

# Victim compensation: a child of penal welfarism or carceral policies

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## **Abstract Swedish**

*Under efterkrigstiden förändrades många västerländska länders kriminalpolitik i riktning mot välfärd och rehabilitering. Detta ideal fokuserade gärningsmannen, inte brottsoffret. Detta skulle snart komma att förändras. En av de första initiativ som togs för brottsoffer var brottsskadeersättning, en ekonomisk kompensation som infördes på 1960-talet. Denna artikel jämför utvecklingen av brottsskadeersättning i två länder, USA och Sverige, i relation till deras välfärds- och kriminalpolitik. Båda länderna initierade kompensationsreformer för brottsoffer i välfärdsinstitutionella kontexter. Med stöd i en jämförande historisk fallstudiemetod visar artikeln dock att kompensationsreformerna i de två länderna skilde sig åt och kom att avspegla respektive lands välfärds- och kriminalpolitik. De första svenska kompensationsreformerna förankrades som en socialförsäkringsfråga, medan deras motsvarigheter i USA snabbt banade väg för mer straffinriktade program.*

## **Abstract English**

*In the post-war period, many Westernized countries advanced toward more rehabilitative and welfarist ideals informing crime policies. These ideals centered on the offending individual, not the victim. This was soon to change. Victim compensation programs were one of the first initiatives taken for victims of crime with the first established in the 1960s. This paper examines and compares the development of victim compensation programs in two countries with contrasting social welfare and penal policies, the United States and Sweden. Both countries developed victim compensation programs located within welfarist administrative institutions, suggesting common penal welfare frameworks and instruments. Using the comparative historical case study method, the study finds that formative*

*victim compensation policies in the two countries differed widely, reflecting social welfare versus remedial welfare policies, and rehabilitative versus punitive carceral frameworks, respectively. Arguments upholding penal welfarist ideals and social insurance concerns underlay the early formation of Sweden's victim compensation program and anchored subsequent developments while, in the United States, political conditions led to a rapid trajectory in more punitive directions.*

## **Introduction**

The victim rights movement, emerging in the United States in the mid-1970s and disseminating globally thereafter, has been recognized as a vehicle for the consolidation of pro-carceral sentiment and accompanying criminal legal policies (Elias, 1986; Gottschalk, 2006; Simon, 2007; Weed, 1998). However, the inception of the first crime victim-related policies took the form of victim compensation policies motivated more by social welfare concerns than their punitive merits. How then is victim compensation, birthed from welfarist ideals, related to the eventual and overarching association of victim rights with conservative, retributive crime policy?

This article examines the emergence of victim compensation in two distinct national contexts, the United States and Sweden, both known for their “exceptional” welfare and crime policies, each representing extremes. The comparison of early victim compensation policies in both contexts serves to more finely articulate distinctions in social welfare and carceral characteristics relevant to victim compensation policies but with more expansive implications. While social welfarist beginnings defined the first victim compensation policies in both national contexts, the juxtaposition of welfarist policies within a remedial welfare regime (United States) and a social democratic regime (Sweden) raises critical insights into differences in motivation, outcomes, and policy trajectories despite ostensibly similar policy origins. Furthermore, the intersection between welfare and crime policy regimes (see Gallo and Kim, 2016) represented by these two national contexts inform our understanding of divergent and convergent directions that follow these emergent victim compensation strategies.

Although the concept and practice of pecuniary or other forms of payment for harms committed date back to much earlier times (Elias, 1986), the contemporary version of victim compensation or restitution has its birth in the post-war development of the welfare state (Mawby & Walklate, 1994). Concomitantly, crime policy accompanying the developing welfare state in many countries advanced toward more rehabilitative and welfarist ideals. The improvement of economic

and social conditions as an important element of crime prevention and crime control defines what Garland (2001) refers to as penal welfarism. The penal welfare framework centered on the offending individual, not the victim (Garland, 2001). This was soon to change.

Victim compensation programs were one of the first initiatives taken for victims of crime with the first established in New Zealand in 1963, followed by England in 1964, and the United States in 1965. Victim compensation differed from restitution in that the state helped victims pay for expenses that result from crime. Restitution involves payments made by the offender to the victim. Margery Fry, a British penal reformer, put the idea of victim compensation forward in the 1950s. Motivated by social welfare concerns, she framed the victim not as a special category, but as comparable to victims of industrial accidents, deserving of state support due to needs resulting from the vicissitudes of life (Fry, 1957/1959). Fry was also moved by earlier forms of justice where families paid direct restitution for harms committed by their family members directly to the offended family. Restitution obviated the compulsion towards vengeance, providing a humanist ethical model that might inform contemporary policy (Weed, 1995). While more retributive voices participated in early discussions of victims as a newly emergent category of citizen, it was the welfarist and penal reform impulses of Fry that drove the first victim compensation policies.

The first victim compensation policy that initiated in the United States in 1965 in the state of California landed within the Department of Social Welfare as opposed to an institution of crime control. Political conditions then led to a rather rapid trajectory in more punitive directions. While Sweden's first victim compensation legislation was not introduced until 1971, the beginnings of its victim compensation policy date back to the 1940s. Arguments upholding penal welfarist ideals and social insurance concerns underlay the early formation of Sweden's victim compensation program and anchored subsequent developments.

### **Historical Case Study**

This study uses a comparative historical case study method (George & Bennett, 2005). It builds on legislative material connected to the first victim compensation programs in the two countries, including bills and government reports. It also turns to secondary literature, especially that explaining policy innovations contemporary at the time, to trace cross-national trajectories and policy distinctions. The comparative historical method presents a systematic approach for the analysis of two distinct but related case studies, taking advantage of the analytic benefit of two national context and, in this case, two time periods of initiation of a com-

mon policy, that is, victim compensation plans. This method allowed for a productive comparison of policy initiation through welfarist and penal frameworks, focusing on such factors as reason for initiation, administrative body, means-testing, attachment to criminal prosecution, and source of funding.

### **The United States: Remedial Social Welfare Beginnings and Early Carceral Ties**

In the U.S. context, victim compensation discussions entered a policy context embedded in a history of remedial welfare policies, defined by needs based programs for those determined to be deserving recipients. Nascent discussions of victim compensation policy took place in the 1950s during a time when penal welfarist concerns for offender rehabilitation still weighed heavily in the consideration of crime related policy (Garland, 2001). Its implementation, however, coincided with the emergence of punitive crime policies that increasingly centered victims, symbolically and concretely, as deserving citizens in contrast to vilified offenders.

The arguments of Fry were introduced in a U.S. roundtable in 1959 (Fry et al., 1957/1959). Fry's argument for state compensation as opposed to offender restitution gained substantial consideration in early discussions. By 1962, the U.S. Model Penal Code, which was designed by scholars, prosecutors, and defense lawyers to assist U.S. legislatures to update penal law listed restitution as one criterion for withholding sentence of imprisonment (Model Penal Code § 7.01). It was not until the passage of victim compensation laws in New Zealand in 1963 and England in 1964, that legal scholars and policymakers in the United States began to pay closer attention the arguments and proposals undergirding policy change abroad. The idea of a federal program was proposed by lawmakers as early as 1965 when Senator Yarborough began introducing a bill that would create a national compensation plan providing states with financial incentives to adopt similar programs (Elias, 1983).

Despite discussions for the implementation of national compensation policies, the enactment of such policies in the United States started at the state level. They were also initiated as crime related sentiments and policies shifted from penal welfarism to the punitive regime emerging in the 1960s and gaining rapid force in 1970s and decades to follow. The 1960s were characterized by conservative political reaction to the advances made during the civil rights period, marked by a turn to racially coded references to crime (Simon, 2007). Anxieties about unbridled defendant rights were being matched by the identification and elevation of innocent victims of violent crimes committed by strangers (Elias, 1986; Gott-

schalk, 2006; Simon, 2007). It is in this shifting political environment that the state of California enacted the nation's first crime compensation bill.

### **California victim compensation: The remedial nature of social welfare**

The first U.S. policy began in California, where victim compensation was initiated through the Department of Social Welfare in 1965 (Cal. Welfare & Inst'ns Code § 11211). Seemingly far from the debates of legal scholars, a letter written to a State Senator on April 1, 1965 recounted an unfortunate situation in which a 50-year old female victim of a purse snatching was burdened with her own medical bills. This letter initiated state legislation enacted within less than four months, by July 16th of that same year. The speed in which a hastily written bill moved through both houses of the state legislature virtually without debate spoke to emerging pro-victim sentiments. Its swift enactment was also facilitated by the ready availability of a Department of Social Welfare, already established to aid other "needy" individuals (Vaughn, 1979). Despite opposition from Department of Social Welfare personnel mystified by the vagueness of the bill and dismayed by the impossible task of its implementation, this policy, passed in 1964, establishing a legislative precedent.

Unconcerned with the rehabilitative effects on offenders, the California bill focused solely on the unmet needs of victims. State funds capped at \$100,000 were to be distributed under the guidelines already established by the Department of Social Welfare, that is, with a remedial means-tested criterion. The usual bar was slightly altered to favor indigent individuals even if they had some manner of property in the case of criminal victimization (Bernstein, 1972). In its original form, victims were eligible for compensation under the means-tested criterion already established by the Department of Social Welfare, that is, only married victims with dependent children could receive funds. Those who were "unmarried, childless married couples, elderly people or individuals unable to pass a public welfare needs test" (Bernstein, 1972, p. 97) were excluded as they did not meet the rigorous standards of poor relief. Public outcry in response to these restrictions forced an amendment which expanded the criteria to include single adults and adult dependents of victims. Those claimants who had property were subject to a reduction in compensation equivalent to the value of that property with individuals owning property valued at more than \$15,500 completely ineligible for compensation (Bernstein, 1972).

The means-test criteria served a further function. While restrictions were somewhat loosened from the stringent policies of the Department of Social Welfare, the retention of the means-test inhibited suggestions that victim compensati-

on was a right. The state was able to avoid full responsibility for the provision of victim compensation by legislating the funds as a means-test gift granted to those who had a financial need (Bernstein, 1972; Shank, 1970).

Efficiency with which funds were paid can be extrapolated from the statistics describing claims versus dispensation of funds. By the summer of 1969, there were a “total of 508 claims of which 70 had been allowed, 189 denied and 249 were still pending” (Shank, 1970, p. 91). Only \$68,344.91 had been paid out since the bill’s passage despite an already limited budget of \$100,000 allocated for the first year alone (Shank, 1970).

### **California victim compensation and offender restitution**

While public funds were appropriated to California’s victim compensation program, the bill also established an Indemnity Fund based upon fines paid by criminal offenders, not directly to the victim but to the state (Cal. Welfare & Inst’ns Code § 11211, Section 2). Hence, the state compensation as argued by Margery Fry and warnings against the punitive impact of offender restitution failed to take anchor in the funding aspect of California’s victim compensation legislation.

### **Amendment of 1967 and enhanced ties to the carceral state**

Two years later, in 1967, California Senate Bill (SB) 1057, the codified 1965 law, was amended with the passage of SB 563. Whereas the administration of the original victim compensation was held within the Department of Social Welfare, the office of the district attorney was given the role of informing victims of the availability of compensation as well as the paperwork necessary for filing such claims.

Notably, the amended bill also added the stipulation that the victim must also “cooperate with a state or local law enforcement agency in the apprehension and conviction of the criminal committing the crime,” (Cal. Gov’t Code § 13963) or risk ineligibility for compensation. Hence, victims were not only subject to remedial means-testing but were forced to participate as witnesses in criminal proceedings as a requirement for receiving compensation.

While California’s victim compensation bill represented the first legislation in the United States, several states followed suit. New York was the first state to adopt a victim compensation bill following California, fueled by public outrage over the murder of a “good Samaritan” in a subway station. The veteran who lost his life in the act of protecting a stranger was named as the “forgotten man,” prompting demands for public compensation for his widow and orphaned child. As public attention shifted to the victim of crime as a prioritized category of citi-

zen, the trope of the deprived “innocent” victim versus the coddled and overly-protected defendant increasingly articulated the binary framework that fueled the victim rights movement and the rise of pro-criminalization policies in the United States.

### **Sweden: Penal Welfarist Ideals and Social Insurance Concerns**

In the early 20th century, Sweden started a transformation from a poor rural country to a wealthy urban welfare state. Sweden would become known as a social-democratic welfare state, characterized by a strong belief in equality, social solidarity, and universal access to public services. In the construction of the Swedish welfare state in the 1940s and 1950s, crime was considered a social problem resulting from inequality and poverty. On an individual level, rehabilitation of the offender would become the ideal (Svensson & Gallo, 2018). The understanding of crime as a response to a social situation did not, however, focus on victims of crime; in fact, the word *brottsoffer* (crime victim) was not used in the Swedish language until the end of the 1960s (Gallo & Svensson, 2019).

The discussion around tort law also became influenced by ambitious social insurance strategies aiming to cover a broad range of social risks, including traffic, unemployment, and illness. Tort law was seen as one way of addressing damages in a system of comprehensive government welfare programs and private insurance. Many private insurance companies had started to offer a combination of separate insurance policies against, for instance, fire and burglary. Some proposals even outlined extensive reforms aiming to replace tort liability with social insurance (Heller, 1974; SOU 1950:16). In 1950, however, a commission appointed to review tort law argued that restitution in criminal cases could be a valuable crime policy measure, as it could prevent crime, serve as an alternative criminal sanction, and give the perpetrator insights into the causes and consequences of criminal behavior (SOU 1950:16). Yet, their report expressed doubts against government compensation funds for victims of crime if these same protections were not offered to victims of other social risks.

The 1950 report rejected the idea that criminal injuries compensation should be funded by fines “that entered into the state treasury due to offenses other than the one in question” (SOU 1950:16, p 84). It also highlighted the possible benefits of compensating for damages caused by persons in or discharged from prison, an idea already in the works. In the 1940s, a number of people submitted petitions to the Ministry of Social Affairs about damages caused by pupils who had deviated from state-run reformatory schools for delinquent youth. In response to these petitions, the government established so-called “escape schemes” which provided

compensation for injury and damage caused by persons who had escaped from prisons, reformatory schools, and alcohol rehabilitation centers (prop. 1948:87; SOU 1977:36). In the bill, the government argued that it was unreasonable that people living close to an institution would be at higher risk than others to be subjected by crime (prop. 1948:87, p. 3). The escape schemes were part of a broader strategy to reduce surveillance and facilitate more open forms of corrections. As reflected in the bill:

Another reason for reimbursement in the present case is that both prison and other forms of care seek more open forms of care with less compulsion and surveillance. Escapes will happen to some degree, but the inconveniences that arise are small compared to the benefits of an open system (prop. 1948:87, p. 3-4).

The government used the legal terms *målsägande* and *skadelidande* which both translate to *injured party* to describe those who had suffered damages. The Swedish terms for “crime victim” or “victim” still do not exist in the Swedish language Penal Code. Damages were referred to as “crimes”; however, the government also used other terms, including “inconveniences” as in the quote above. In fact, the damage did not even have to be caused by crime for compensation to be paid (SOU 1977:36). Crime victimization was hence seen as one among many other social risks which should be addressed with a social insurance strategy. The escape schemes were administered by the National Board of Health and Welfare and funded by taxes. If private insurance did not cover the damages, the state mostly granted full compensation without means testing (SOU 1977:36).

### **Means-tested criminal injuries compensation**

In the early 1970s, a new the Tort Liability Act (1972:207) came into force. The introduction of the act questioned preventative aims of restitution and instead emphasized its function of a compensation system (Mannelqvist, 2006). Many private home insurance policies had also begun to include *assault protection* (*överfallsskydd*) that compensated for damages that the offending people could not pay. There were, however, still gaps in the insurance coverage, especially in lower socio-economic areas. As a response to these discrepancies, the government established a new means-tested criminal injuries compensation scheme under the Ministry of Justice (prop. 1971/72:1). The 1972 scheme was primarily established for those who could not get compensation from the offender, social insurance, or private insurance, and the financial situation of the applicant should be considered. Compensation aimed at “socially harrowing needs,” including in-



come loss, medical and dental care” (prop. 1971/72:1, p. 15). A police report was required, and the victim was obligated to transfer the claims against offender to the state. However, the government stated that the state could only recover claims from offenders “in exceptional cases” (prop. 1971/72:1, p. 15).

Some referral bodies compared injuries caused by crime to other types of injuries and pointed out that other injured groups also could be compensated by public funds, for example, victims of accidents. However, the government now highlighted crime victims as a particularly needy group “because they often lack the opportunity to receive compensation from the person who caused the injury” (prop. 1971/72:1, p. 16). The government now used the word *brottsoffer* (*crime victim*) to describe those who suffered damages through crime in the bill.

### **Merger under the Ministry of Justice**

In the end of the 1970s, the welfare state was still strong, but social-democratic ideals were increasingly contested. Crime policy had also started to move away from rehabilitation and structural explanations of crime. Gallo and Svensson (2019) have argued that the idea of victims of crime as a group in need of support emerged and grew strong when the Swedish welfare state, society, politics, and organizational fields were going through substantial changes. In 1976, the social-democratic government lost the election to a center-right government after having dominated Swedish politics for almost half a decade. Two years later, in 1978, the center-right government proposed the first major reform for victims of crime – the 1978 Criminal Injuries Compensation Act (1978:413). The act retained welfarist characteristics but merged the escape schemes and the criminal injuries compensation scheme under the Ministry of Justice. Similar to the 1948 escape schemes, the government argued that criminal injuries compensation could “contribute to a positive attitude towards the more open and humane prison services” (prop. 1977/1978, p. 9).

Taxes funded the act, and restitution for victims of crime was seen as a state responsibility. The government explicitly stated that the state should exercise caution in requiring the tortfeasor (*skadevållare*) to pay back the money, since a large “compensation burden” could hinder his or her rehabilitation (prop. 1977/78:126, p. 9). The act required a police report. However, the bill underlined that, in some cases, the applicant may have reasonable grounds for not making a report, for example when the perpetrator and the injured party belonged to the same family (prop. 1977/78:126).

## Discussion

Both the United States and Sweden first located victim compensation within social welfare institutions. Hence, one could say that they were both children of penal welfarism. However, a closer comparison between the early development of victim compensation policies in the two countries reveals a wide difference in the articulation of social welfare motivations and outcomes and their ties to carceral policies.

*Table 1. Comparison of Victim Compensation Bills: United States (1965/1967) and Sweden (1971/1978)*

	<b>United States (California)</b>	<b>Sweden</b>
<b>Name of Policy</b>	Aid to families with dependent children (1965); indemnification of (needy) victims (1967)	Compensation for personal injury due to crime (1971); criminal injuries compensation (1978)
<b>Definition of Injury</b>	Crime is distinct from other social risks	Crime is considered a social risk
<b>Eligibility for Compensation</b>	Injury resulting in pecuniary loss as a direct result of a convicted violent crime; means-tested; tied eligibility to victim cooperation with apprehension and conviction	Means tested and police report (1971); injury resulting in a police report (or valid reason for such report not being made) (1978)
<b>Financing</b>	State taxes supplemented by Indemnity Fund (paid to state through offender restitution)	Taxes
<b>Person Receiving Compensation</b>	Victim or victim's family (1965); claimant (1967)	Crime victim and injured party
<b>Perpetrator of Crime</b>	Defendant	Tortfeasor
<b>Concerns with Regard to Victim</b>	Financial compensation for costs incurred due to injury or death	Solidarity with victims of crime; collective financial responsibility for their personal injuries
<b>Concerns with Regard to Perpetrator</b>	Financial restitution (to the state) for injury inflicted (in addition to incarceration)	Concern for rehabilitation (restitution seen as possibly inhibiting rehabilitation); support for open corrections

Reflective of the location of each national context within the welfare state continuum and that of crime policy (Gallo & Kim, 2016), the characteristics of each set of policies demonstrate the strength of Sweden's social welfare and penal welfare

foundations and the remedial nature of U.S. welfare policies. Within the context of a growing carceral state, U.S. victim compensation policies succumbed to punitive pressures.

In the United States, rising anxieties regarding crime emerging in the 1960s began to weaken penal welfarist frameworks that characterized the post-war period. Public sentiment favoring victims and wary of the rights of defendants were reflected in testimony and public statements accompanying the swift passage of California's 1965 bill (Bernstein, 1972). The belief that victims constitute a special deserving category as opposed to one whose needs arise from an array of social risks was reflected in the bill's swift passage if not its operationalization. California's victim compensation bill established a precedent that would soon be followed by 28 other U.S. programs by the end of the 1970s, introducing these plans during a time of increasingly punitive crime policies (Young & Stein, 2004).

Fundamental to early Swedish victim compensation policy was the belief that victimization to crime falls under the category of social risks, equivalent to the risks of accidents and natural disasters. Commitment to offender rehabilitation and open forms of correction was also evident in the development of victim compensation in Sweden. State support for victim compensation as a complement to offender restitution remained a foundation of Swedish policy.

### **Means-testing**

The California law placed the operations of victim compensation within a remedial social welfare framework and administrative body, one that began within severely restricted eligibility confined only to married couples with dependent children. Even with the expansion of eligibility, property prohibitions reflective of remedial U.S. welfare policies, sought to use this test as a way to reduce compensation. In Sweden, special compensation programs for victims were not seen as necessary, since various forms of universal social insurance provided compensation for losses, irrespective of the cause (Tham, Rönnerling, & Rytterbo, 2011). While Sweden's 1971 victim compensation law adopted a means-test for its beneficiaries, this was done in order to expand compensation coverage beyond those who could afford private insurance to victims who did not have access to any other means of compensation through social insurance. At this time, victims at the low end of the socioeconomic ladder were at the center stage of discussion. Sweden's 1978 act eliminated the means-test entirely; "crime victims", in general, had now become a group in need of state support.

### **Financial source of compensation**

The California victim compensation law immediately established an Indemnity Fund in which the rather paltry public funds would be expanded by fines paid by criminal offenders. The fines were not tied directly to compensation for harm inflicted on the victims of crime but funneled directly to the state. Swedish victim compensation throughout the 1940s under the “escape schemes” and under the 1971 and 1978 policies was funded through public funds. Compensation was seen as the state’s responsibility. Offender restitution was, in part, seen as detrimental to the country’s commitment to rehabilitation.

### **Carceral ties**

Most dramatically, California’s amendment in 1967 added the requirement for victims receiving compensation to actively participate in the arrest and conviction of the criminal who committed the crime. Hence, the ties of offenders were not only made to victim in terms of financial restitution; victims were tied directly to the punishment of offenders in the form of active participation in their apprehension and imprisonment. While Sweden, at least during the formative period of victim compensation remained the child of penal welfarism, the United States example demonstrated the already punitive nature of social welfare and the intimate ties to carceral expansion.

### **Conclusion**

Victim compensation was framed as a social welfare issue in the United States and Sweden but then moved to be a criminal justice matter in the 1960s and 1970s, respectively. Since then, victim compensation programs have spread rapidly around the world. In the 1980s, the first international instruments for victims of crime, developed by the organizations such as the United Nations and the Council of Europe, put forward compensation as a central concept. In both United States and Sweden, crime victim compensation has moved towards less welfarist and more punitive characteristics. Further historical developments in the United States reveal the increasing mobilization of victims as a central social actor and the victim rights movement as a vehicle towards policies of mass incarceration (Simon, 2007). In 1984, the federal Victims of Crime Act (VOCA) created the Crime Victim Fund made up entirely of federal criminal fines to support state victim compensation and local victim assistance programs. A selling feature of the bill was that it cost the public nothing, relying only on offenders whose restitution serve as just deserts for their crimes.

Future historical developments would also show evidence of Sweden's convergence towards a more punitive policy related to compensating victims of crime. Tort law has also clearly expanded into a more prominent role (Schutz, 2016). Similar to social insurance, criminal injuries compensation still relies on public funds (Mannelqvist, 2006b). However, the offending individual is now required to pay back the money to the state if possible. The government has also established an alternative stream of funding based on offender fees; the 1994 Crime Victim Fund supports research and non-profit organizations. Despite the move towards the penal sphere in Sweden, victim compensation still retained many of its welfarist characteristics. Hence, the development of victim compensation in both countries retain alignment with their respective welfare and penal frameworks.

These findings provide important empirical examples of the influence of both welfare and penal frameworks on a wide variety of social and crime policies. This comparative research also more specifically distinguishes political contexts and frameworks that might differentiate the policy consequences of seemingly similar policies. The research has further implications informing debates on convergence versus divergence of social welfare and penal policies between once widely contrasting regimes.

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