

## **THE PHILOSOPHY OF COMPENSATION**

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**by John Haldane and Anthony Harvey**

That the State has a responsibility for the victims of violent crime is a proposition that has only recently come to be acknowledged by governments. The first comprehensive compensation scheme was enacted in New Zealand in 1964; a few months later a scheme was instituted in the UK, and during the following decade similar schemes were adopted in the US, Canada, Australia and some member states of the European Community. A European Convention on the Compensation of Victims of Violent Crime was adopted in 1983, drawing attention to the 'need' to compensate victims and declaring it 'necessary' for governments to make provision to do so. This Convention was ratified by the UK in January 1990.

What has happened, it may be asked, to bring the needs of victims, which appear for centuries to have been almost totally ignored by governments, so suddenly into prominence? If society has a duty to provide compensation to the victims of violent crime, this duty might be thought to rest on fundamental principles of equity and social responsibility, which were surely just as valid in previous ages as they are today. This may be so; but state compensation for the victims of crime requires the expenditure of public money, and in earlier times a sense of responsibility for the plight of such victims was evidently not felt sufficiently strongly in the public at large to warrant any government to pursue the matter. But in the years after the Second World War the moral conscience of the West became increasingly preoccupied with the needs and legitimate claims of the socially disadvantaged. The UN Declaration of Human Rights of 1948, which was motivated principally by the concern to prevent any repetition of the atrocities committed by the Nazi regime, was subsequently adopted as a charter for protection against discrimination and oppression of all kinds, and for the firmer establishment of democratic rights and freedoms. A number of universal and regional Human Rights Conventions achieved recognition and ratification by many countries, and the ever-widening categories of

those deemed to be in need of such protection were bound to arouse interest in the sufferings of innocent people who had been the victims of violent crime. At the same time, society in the developed world was becoming rapidly richer, and welfare arrangements were being steadily extended to victims of various forms of disability and disadvantage: in this climate some provision for the victims of crime could hardly be far behind. In addition, there was strong political pressure in Western societies to make more generous provision for the poor and to ensure a fairer distribution of society's resources. Given the ever-growing public expenditure on the enforcement of law and the punishment of criminals, the public was increasingly likely to be moved by an appeal to the apparent unfairness involved in devoting no comparable resources to relieve the plight of innocent victims of crime.

If it was this degree of moral consensus among the public which impelled Her Majesty's government in the sixties to make provision for compensation, the theoretical justification for doing so remained obscure. In 1961, the government could find 'no constitutional principle on which state compensation could be justified', and the Home office vigorously resisted any suggestion that the victim has a legal 'right' to compensation. This did not prevent the government making arrangement for such compensation and from setting up a quasi-judicial agency to administer them; but the same fear (misplaced, as we shall see) that to acknowledge a 'right' to compensation would commit the government to meeting an unlimited number of claims in full and thereby create an uncontrollable channel of public expenditure lie behind its continuing reluctance to bring into force the statutory criminal injuries compensation scheme established by the Criminal Justice Act 1988. Such reluctance is not, however, evident in Northern Ireland where a statutory scheme was introduced in 1968 and remains in force (though given legal effect by Order in Council) to this day. A similar lack of clarity characterises the wording of the European Convention. In the preamble the reasons given for the 'necessity' of providing at least minimum provisions for compensation are 'equity' and 'social solidarity'. These reasons are not further elucidated. In the Explanatory Report (1984) a number of other arguments are listed, without comment; it is also stated that recent victim studies 'have thrown light on victims' psychological and physical distress after a crime', which 'points to the need to compensate the victim' (para 6 and 7). Thus, even if there is now a general public consensus on the need to provide compensation, the theoretical justification for doing so remains both obscure and controversial.

Part of the difficulty resides in the notion of ‘compensation’ itself. In Hebrew law the guiding principle for the assessment of criminal damages was the *lex talionis*, an eye for an eye and a tooth for a tooth. This was echoed in an early judgement of the US Supreme Court, which described compensation as the provision of a ‘full and perfect’ equivalent. The difficulty is, of course, that in the majority of cases perfect equivalence is unattainable. If you take my car and in using it damage it, then it may be sufficient compensation if you make good the damage and provide for the inconvenience. The relative ease of calculating adequate compensation in such a case is due to the fact that cars are not generally regarded as ends in themselves but as means of transport. If however you assault me in the process, then it is likely that the loss I suffer constitutes damage to things which I regard as intimately connected with the very sense of my life’s having the value it does have, things such as bodily and psychological integrity. People desire good health in order to pursue their chosen ends; but equally the point of some activities is that they induce and help to maintain health. The same is true in respect of psychological well-being, i.e. mental health. Thus, in taking someone’s property against their will - either by theft or, for that matter, by legally sanctioned confiscation - there may be losses in respect of mental and physical health which are not wholly compensated for by providing alternative instruments for the attainment of those goals for which mental and bodily health were the agent’s means.

Similarly, physical damage or shock may render someone unfit for employment which is likely to be their sole or main source of income. If one compensates them for loss of earnings one has provided equivalent means in the sense of restoring financial powers. But this may fall short of adequate compensation if it neglects the fact that someone’s employment may be a constituent feature of their life, not merely a means but an end in itself. To the extent that this has been denied them they have suffered a special kind of loss; in many cases one that is deeper than the loss of income, for it affects their very sense of identity and thereby their idea of what makes their life a liveable one.

But the fact that it is seldom possible to compensate a victim of crime by providing an exact equivalent of the loss sustained does not mean that compensation is either useless or arbitrary. It is true that any provision of alternative goods may be inadequate or inappropriate, and that there may always remain what one may call an ineliminable residue of loss. It is also true that the damage a person sustains may be mitigated by care and treatment

and may eventually be healed. Nevertheless the very fact that compensation is provided may of itself be a source of help and satisfaction to the victim. At the very least, it represents an acknowledgement by society of the fact of undeserved loss or damage. Ideally, of course, both the acknowledgement and the material reparation should be provided by the offender. But in practice this is seldom possible, and one of the strongest arguments for the state taking responsibility for compensation is that victims may thereby receive something of that which they have a right to expect but which in the normal way cannot be obtained from the offender.

Mention of the offender at this point makes it necessary to distinguish between different consequences of liability for injury to another person. Civil law has traditionally provided for compensation in cases where the agents of injury to the interest of others are deemed to be at fault. An award of damages is the most well known form of compensation, though for reasons explored later, civil actions for personal injuries arising from the commission of crimes of violence are rare. In criminal law, on the other hand, the principal consequence is the sanctioning of the offender. The primary justification for judicial punishment has nothing to do with the individual victim; it is that the offender has broken the laws of society, and it is the responsibility of the state to punish the transgression, to deter further such offences and (where possible) to rehabilitate the offender. It is therefore not surprising that justifications for judicial penalties are concerned mainly with the offender and with the need to protect society from such offences: the rights or interests of the immediate victims play no part in the reasoning. So far as the criminal law is concerned, a victim is viewed simply as a citizen in whose person civil society itself has been offended against. But this does not necessarily mean that the state has no further responsibilities towards the victim. It is of the essence of any system of criminal justice that the individual citizen ceases to have a right to personal revenge. A civilised society, it is often said, is one in which the state has a monopoly of coercive force. The individual may be imagined to have ceded to the state the duty of exacting retribution for unlawful injury, and once this is done the victim has no further claim on the offender. But it can be argued that, even if a victim has handed over to the state the responsibility for punishment, this does not altogether settle the matter of reparation. Where the offender is in a position to make restitution or offer compensation, this should be enforced by the courts (as is now the case in Britain after a conviction in a criminal court.) Where the offender is not apprehended, or has no means to pay, it is for the state to provide some form of compensation.

But to bring the question within the scope of a general theory of punishment is to enter a notoriously difficult field in the application of moral philosophy. Traditional justifications for judicial punishment are of three sorts non-consequentialist, consequentialist and contractualist; arguing, respectively, that punishment is right a) in itself, b) on account of its beneficial effects (for society and/or the criminal) and c) because it is implied by a social consensus. In practice penal policy is usually based on a combination of these; but it is important to distinguish them, and in fact they correspond to three main lines of traditional philosophical theory. Allowing for simplification, one may group the various social and political theories under three headings: Natural Law Theories which hold that the nature of human beings implies certain universal values for them; Consequentialist Theories which argue that an action or policy is justified to the extent that it maximises the level and distribution of some given value within a defined community; and Contractualist Theories which argue that the rightness or wrongness of policies depends upon whether they, and/or the institutions which establish and enforce them, have the support of the members of society.

This is not the place to discuss the merits of these competing theories. The important point to notice is that, so far as the judicial process is concerned, more than one of them is customarily invoked to support a particular sentencing policy (e.g. a deterrent element is consequentialist, a retributive element is non-consequentialist) and that different moral theories can be appealed to in support of similar moral claims or policies, e.g. a severer regime of punishment may be justified both because it is deterrent (consequentialist) and because it is deserved (non-consequentialist). It is thus not necessary to agree on the philosophical basis of all moral actions in order to be able to commend a particular policy on moral grounds. If it can be shown that more than one philosophical theory supports the proposal, there is a reasonable presumption that the proposed policy has moral justification.

These considerations have all arisen from the notion of compensation, and provide some basis for an argument that the State has an obligation to provide it. But before going further it is necessary to say something about the notion of victim. The 'Victim's Charter' issued by the Home Office in 1990 states that 'all victims are special by virtue of what they have gone through'. But is this necessarily so? It is arguable that those who suffer grievous harm through accident or natural disaster are entitled to at least as much support - and that this is the view of the public seems to be shown by the huge

response to appeals on behalf of the victims of any particularly sensational natural disaster. On this view, victims of violent crime would be simply a particular category of those requiring public assistance, and there would be no question of compensation at all. It could be said, for instance, that the state could provide assistance to victims through an expanded national insurance scheme. Building on existing arrangements such a scheme could, but need not, make special provision for victims of crime as opposed to subjects of other misfortunes for which redress through the civil courts is, for whatever legitimate reason, unavailable. One reason for according special treatment for crime victims would be the presumption of a distinctive harm suffered by those who have been wronged. But equally a reason for not singling out this group might be the thought that it is a highly relative matter what constitutes crime, and so to attach special significance to this gives inappropriate emphasis to these misfortunes and stigmatises their victims. Furthermore to treat crime victims differently is, in effect, to compensate them for a loss additional to those shared with victims of accident or disease.

A second non-compensatory option would be for the state to provide the victim with the means of taking civil action against the offender, suing him or her for damages in respect of a tort. The rationale for this approach would be that when a criminal damage is inflicted two interests are affected: those of the society or the state, for which the remedy is punishment, and those of the immediate victim, for which the remedy is damages. On this view the residue calls for state treatment, not through compensation but rather by way of state provision of legal services or of the means to secure them. In this regard the role of the state would be an enabling one again related to that which it already occupies with respect to the provision of health and social services.

Interesting as it may be, this second way of proceeding is inadequate in circumstances in which the offender is not apprehended, or disappears before civil action can proceed, or in which he or she lacks the means to provide damages. One could of course take the view that these possibilities are part of life's lottery and that the state has no further duty beyond that of punishing and providing the means for civil actions. But the application of such a policy would certainly be perceived as unfair to a large number of the victims of violent crime; and the claim that the government has no duty to compensate would be in defiance of the view, now embodied in the practice of the courts, that every punishment administered by the state should, where appropriate, include an element of reparation.

Yet even if victims of violent crime cannot be simply subsumed into the general category of victims of misfortune - even if they are 'special' - there are certain respects in which the obligation which the state has towards them is similar to that which it has towards those who are disadvantaged in other ways. Various kinds of aid may be required and are available. The most urgent needs of the victim may be counselling, help from the police, legal advice or protection from the media. These are spelled out in the 'Victim's Charter' and are available either through general agencies such as the Health Service or through the specialised provision of Victim Support.

None of this need be controversial: it is part of what government is now expected to do for any who suffer disadvantage through no fault of their own. Indeed some would argue that, if properly administered, this form of provision for victims is more beneficial than any monetary compensation. As we have seen, compensation in any particular case is not likely to be objectively quantifiable or in any real sense equivalent to the loss or damage sustained. Monetary values bear little relation to the personal impact of violence. On the other hand the moral, psychological and financial support that can be provided through the health and social services, and in particular through Victim Support (with its network of voluntary help), offers genuine resources for healing the trauma caused by violent crime at relatively little cost, and there is a strong case for saying that generous provision of these services for victims is a better use of public money than a system of monetary compensation that will seldom have any real equivalence with the hurt actually suffered. At present, partly perhaps for historical reasons (since the Scheme predated the creation of Victim Support by about ten years), monetary compensation is given a far higher priority in public expenditure than the provision of social and psychological aid for victims. Simply on grounds of value for money, a strong case could be made out for reversing these priorities.

Yet, once it is granted that some compensation must be given to the victim, money remains the one practical means by which the state can provide it in any systematic way; moreover, as we noted earlier, the fact of compensation may be more significant to the victim than the amount, even though the amount must be perceived to be equitable in relation to other awards made to victims in similar circumstances. It remains to consider in more detail the arguments which are used to justify such awards.

We have already observed that different kinds of philosophical reasoning may be invoked to justify particular policies, and that this by no means weakens the case for them; indeed, where arguments based on different premises support the same conclusion, the force of the argument may be strengthened. It will be convenient to list the arguments for a state obligation according to the broad philosophical categories of ‘consequentialist’ (or forward looking) and ‘non-consequentialist’ (or backward looking) and to note in conclusion those which draw their strength from both (that is, mixed theories).

**(i) consequentialist**

It is argued that an element of reparation in the criminal system is necessary if individuals are to retain respect for the administration of justice and not take the law into their own hands, seek to recover their property by force or commit acts of personal revenge. It is also suggested that victims may be more ready to report offences and cooperate with the police and with the courts if the successful outcome of a prosecution will strengthen their claim to compensation. This is presumably the sense of the Explanatory Report on the European Convention, when it speaks (para 7) of the need ‘to quell the social conflict caused by the offence and make it easier to apply rational, effective crime policy.’

**(ii) non-consequentialist**

The European Convention includes ‘equity’ among its arguments for the necessity of compensation. This can be understood in two ways. It may mean that it is unfair that victims should receive nothing from the state when substantial public expenditure is devoted to the apprehension, conviction and punishment of criminals; and also that it is unfair that help and relief is not given to victims of crime on a scale comparable with that given to sufferers from other forms of disadvantage or disability. If such a disposition of public funds is felt to be inequitable, it is arguably wrong in itself and ought to be rectified. It can also be argued (though not perhaps quite so plausibly) that every offence indicates that the State has failed in its obligation to protect its citizens from unlawful attack, and therefore that the state owes something to the victim as compensation for this failure; moreover, since human life and dignity are overriding social priorities, since compensation in various forms (from simple recognition to monetary reparation) can contribute to the continuance of quality of life and the

restoration of dignity, and since only the state has the resources to provide such compensation, the damaging consequences of violent crime for the life and dignity of the victim lay a positive duty on government to respond with such means as are available.

But then, if it is recognised that government has a duty or an obligation, it may follow that the victim has a right to be compensated. This consequence has evidently alarmed politicians, who appear to have inferred that the exercise of this right would make victims legally entitled to whatever level of compensation a court or official agency might determine, and that this would result in public expenditure outside political control. But this is to misunderstand the meaning of 'rights'. It is widely agreed that every citizen of this country has a right to (for example) health care and education. But in order to claim this right, applicants have to show that they meet the appropriate conditions (such as an illness that would benefit from treatment or the standard of educational achievement qualifying for a particular course). Moreover, the right is to no more than a fair share of that which the state may reasonably be expected to provide within the limits of its economic circumstances. Similarly with a right to compensation. This is a right to an equitable share in such provision for compensation as the government can reasonably afford. It is not a blank cheque to be filled in by a Compensation Board.

### **(iii) mixed theories**

The second reason adopted in the European Convention for the necessity to compensate victims of violent crime is 'social solidarity'. The focus of concern is upon the common good and the idea that in the person of the victim harm is done to society which he or she has no duty to bear alone. Accordingly compensation is a means by which the loss is distributed across society as a whole, so recognising the reality of social existence and deepening a sense of community. To promote such social solidarity is widely seen as a proper objective of government and is an aim shared by many organisations and agencies in the community. It may be seen both as something which is good as a means to the greater happiness and well-being of the citizens and also as something good in itself and a laudable aim of public policy.

A further argument under this heading, which has already been spelt out, derives from the theory of punishment. Judicial punishment should include some element of reparation to the victim; if this cannot be recovered from

the offender, it becomes the duty of the government to supply it. This argument presupposes that the provision of reparation is good in itself, but it may also take into account the beneficial consequences for the victim of acknowledgement and compensation.

Finally, the government may be said to have assumed an absolute obligation to maintain arrangements for compensation when it ratified the European Convention in 1990. This again may be justified by the beneficial consequences it is likely to have for citizens of European countries who suffer criminal injuries when abroad: but it may also be regarded as good in itself in so far as Her Majesty's Government has an absolute duty to honour treaties into which it has entered in the name of the British people.

### **Theories of State Compensation**

These arguments depend for their theoretical justification on more than one philosophical theory. But, as was argued above, this does not by any means weaken their cumulative force. As in other issues of moral philosophy, similar moral claims may be supported by different moral theories: the resulting moral consensus is often more significant than the different routes by which it is reached. And where the same conclusion is reached by both consequentialist and non-consequentialist reasoning, the force of the argument may be regarded as particularly strong. Not all the theories advanced, of course, are of equal weight. In particular, that of social maintenance and enhancement (that is, that compensation increases social cohesion around respect for the law) is open to serious question on empirical grounds, and that of social damages (i.e. that the government has failed to provide protection) seems to presuppose the impossible condition that government should be able to protect all citizens from all criminal assaults. But taken together they amount to a formidable case, and any government today which sought to evade or reduce its responsibility for compensation would properly incur severe moral censure.

*This article was previously published in the Journal of Applied Philosophy xii, 1995. It is reproduced with permission.*

*Details about the Journal are available from Blackwells, Blackwells Publishing, Oxford.*

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