justice. When it is the community that compensates a victim – ordinarily through government-administered social insurance -- the compensation also establishes a relationship of justice between community and victim. And when the community condemns the wrongdoer for the harm he inflicted on the victim -- through imposition of tort damages, regulatory penalties, or criminal sanctions – it likewise establishes a justice relationship with the wrongdoer.

The community's relationship to the victim requires additional comment. When the community uses public funds to compensate victims, it is deciding that the victim's loss is one

that should be spread among all of its members (i.e., taxpayers). The justification for governmental loss-spreading rests on some or all of a set of conventional but contestable assumptions. First, it assumes that people are risk-averse – that is, they would prefer to incur a small, certain cost now (in the form of increased taxes) in order to avoid the risk of a large loss to themselves in the future (an uncompensated injury). Second, it assumes that the loss of a dollar imposes greater unhappiness on a poor person than on a rich one. Third, it assumes that people will not (and perhaps should not) privately insure against these losses (or at least *all* of them). Finally, it assumes that government should bear the responsibility of spreading the loss. I now consider some of the most important arguments for and against requiring government to do so.

Compensation by Government

A liberal society presumes that government's role should generally be limited to doing for people what they cannot do for themselves. People can insure themselves privately against most losses from crime and other misfortunes, and most people do so. Although modern governments in fact manage risks in a multitude of ways,¹ some special justification is needed before society assigns government this function. This justification, moreover, must go beyond the fact that victims would think themselves better off if the government did so; after all, those who are favored by government almost *always* think this. Three main justifications can be plausibly advanced: efficiency, redistribution, and special responsibility.

1. Efficiency. Government can be an efficient risk spreader. This may be because of government's ability to exploit the "law of large numbers" in designing insurance pools, which tends to reduce unit administrative costs and enhance the statistical predictability of its underwriting decisions. Government can also use the law to coerce people into the insurance pool, which helps to overcome an important insurance market imperfection known as adverse selection.

These strengths in government compensation, however, also entail some characteristic weaknesses. Mandated participation may be unfair to some who would prefer private insurance arrangements. Depending on whether and to what extent the compensation fund is financed by requiring risk-rated payments from wrongdoers, government insurance programs may offer little

¹ See generally, David A. Moss, When All Else Fails: Government as Ultimate Risk Manager (Harvard University Press, 2002)

in the way of deterrence. Lacking a profit motive, government compensation funds often suffer from certain administrative inefficiencies, and their policies are often shaped by political factors.

2. Redistribution. It is just such political factors, of course, that make redistribution through government compensation possible and perhaps desirable. Such redistribution-through-compensation is especially attractive when victims are too poor to be able to self-insure against their losses or to insure through private insurance markets. On the other hand, this approach may be less justified where many of the program's beneficiaries are not poor and could self- or market-insure more efficiently than government can insure them.

3. Special responsibility. One may argue that government is responsible in some moral sense for the victim's loss. The government's responsibility for crimes committed by others is a complex matter, involving questions about the nature of victimization, causality, and the scope of public duty.

Is there any set of coherent and consistent principles, for example, that can explain why some victims of misfortunes are compensated while most others – those born with congenital defects, low intelligence, susceptibility to grave diseases, or incompetent or abusive parents -- are not? Even if we focus our attention on the victims of crimes, why are the victims of the 9/11 attacks compensated (most of them quite generously, I might add) while the victims of uninsured drunk drivers are not? Why do many state laws compensate the victims of street crime but not the victims of economic crimes or medical malpractice unable to persuade lawyers to take their costly-to-litigate cases?

One answer might be that the compensable losses from crimes in these examples are due to wrongs that the government should have prevented. But this explanation only raises a host of other difficult questions. To begin with, government obviously cannot prevent all crimes, nor should it attempt to do so – any more than we should try to prevent all accidents. Although we do not like to say it, some crimes -- like many accidents -- are simply not worth preventing, given the prevention costs, scarce enforcement resources, and other social priorities. As in tort law more generally, governmental liability typically requires the victim to show that the government was negligent – as where government owns property on which injuries occur or has failed to exercise adequate supervision of the use of weapons by the police. Can we say that a failure to prevent the crimes for which compensation programs pay constitutes negligence? In certain specific cases, this is surely so. The law, however, holds that the police have no duty to

protect specific individuals and thus that police inaction is not tortious except under unusual conditions – for example, when the police specifically told the victim that it would protect him, the victim relied on this assurance, and the crime would not have occurred had the police done so. As this last requirement (what lawyers call “cause-in-fact”) suggests, many crimes would occur even if the police did what they are supposed to do.

Certain kinds of victims, moreover, are arguably in a better position to prevent their harms than are the police. The distinction between “deserving” and “undeserving” victims, while often hard to draw, is nevertheless drawn constantly by legislatures, politicians, juries, private institutions, and public opinion. Some examples might include those who do not lock their cars or apartments, or who walk in notoriously dangerous neighborhoods without taking reasonable precautions, or who drink themselves into oblivion in situations that leave them defenseless to predators. To recognize the possibility that some victims are the best crime avoiders is not to “blame the victim.” Instead, it merely calls attention to an important but often-ignored fact: crime prevention is the responsibility not only of the government but of all of us.

Even in the strongest cases for compensation – where government actually *caused* the victim’s loss, as with illegal police actions -- the law often precludes government liability for damages even when it has clearly violated the Constitution or a statute. Indeed, the Federal Tort Claims Act expressly immunizes from governmental liability many intentional torts (a category that includes some criminal acts) committed by federal officials. State laws confer a roughly similar set of immunities on state agencies and officials.

My point is not to defend these rules but to show that a program to compensate victims of crime constitutes an exception to a widespread, long-standing pattern of non-compensation for governmental negligence or illegality. One can certainly criticize this traditional pattern – indeed, I wrote a book doing just that² – but serious criticism demands that one seriously consider the arguments that have supported non-compensation for so long. These arguments emphasize a number of factors more or less peculiar to government, which I can only summarize here. Government owes a legal duty to protect the general public, not individuals. Proving cause-in-fact in cases of governmental inaction is more problematic and error-prone than in cases

² Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs (1983).

of government action. Juries should not have the power to second-guess politically accountable officials. Government, as the ultimate “deep pocket” defendant, tends to attract spurious claims that will often be decided by juries who tend, as we all tend, to be more generous with what appears to be other people’s money. Compensation will only take resources away from vital public functions. The prospect of official liability tends to distort their decision-making in ways that are especially harmful to the public interest.

One might argue that terrorism is a special kind of crime such that the case for compensating victims of terrorism is stronger than that for compensating the victims of other kinds of crimes. Terrorism, one might say, is a relatively indiscriminate assault on the government or on the society as a whole, part of a premeditated ideological program seeking to create a climate of generalized fear, suspicion, and profound disorientation in which public and private life are utterly convulsed and deformed. Other crimes, in this view, are usually targeted on particular individuals and are motivated by more familiar reasons like greed, passion, revenge, and sociopathy. Terrorism is usually sponsored by a state or an network of organizations like Al Quada that is tantamount to a state-within-states, while conventional crime is primarily the work of individuals.

The important question for our purposes is whether victims of terror are more (or less) deserving of government compensation than victims of ordinary crime. The differences in the two categories are easily exaggerated. Organized crime entities, for example, resemble terrorist groups in many of these respects, although they tend to be non-ideological; the Mafia, at least, focuses obsessively on economic gain and views some government officials (those whom it can corrupt) as allies. Terrorists sometimes operate without organizational support and often target individual victims. These overlaps help to explain certain similarities in legal techniques found in the RICO statute and the anti-terrorism laws enacted in the wake of the Oklahoma City and 9/11 catastrophes. And in both cases, of course, the victims are equally innocent and suffer the same kinds of injuries.

But these similarities and differences do not really resolve the question of whether government should compensate victims of either category *qua* crime victims. (I add this qualification – *qua* crime victims – to remind us that government *already* pays for (or subsidizes) certain losses suffered by victims of both kinds, through *other* public programs like Social

Security disability, Medicaid, Medicare, unemployment insurance, and the like). In my view, the differences do not justify treating the two categories differently for compensation purposes.

Conclusion

Compensation of victims can take many forms. Different rationales for compensation imply different legal techniques and constraints. Compensation paid by injurers to victims through the tort system most directly advances the ideal of corrective justice, but this system exhibits many shortcomings. Government compensation avoids certain of these shortcomings but entails others. One of the most challenging is the need to justify compensating some victims but not others. To say that the government is “responsible” for compensation is to beg all of the difficult normative and empirical questions raised by the concept of responsibility. These questions are particularly important in a liberal society that limits the role of government in dealing with the many kinds of misfortunes that befall us.

If the experience of the 9/11 compensation program teaches us anything, it is that once the government fashions a special compensation program for one set of victims, it will find it difficult to deny such favorable treatment to others – at least as a logical and moral matter. When the line-drawing occurs, it is likely to be on political grounds, not logical or moral ones. Pending legislation that would extend the 9/11 program to the victims of Oklahoma City, Khobar Towers, the U.S.S. Cole, and other highly visible terrorist attacks gain traction in part because the victims’ claims are logically and morally indistinguishable from those of the 9/11 victims. In the end, however, the decisive factor will be political. The victim groups that will fare best are those that are easily identifiable, concentrated in important legislative districts, members of influential groups, suffer large losses in circumstances that are mediagenic and evoke widespread sympathy, and can more readily link those losses to government policy. These factors help to explain why Congress has established special federal compensation programs for some occupational groups (e.g., veterans, uranium workers, and coal miners with black lung) and not for others (e.g., textile workers with brown lung), and for children with vaccine-related injuries but not for those with birth defects. (As I write, Congress is considering a compensation program for victims of asbestos exposure.)

Another lesson of the 9/11 program is that most people who sustain enormous emotional, economic, and personal losses and who receive government compensation for these losses will

always approach their awards with a mixture of relief and resentment – relief because the money is a welcome balm for their suffering, and resentment because it can never replace what they have lost. Indeed, the very effort to attach a monetary value to their most precious relationships will affront many survivors, even as they feel obliged to accept it. The compensation will never be enough – not because they are greedy but because they are human and thus to a degree are inconsolable.

What this means, at a minimum, is that victim compensation programs will always be a source of contention and bitterness even as they are a source of assistance to those whom they serve. These programs, moreover, inevitably draw lines that will strike many others as arbitrary and unfair, excluding claimants who seem equally worthy from a logical and moral point of view. Finally, they create incentives for (“reward” would be an accurate but inflammatory synonym) people to define themselves as victims – as indeed they are -- since only by doing so can they qualify for compensation. Whether this self-definition helps them to get beyond their losses or instead retards their recovery is an important question best left to psychologists.