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Preferring Punishment of Criminals over Providing for Victims

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INTRODUCTION

The past two centuries have been an extraordinary era for criticism and reform of institutions and social practices. Unprecedented egalitarian and humanitarian movements have arisen to protest and improve the condition of victims of every variety of evil, personal and impersonal, natural and social. The beneficiaries of these movements belong to all manner of groups: racial, ethnic, and religious minorities, the poor, the insane, the orphaned, the handicapped, the homosexual, the young, the elderly, the female, the animal, the unborn, and so on. Many of these movements had few followers and fewer victories until deep into this century, but most had precursors in the last century, which challenged the moral legitimacy of accepted practices.

The criminal justice systems of this era have inevitably been participants, as mechanisms for resisting reforms, as enforcers of established reforms, and as the targets of reform. The modifications of criminal justice systems have been diverse, as have the

motivations for them. What is now the most conspicuous element of the system, the police force, was not even conceived of before this period. Originating early in the nineteenth century as a modest effort to control urban riots and street crimes, police departments have evolved into major social and political forces in urban life, and in suburban and rural life as well. Their functions and focuses have expanded beyond the enforcement of a restricted range of criminal laws to encompass not merely the enforcement of an odd lot of laws, noncriminal and criminal alike, but also well-nigh any errand that goes unassigned to other agencies of the modern welfare state (Wertheimer, 1974). The implications of this expansion are not well understood; some ways that it might bear on the history of reform will be suggested at the end of this chapter.

Before the police arrived on the scene, older and more essential elements of a criminal justice system began to be subjected to critique and reform. I am not here alluding to the various campaigns against the criminalization of this or that activity. (Such campaigns have been primarily twentieth-century phenomena, and their main targets have been the so-called victimless crimes.[1] Tampering with central, essential prohibitions of the criminal code has not been seriously contemplated.) What has been the subject of constant questioning and repeated revision since the late eighteenth century is the distinctive activity of the criminal justice system, namely, criminal punishment. The propriety of retribution and the efficacy of punishment for deterrence, reform, or rehabilitation have been challenged, so that no rationale or goal of punishment now seems secure. The violence of punishment (or at least the visibility of it) has been minimized, along with its publicity and much of its blatant degradations. Alternatives to punishment, particularly regimens of enforced noncondemnatory psychotherapy, have been championed. For philosophers, even the very concept of punishment now seems a puzzle (Wertheimer, 1983).

Much of this evolution in the ideology and penal institutions of the criminal justice system is comprehensible within the larger

cultural context of concern to reduce unwarranted suffering and indignity. Both the older movements to ameliorate prison conditions and the newer interest in the rights of prisoners fit into that framework. To some degree, the same may be said of the recent interest in the rights of preconviction criminal suspects and defendants, though in this case the recognition of rights was initiated more as a means of constraining police power and protecting the integrity of the legal system than as a result of a revision in society's conception of the rights of individuals.[2]

The current movement to protect the rights and interests of crime victims may seem to be simply another example of this general reformist trend of modern times. Yet, although the crime-victim reform movement must of course be viewed within this context, various features of the history of this movement are untypical and, in combination, quite puzzling. Part of the puzzle is the very recency of any politically significant concern with the plight of crime victims. Governmental mistreatment of crime victims may not be quite as ancient as some other species of political injustice, but because in one form or another it long antedates the whole era of social reform movements, one wonders why, unlike so many other injustices, it did not become a target of protest until the late twentieth century.

That question is made specially perplexing by a confluence of factors. First, unlike in most other systematic institutional injustices, the victims here are not pariahs or political impotents: the victims of crime comprise an unstigmatized class that cuts across all other social categories and includes many persons with substantial social, economic, and political power. Second, unlike most other systematic institutional injustices, governmental mistreatment of crime victims has generally been pointless and purposeless, profiting no one. And third, unlike in most other institutional injustices, the recognition of the injustice of the practices has not required any significant change of the community's moral principles and beliefs. These and other features of the situation need to be presented in more detail if the puzzle is to be appreciated.

JUSTIFYING PRIORITIES

Our criminal justice system dispatches patrols to prevent crimes, and its penal system aspires to deter potential offenders and to incapacitate and reform criminals to prevent further crimes. Yet, once a crime has been committed, the victim whom that state strove so energetically and expensively to protect seems to be immediately forgotten and left to nurse his or her own wounds while the state fixates on the pursuit, prosecution, and punishment of the criminal.

That pursuit can seem single-minded, short-sighted, and tunnel-visioned. Our criminal justice system seems devoted to punishing the guilty, not as a means of protecting the innocent, but as an end in itself, for it pursues that goal in a manner indifferent and routinely inimical to the interests of the innocent injured parties. Aside from the general public goods it may bestow on every citizen simultaneously, our legal system offers virtually no benefits to a crime victim, except accidentally, while worsening his or her lot in various ways. It aggressively acquires items of evidentiary value for apprehending, prosecuting, and sentencing criminals but denies the victim control and use of evidentiary items that she or he owns until the conclusion of the trial. Moreover it generally acts as no more than a passive conduit in the acquisition and return to the owner of items lacking evidentiary value. It subjects victims (and their families and friends) to diverse and often gratuitous inconveniences and embarrassments, effectively precludes them from compelling the convict to make restitution, and in other ways often interferes with a victim's attempts to make himself or herself whole.

Until quite recently, modern legal systems have regularly displayed a decided preference for punishing the perpetrator and a relative lack of interest regarding the victim's due. It is natural to wonder what explains this tendency of legal systems and why a countertrend has taken so long to emerge.

Some structural features of this situation are readily rationalized by arguing that community resources are expended more

efficiently on law enforcement (i.e., capturing, convicting, and punishing criminals) than on aiding crime victims because the former is a paradigm "public good" whereas relief for victims is principally a "private good." Generally, an uncaught criminal is likely to commit further crimes, and her or his unpunished offenses are likely to encourage others to do the same. Helping a victim helps only that victim (or at most only the small circle of people who care about, or are dependent on, that victim), whereas the apprehension and punishment of a miscreant may provide benefits to everyone alike. This situation is comparable to that of public health provisions. The state can more economically and efficiently engage in preventive measures—public sanitation, inoculation programs, and the like—than in socialized medical treatment of all who happen to fall ill. With both crime and disease, many essential preventive measures cannot be managed effectively or at all by individuals acting on their own. By contrast, much of the response to injury can be managed as efficiently by individuals as, or more efficiently than, by any state scheme. Generally, individuals can insure themselves against the losses they individually incur when preventive measures fail; individuals are more motivated to take the precautions they can manage individually when they bear the burdens of failing to. In short, a plague of crime threatens the maintenance of a political order, and the requisite conformity to law may not be motivated without a state-supported penal system for violators; but although relief for victims may be desirable, generally its provision is neither a political necessity nor an impossibility without state participation.

In pursuit of the legitimate public goods of law enforcement, some sacrifices by crime victims must be imposed if a legal system is to operate justly. For example, the demands of a trial, fair to both prosecution and defense, require that the integrity of evidence be preserved, and this preservation may warrant temporarily denying crime victims, along with third parties, the use of some of their property. Generally the unavoidable inconveniences are relatively minor, especially when compared to the consequent public benefits.

Considerations of this kind may provide a plausible justifica-

tion of many of the most basic features of the common pattern of governmental treatment of crime victims. And even if these and other such defenses are ultimately unsuccessful as justifications, they seem sufficiently plausible to provide an adequate explanation of governmental patterns.

EXPLAINING INJUSTICES

However, victims-of-crime reformers are protesting not against "unavoidable inconveniences," but against major and minor inconveniences, indignities, and hardships that appear quite avoidable and devoid of any ready rationale. So the justification sketched above cannot (by itself) offer any understanding of the plentiful, pervasive, and persistent official and unofficial practices being protested.

The natural strategy of any reform movement is to begin by focusing on the most blatant inequities and irrationalities, and to enter complaints against more defensible practices only after some success against the less defensible ones. Because the victims-of-crime reform movement is still in its infancy, the proposals pressed to date are, predictably, in the ideological mainstream. They don't pit the victims' interests or rights against those of the offender or the general community. Most of the popular proposals aren't even expensive to implement, and those that are call for adaptations of familiar governmental mechanisms. For example, the much-discussed forms of financial relief for medical or property losses suffered by needy crime victims are compulsory social insurance schemes that, however costly, are far from radical in their principles. The current recommendations for facilitating restitution are designed to prevent serious challenges to the traditional subordination of the demands of restitution to those of crime control. Perhaps some day reformist demands will require a reconsideration of whether that subordination should be a political absolute. But as things are, no rethinking of traditional moral and political

principles seems required for recognizing the inequities pervading governmental treatment of crime victims.

Yet the obvious reasonableness of the reformers' complaints makes their necessity only more remarkable. It is precisely because the reformist critiques seem so commonsensical that the prevalence and persistence of the injustices committed against crime victims are puzzling. Blatant inequities and irrationalities in this area are the norm, not the exception, and have been for ages; yet we are only now beginning to rectify or even recognize these conditions. Why is this?

The egregious practices appear utterly devoid of utility for anyone, burdening the victim while benefiting no one. They benefit neither the community in general, nor any special interest group, not even the criminal. And again, the victims bearing the burdens are, as often as not, respected members of the community, well-to-do, and not without political influence. Thus the familiar social and economic analyses that may plausibly explain other recurrent forms of injustice (e.g., in terms of class exploitation) seem incapable of accounting for the phenomena here.

Of course, the sheer persistence of these practices poses no great puzzle, because the hardships they impose are distributed in a haphazard fashion that does not foster the formation of an effective reform movement. Moreover crime victims share no commonalities to bring and hold them together in a movement. Such factors may suffice to explain any failures to overcome institutional inertia, but they are no help in explaining why the reform movement is arising and making headway now rather than fifty or a hundred years earlier or later, nor why the objectionable practices originated to begin with.

Most of the common practices—such as routinely subjecting victims to sitting with their assailants in small pretrial holding rooms, leaving victims unnotified of the progress of "their" case, and similar official and unofficial instances of inattention to crime victims' interest—may seem, when taken case by case, to be rather random arrangements, so arbitrary and alterable as to appear almost inexplicable. It is only when taken together that they seem

systematic. Yet, although still appearing to be without purpose, intent, or function, they seem symptomatic of some deep principles inherent in the system. They form a pattern of purposeless neglect that is consistent with—though not recommended by—the rationale sketched above for the basic structure of governmental priorities. Though this systemic neglect is not justified by the legitimate subordination of crime victims' interests to essential aims of governance, it may be explicable as a side effect of a process that promotes the arrogance of power.

Note that this systemic neglect occurs, not in every society, but peculiarly in the criminal justice systems of nation-states where conflict resolution is dominated by the state. In olden times, sovereigns provided civil courts to be used for an impartial and decisive settlement of disputes between private parties. Generally, the police power of the state was used only against threats to the sovereign, its agents, or the community as a whole. It dealt with treason, counterfeiting, smuggling, and assaults on officials, but not with assaults on private parties or thefts of their property. The latter were left to private arrangements. Eventually, as both a consequence and a cause of the augmentation of state power, the state assumed authority over the criminal acts against the persons and property within its territory. Aggrieved individuals and their sympathizers were denied the right of retaliative action and were permitted only to make a complaint to the sovereign. In the new order the state defines the class of crimes, authoritatively prohibits certain acts, requires all subjects to report such acts to it and supply it with all pertinent information, takes suspected offenders into its custody, determines their guilt in its courts, and controls the disposition of their fates. The victim is not an actor in these proceedings, except perhaps as a witness with no special standing. The procedures of the criminal justice system may be initiated by a victim's complaint or by the state itself, but in either case the state does not act as the servant of the victim. The victim is merely an entity illegally harmed, and as such he or she is inessential to the criminal process, for a state may criminalize actions having no victims. The state may confine its criminal prohibitions to acts that

(the state believes) are wrongful harms; but in any case, the state proceeds against an alleged violator, not on the grounds that he or she harmed some person (the victim), but rather on the grounds that he or she violated an authoritative prohibition (the state's law). Throughout the whole drama, from investigation to arrest to punishment, the only adversaries in the conflict are the state and its allegedly disobedient subject; the victim (if any) is an impotent spectator with, at most, a bit part as witness in the official drama prompted by his or her personal tragedy.

Given the structure and function of this legal system and the ethos it sustains, a systemic indifference to the crime victim's interests is an unintended outcome that needs only the natural tendencies of individuals operating a bureaucracy to become a virtual inevitability, resistible only by an aroused citizenry. Like bureaucrats everywhere, police officers, prosecutors, and judges are generally disposed to jealously guard their prerogatives, to aggrandize power, and to limit their concerns according to their agencies' priorities. When those general dispositions operate within the peculiar structure and ethos of our criminal justice system, they become tendencies to treat the crime victim either as a mere resource for the system's aims or else as an unwelcome intruder with no legitimate stake in the institutional processes. Some officials may, as individuals, sympathize with a victim's plight, but the internal logic of the system they work within provides few if any motives for respecting the victim's interests.

The state's preference for punishing violators over providing for the victim's needs may seem reminiscent of a predilection that many people have. For when victims are left alone to seek their own redress, they commonly behave rather like states, disposed to focus on fixing the assailant's wagon even at the cost of tending the victim's wounds. However, the rationale offered above for the state's preference presumes no predilection for vengefulness, nor any need for vindication. Such motivation may indeed operate in states as well as in their subjects, but in either case, their operation is evidence of, and is explained by, the character of the agent. Our rulers now relate to us through law, not through the personal

relations that kings and patriarchs once claimed (Weber, 1947; Wolff, 1950). With that depersonalization of the authority relation, the sovereign became less disposed to regard crime as insubordination, a personal affront that calls for punishment as a means of vengeance. This depersonalization of criminal law and its violations is, I suggest, a prerequisite for the state's recognition of the legitimate interests of the victim. But this precondition already was fulfilled a few centuries ago with the emergence of governments "of law, not of men," so it sheds little light on the lack of protest against the ill treatment of crime victims until the past few decades.

EXPLAINING REFORM HISTORY

The recency of the crime-victims reform movement still remains to be explained. Part of the puzzle here is an apparent lack of any alteration in our moral, political, or empirical beliefs, or in the corresponding realities, that coincided with and could explain the alteration in our attitudes toward the ancient defects in our legal systems. Another part of the puzzle is that our underlying attitudes here seem not to have changed at all. Prevalent attitudes regarding the rights of women, of African-Americans, of homosexuals, and so on have changed profoundly. So too, conceptions of the just deserts of the aggressor have altered over the past two centuries. However, none of these developments seems particularly relevant to conceptions of the deserts or entitlements of the victim. In fact, it's doubtful that we differ significantly from our predecessors (who never much pondered the legal plight of criminal victims) regarding the principles that make the current protests seem to us so reasonable; for example, the propriety of restitution by the wrongdoer to those she or he has wronged is hardly a new idea.

Certainly at least some of the current concern about crime victims comes from dovetailing with other causes of current interest. The clearest instance is the attention commanded by com-

plaints against police and prosecutorial insensitivities in the treatment of rape victims, which owes much to the momentum of the feminist movement. But such instances seem isolated and exceptional, and thus unlikely sources of strength of a generalized crime-victim movement. Indeed, that movement is already potent enough so that other causes are crowding themselves under its banner in hopes of gleaning some "gilt by association." A nice example here is the attempt by opponents of gun control to tuck themselves under the banner by opening it to cover potential crime victims and the means to preempt their becoming actual victims.

Another explanation claims that concern with the rights and interests of crime victims is a consequence or expression of the popular reaction against the recent legal recognition of an array of so-called rights of criminals (i.e., suspects, defendants, and prisoners). But that seems implausible if only because it's provincial: the current controversy over the rights of criminals is almost wholly confined to the United States, whereas American concern about crime victims has counterparts in other countries. Moreover the two issues involve quite independent principles, so champions of the rights of criminals feel no strain when championing the cause of crime victims, too. After all, the complaints made for crime victims are not against the criminal, but against the state's needlessly compounding crime victims' suffering. Nonetheless perhaps a concern about crime victims often does express some hostile overreaction against criminals and the "coddling" of them, just as some folks oppose gun control from what they conceive of as a concern about the interests of crime victims.

One last hypothesis merits consideration, even if it is mere speculation. Early on I mentioned the extraordinary expansion of the role of police departments from simple patrol and control of street crime to omnibus public service agencies. My sense of things is that, with police remaining rooted in the criminal justice system, this diffusion of their functions has effected a blurring of public conceptions and a dilution of old attitudes regarding the entire system of criminal justice, its laws, its procedures, its

officials, and our relation to them. Once, the system was symbolized by the judge, black-robed and on high, priestly and majestic, impersonal, unapproachable, master of the mysteries of the Law's contest with secular sin. Nowadays the system comes into our home and on the phone in the form of Officer Friendly and his less convivial colleagues. They're there to right a heinous wrong, referee a domestic wrangle, or relieve a granny's worries: it's all the same. Sure they can seem fearsome, but we don't think they are awesome. They're public Mr. Fixits, and there's nothing mysterious about them. And so it goes for the rest of the system they represent. The sanctity is gone from the hallowed halls of justice, and with it all presumption of propriety in our being humiliated by its procedures or officials when we've done nothing wrong. The justice system is now seen to be only another public service agency, there to serve our needs and interests, and answerable to us and our common sense when it proceeds toward its main goals (catching, convicting, and confining criminals) unmindful of our interests in matters tangential to the achievement of those goals.

Whatever truth there may be in this impressionistic explanation, it remains worth wondering what has prompted the protests against the mistreatment of crime victims, if only because the protests may be portents of things to come, the first signs of future alterations in our response to what we call crime.

NOTES

1. I call them "so-called" because what has frequently been at issue in the protest is whether, in what sense, and to what extent certain activities have a real "victim." Protests against the criminalization of abortion are a clear case.
2. Regrettably, although understandably, debates about the rights of criminal suspects, the rights of criminal defendants, and the rights of prisoners regularly lump all three together as "rights of criminals," despite the incoherence of that conception within a legal system premised on a presumption of innocence (i.e., noncriminality) persisting until proof of guilt by due process. In both their histories and their rationales, these different categories of rights show significant independence.

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