

COMPENSATION AND THE SOCIAL STRUCTURE OF MISFORTUNE

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This essay identifies social conditions associated with the compensatory style of conflict management, addresses variable aspects of compensation itself, and examines the modern trend toward a greater degree of compensatory liability of organizations for the misfortunes of individuals. Several propositions are discussed: Compensation is a direct function of groups and a curvilinear function of relational distance, and is greater in upward and group-directed cases than in downward and individual-directed cases. In addition, liability varies directly with social distance and is greater in group-directed than in individual-directed cases. The modern trend toward greater organizational liability appears to be a devolution toward a pattern of collective dependency characteristic of earlier societies before the decline of kinship.

Compensation is a style of conflict management in which a grievance is handled by a payment to the aggrieved.¹ The following discussion introduces and elaborates the sociological theory of this phenomenon. It concludes with an application of the theory to the evolution of compensation, including its explosive growth in modern societies such as the United States.

I. COMPENSATION AS A DEPENDENT VARIABLE

Compensation falls within the jurisdiction of a field of sociological inquiry ultimately concerned with the prediction and

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¹ This might be called compulsory or involuntary compensation to distinguish it from payments made on a voluntary or contractual basis, such as compensation for labor by an employer or for unemployment by a government. The distinction between compulsory and voluntary compensation is not always easily drawn or even important, however, and the voluntary form does not lie entirely beyond the scope of this discussion.

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explanation of conflict management of every kind (see, generally, Black, 1984c and 1987a, for overviews of this subject). It is one of several major styles in which particular grievances are handled. Each has its own language and logic, including its own standards, questions, and solutions (see Black, 1976: 4–6; 1984b: 812; see also Horwitz, 1982: 122–127).

A. Styles of Conflict Management

The penal style of conflict management speaks in a language of prohibitions, violations, guilt, and retribution. Illustrated in modern law by criminal justice, it focuses on conduct and punishes those who violate its prohibitions. The conciliatory style focuses on relationships and seeks to restore harmony between those in conflict. It is seen in the mediation of marital, industrial, and international conflict. The therapeutic style focuses on persons who suffer from abnormalities and seeks to help them. Modern psychiatry is an example of this. In contrast to these, the compensatory style of conflict management focuses primarily upon the consequences of conduct rather than upon the conduct itself, the relationship it might disrupt, or the person who is its agent. It speaks of obligations, damages, debts, and restitution. It examines the misfortune of a particular victim and addresses the question of who, if anyone, should provide a remedy. An example is the modern law of accidental injuries.

Although each style of conflict management may seem a natural, even automatic reaction to the problem it addresses in contemporary life, cross-cultural and historical evidence indicates that this is far from true. What is compensated in one setting is punished in another; in a third, the restoration of social harmony takes priority, while in still another the problem is defined as spiritual possession or mental illness. Consider violence.

In a modern society such as the United States, violence is often regarded as criminal and worthy of punishment, but it might also result in mediation to repair the relationship involved, psychotherapy to treat a “violent personality,” or a civil lawsuit to obtain compensatory damages. Variation in the response to violence across societies and history is even more dramatic. Although a killing will bring punishment or retaliation by the victim’s family in many societies, in others compensation is a common response (for examples of the latter, see Howell, 1954; Lewis, 1959; Gulliver, 1963; Jones, 1974; Koch, 1974). But everywhere there are exceptions. Among the Bedouin of Cyre-

naica in Libya, for instance, killings are frequently compensated with a payment of camels (Peters, 1967). When a killing occurs between people widely separated in social space, however, feuding or warfare is likely to result (*ibid.*, pp. 267–269). On the other hand, a killing between people in the same camp is endured as a misfortune that cannot be remedied: The killer (scorned as one who “defecates in the tent”) typically goes into temporary exile (*ibid.*, pp. 263–264). If the victim is a close relative of the killer, the latter is regarded as “out of his mind,” for the offense is otherwise inconceivable (*ibid.*, p. 272). If a man kills his father, this too is inconceivable and proves that the killer is not really the victim’s son: The killer must therefore be illegitimate, and his mother is condemned as an adulteress (*ibid.*, p. 275). But if a woman is killed under any circumstances, the death is always regarded as accidental, since a man would never do such a thing intentionally (*ibid.*, p. 270).

One finds similar practices elsewhere. The Lugbara of Uganda, for instance, consider it unthinkable that a man would deliberately kill his brother, and when this happens they demand neither revenge nor blood money. Other killings within the clan might require a payment of cattle to the survivor’s immediate family. But those beyond the clan call for violent retaliation, sometimes (when the killer is especially distant) accompanied by mutilation and cannibalizing of the person killed in revenge (Middleton, 1965: 51–52). Among the Jalé of New Guinea, a killing across a great distance in social space may also involve cannibalism (“People whose face is known should not be eaten” [Koch, 1974: 80]), whereas others bring only simple vengeance against the killer or one of his relatives, seizure of a pig from the killer’s family, or payment of a “guilt pig” by the killer’s to the victim’s family (*ibid.*, chap. 3). Illustrations of variation abound in anthropological literature.

Since none of the styles of conflict management seems to be inherently associated with particular grievances, why a given style is used in any situation is an empirical question requiring explanation. Moreover, each style is itself highly variable. In compensation, the amount demanded and given from one instance of misfortune to another varies, as does the system of liability specifying who must make such a payment to whom and the process by which the payment is reckoned and collected.

B. Dimensions of Compensation

One life or limb is worth more than another. Herding societies, for example, reckon a man’s life is worth twice as much

as a woman's (see, e.g., Hasluck, 1954: 239; Lewis, 1959: 277; 1961: 163; Peters, 1967: 270). Slave societies value a freeman's life more than a slave's (see, e.g., Wiedemann, 1981: 174; Patterson, 1982: 194–195). In tribal Europe, the value of a man's life increased with his rank (see, e.g., Maitland, [1881] 1911: 213–214; Pollock and Maitland, [1898] 1968, vol. 1: 47–48). In modern America, civil courts reckon the value of a person's life according to earning power.

The degree of liability, or the extent to which a person or group is accountable for the misfortune of another, varies as well (cf. Cooney, 1987: chap. 2).² In a compensatory context, liability entails a debt, and its extent depends upon the conditions creating such a debt. At one extreme, it is limited to a specific category of misfortune inflicted upon one party by another in a specific manner with a specific subjective orientation (such as a physical injury inflicted by a careless driver). At the other extreme, liability is literally unconditional, since it arises from any misfortune whatsoever befalling anyone at all. The Anglo-American legal tradition extends the range of compensatory liability to include intentional injuries of various kinds (such as civil assault), unintentional injuries resulting from negligence (such as an injury suffered in an accident involving a lack of reasonable care), injuries simply caused by a particular party (such as an injury involving a defective product), and injuries merely associated with a particular party (such as an injury involving a product that is not defective). Liability thus may depend upon both conduct and subjectivity, conduct alone, or neither conduct nor subjectivity. Liability requiring both injurious conduct and a particular state of mind has been called relative liability (Koch, 1984: 98), that requiring injurious conduct alone is referred to as strict liability (see, e.g., Lieberman, 1981: 40–42), and that requiring mere association is known as absolute liability (see, e.g., *ibid.*, pp. 42, 47). The key difference between strict and absolute liability is that in the former an obligation has allegedly not been fulfilled whereas in the latter no such allegation is made. In neither, however, is the subjectivity of the allegedly liable party regarded as relevant.

In simple societies, compensation may be demanded and paid when the liable party seems to a modern observer to be only remotely related to the misfortune in question. The Jalé of New Guinea, for example, hold a man's clan liable for the death of his wife during childbirth. Compensation is then owed

² The concept of "accountable" here is not intended to imply a claim of causation, fault, or blameworthiness on the part of the liable party.

the woman's family because she would not have died unless her husband had impregnated her: "She died by his penis" (Koch, 1974: 88). If a Jalé man is invited to go hunting and suffers a fatal fall or other misfortune, the clan of the man who proposed the trip must pay a "guilt pig" to the dead man's relatives (*ibid.*). Similarly, among the Tlingit Indians of the Northwest Coast of North America, "if a man was injured or accidentally killed while out hunting with the members of another clan, this clan would have to compensate the dead or injured man's clan by a payment of goods" (Oberg, 1934: 150). The Ifugao of the Philippines hold the givers of certain feasts liable for compensation if any guests are injured or killed during the occasion, accidentally or otherwise. Had there been no feast, they reason, the misfortune would not have occurred (Barton, [1919] 1969: 72–73). Among the Yurok Indians of California, a man who falls ill might accuse someone (such as a known enemy) of bewitching him, and demand and receive compensation from the alleged witch's family (Kroeber, 1925: 37). And one who asks another to ferry him across a river becomes liable for damages if the boat owner's house burns down during his absence, for had he been home, he might have saved his house (*ibid.*, p. 35). Much the same standard of compensatory liability occurs in post-tribal societies such as medieval England and the Arab nations adhering to traditional Islamic law (see, for example, Pollock and Maitland, [1898] 1968, vol. 2: 170–171; Black, 1987b). In contrast, the Carib Indians of Guyana totally excuse all accidental injuries, including those involving negligence, on the grounds that they are supernaturally caused by the violation of a taboo (Gillin, 1934: 337). These illustrations are not meant to suggest that tribal and earlier people have no understanding of issues such as causation, intention, or fault.³ Rather, the point is that the application of these notions cannot be taken for granted but requires explanation.⁴

The administration of compensation is also variable. It is not the exclusive responsibility of courts and judges, as a mod-

³ Compare Maitland's assertion of "the utter incompetence of ancient law to take note of the mental elements of crime" ([1883] 1911: 327).

⁴ Who receives the compensation for an injury is variable as well. In the case of a killing, for example, the payment might be made to a surviving spouse or nuclear family, shared with a larger group such as a clan (see, e.g., Lewis, 1959: 284–286; Jones, 1974: 69), or disallowed on the ground that the victim is not available to claim it (e.g., Lieberman, 1981: 38). In some African tribes, such as the Zulu, every man "belongs to the king," and compensation for any killing is always paid to him. The king may, however, give something to the deceased's family "out of generosity" (Gluckman, [1965] 1972: 212). For an overview of compensation in tribal societies, see Nader and Combs-Schilling (1977).

ern reader might suppose. In fact, in cross-cultural and historical perspective, a trilateral process in which two adversaries argue their case before a formal tribunal is unusual. Many societies are stateless and have no courts or judges at all, yet they include highly developed compensatory procedures. (This applies to all of the tribal societies cited earlier.) Instead, in such societies compensation is commonly negotiated bilaterally by the principals or their representatives. It also may occur unilaterally, by a voluntary payment to the victim or a seizure of property. For that matter, modern lawyers and citizens negotiate vastly more payments of compensation than are ordered by courts (see, e.g., Macaulay, 1963; Ross, 1970; Trubek *et al.*, 1983: S-19, S-23). Unilateral compensation also occurs in today's society. If examined closely, for instance, a significant amount of property crime such as embezzlement, employee pilfering, and even burglary is compensatory self-help by people taking what they regard as rightfully theirs (see Black, 1983: 37; Tucker, forthcoming).

II. THE THEORY OF COMPENSATION

The sociological theory of compensation addresses the social conditions under which the compensatory style of conflict management occurs. It also addresses the variable aspects of compensation itself.

A. *Style and Societal Structure*

The classical point of departure in the theoretical discussion of compensation is Emile Durkheim's *Division of Labor* ([1893] 1964). He proposed that the compensatory style is directly related to the degree of interdependence in society.⁵ Since over time societies tend to exhibit an ever greater division of labor, which implies interdependence, compensation becomes increasingly prominent, progressively displacing the penal style of conflict management. Durkheim's formulation does not entirely withstand a test of the facts (see, e.g., Diamond, 1957; Schwartz and Miller, 1964; Spitzer, 1975),⁶ but it does illustrate a sociological approach to this subject.

⁵ Durkheim speaks of compensation as an application of "restitutive sanctions" and of interdependence as "organic solidarity."

⁶ For example, the societies with the least interdependence—those of hunters and gatherers—generally have little or no compensation or punishment of the sort associated with criminal justice. Of the two, moreover, compensation seems to appear at an earlier stage of societal development.

Durkheim's formulation applies more convincingly to recent legal evolution: Modern societies do seem to have more compensation than the ancient civilizations to which he often refers.

Later investigators have proposed other conditions associated with compensation. Posner (1980: 43) suggests, for example, that it appears only in societies that enjoy a degree of surplus wealth (see also Rohrl, 1984: 198–199). Accordingly, he (1980: 43) attributes the evolutionary drift from a vengeance-dominated system of social control to one increasingly compensatory

not to . . . diminishing bloodthirstiness . . . but simply to growing wealth. A system of compensation will not work unless injurers and their kin have a sufficient stock of goods in excess of their subsistence needs to be able to pay compensation for the injuries they inflict on others.

But Posner's analysis fails to recognize that people without surplus resources can perform labor or other services to compensate their victims. The Yurok Indians, for instance, had a system of slavery based completely on debts of this kind (Kroeber, 1925: 32–33). Moreover, Posner's proposition cannot explain why vengeance and warfare play a large role in many tribal societies and in international relations despite abundant resources available for compensatory purposes. The acceptance of compensation may even be viewed as "cowardly and dishonorable" (Black, 1984b: 10). For example, the Ifugao of the Philippines, who routinely accept compensation for injuries, prefer vengeance in some cases: "No Ifugao would dream of taking a payment for the deliberate or intentional murder of a kinsman. He would be universally condemned if he did so" (Barton, [1919] 1969: 9). The Kabyles of Algeria hold in contempt anyone who accepts compensation for a killing that dishonors the victim: "He is a man who has agreed to eat the blood of his brother; for him, only his stomach counts" (Bourdieu, 1966: 216). Among the Swat Pathan of Pakistan, compensation for homicide "would further emphasize the superiority of the murderers," and only those without social standing will generally accept it in lieu of revenge (Barth, 1959: 85). Finnish Gypsies do not compensate homicide either, but prefer retaliation or, more often, mutual avoidance by the kin groups involved (Grönfors, 1986: 107–121).

Various societal characteristics are associated with compensation. In a cross-cultural study of reactions to homicide, Cooney (1987: chap. 3) found that compensation is more frequent in relatively developed societies, such as those with a written language, social classes, a state, law, and courts. On the other hand, he uncovered no relationship between compensation for homicide and the use of metal currency, the structure

of the economy, the fixity of residence, the size of local communities, the population density, the fluidity of social relations, the degree of occupational specialization, or the homicide rate itself.

Another societal characteristic that is associated with compensation is organization, or the capacity for collective action (see Black, 1976: chap. 5). Apart from a state structure that organizes society, which was noted by Cooney, compensation is simply more likely among groups than among individuals. The mere presence of groups apparently has this consequence, apart from the issue of who allegedly injures whom (which is addressed in the next section). Thus, tribal societies with highly articulated and structurally interchangeable kinship groups, including those known in anthropology as "segmentary" (see, e.g., Service, 1971: 116–118), seem to have the most compensation. Moreover, it is demanded and given in the name of the groups as such. Examples cited earlier include the Bedouin, Lugbara, Jalé, and Ifugao. More individualistic societies, such as the Eskimo of the Arctic, the Yanomamö of Venezuela and Brazil, the Hadza of Tanzania, and the Tausug of the Philippines, have vastly less compensation (see, respectively, Balikci, 1970: chap. 9; Chagnon, 1977; Woodburn, 1979; Kiefer, 1972).⁷

During the past century, compensation has become an increasingly common mode of conflict management in modern societies. Organizations have proliferated to a degree never before seen, and are often involved in conflicts in which compensation is demanded. But regardless of who participates in the cases—organizations or individuals—the sheer number of organizations and other groups in itself seems to nourish the compensatory style. So arises our first proposition: *Compensation is a direct function of groups.*

Now consider the cases.

B. *Style and Case Structure*

Compensation is associated with the social structure of particular cases: Who has a grievance against whom? What, for example, is the degree of intimacy between them? Are they members of the same family, mere acquaintances, or strangers?

⁷ Various Indians of North America may be exceptions. Compensation was apparently offered and accepted with some frequency among highly individualistic Plains Indians such as the Comanche and Cheyenne (see Hoebel, 1954: chap. 7), for example, although they sometimes contemptuously rejected it as a bribe (see, e.g., Llewellyn and Hoebel, 1941: 135). The Yurok of California were quite individualistic as well, and yet they too practiced compensation (Kroeber, 1925: chap. 2).

In his cross-cultural study, Cooney (1987: chap. 3) found that compensation for homicide occurs less at the extremes of intimacy, between those who are extremely close or extremely distant. He proposes this pattern as a general characteristic of compensation (see also Gluckman, [1965] 1972: 206). A compensatory payment is less likely when an injury occurs between close kin or between members of different tribes or nations. Among the Nuer of Sudan, for instance:

The killing of a stranger, especially of a foreigner, who does not come within the most expanded form of the social structure, is not really wrong (*duer*) at all. . . . The killing of a fellow tribesman, and to a much lesser extent a fellow Nuer of another tribe who is within the orbit of the killer's social sphere, is a wrong because it is an offense against the stability of society in its most extended form. But it is a private delict and not a crime, and demands only retaliation or restitution. The closer the relationship between the component tribal segments involved, the greater the sanction for restitution. . . . Finally, in the narrowest definition of blood-relationship, where kinship is a reality and not merely a fictional social form—that is, within the lineage or the extended family group—restitution becomes less and less necessary because the persons who assist in the payment of compensation are also the recipients. [Thus] a man does not pay compensation at all if he kills his own wife—a rare occurrence—for he would have to pay it to himself (Howell, 1954: 207–208, 57–58; see also Scott, 1976).

Similarly, among the Lugbara of Uganda, “beyond the major lineage and section no blood money is payable,” but “if a fight within the same major lineage leads to death the killer gives compensation of two bulls and two cows to the victim's sons.” When this happens between those still closer, within the minimal lineage, “it is a sin for which there is no humanly awarded punishment” (Middleton, 1965: 51). The Ifugao pay compensation in cases between but never within families: “A family cannot proceed against itself” (Barton, [1919] 1969: 8 [italics omitted]). In modern life, compensation is often paid when injuries occur within the same society but is less likely between members of different societies. At the other extreme, courts generally do not allow compensation when the parties are very closely related, such as members of the same household, and under these conditions it is rarely demanded anyway. Even people who are friends or residents of close-knit communities are reluctant to ask each other for these payments (see, e.g., Engel, 1984; Ellickson, 1986). In other words, compensation is most likely to appear across intermediate distances in social

space. More precisely, *compensation is a curvilinear function of relational distance* (Cooney, 1987: chap. 3).

The social status⁸ of the principals also seems relevant to the use of compensation. In particular, a case against a social superior of the aggrieved, or an upward case, appears more likely to be handled in the compensatory style than a case against a social inferior, or a downward case. Modern law illustrates this: Downward grievances are commonly prosecuted as criminal cases, whereas upward grievances are rarely prosecuted but instead typically entail a demand for compensatory damages, whether because of negligence, malpractice, breach of contract, failure to abide by administrative regulations, or the like. Status superiors often unilaterally mollify their victims by giving them money or other valuables—even masters are known to have compensated their slaves after injuring them (see, e.g., Wiedemann, 1981: 180–181)—and in other cases the aggrieved inferior appropriates some of the superior’s property, usually covertly, a practice that has been common among peasants, servants, and slaves throughout history (Baumgartner, 1984: 309–310). The more compensatory character of upward than downward cases does not merely reflect the greater resources of social superiors but may also be associated with a reluctance on the part of social superiors to accept payment in lieu of other forms of justice (illustrated above by the Swat Pathan view of compensation as humiliating to the recipient). In any event, the available evidence indicates the following: *Upward cases are more compensatory than downward cases* (see Black, 1976: 29).⁹

Another variable is organization: *Cases against groups are more compensatory than cases against individuals* (see *ibid.*, p. 98). In tribal societies, it is virtually always a group—usually a kinship group—that is asked for compensation. In modern societies, groups, particularly business organizations, are often sued

⁸ “Social status” is used here as a composite concept measurable by the principal’s wealth, degree of integration into society (by employment, range of social ties, parenthood, and the like), cultural conventionality and virtuosity, and respectability (see the various types of status treated separately in Black, 1976: chaps. 2–6).

⁹ The use of compensation seems also to vary directly with the social status of the liable party and inversely with the social status of the aggrieved party (see Black, 1976: 29). This means that its likelihood increases with the steepness of the gradient of upward cases and decreases with that of downward cases.

The reader should be aware that upward social control is relatively infrequent and lenient (see, e.g., Black, 1976: 21–24, 35–36; but see Baumgartner, 1984). The point here is that rare though it may be, upward social control is especially likely to be compensatory. A similar pattern applies to the relationship between organization and social control (see n. 19 below).

for compensatory damages. In fact, this seems to be all that people normally want from the organizations they claim have victimized them. In the United States, for example, self-described victims of consumer fraud rarely demand punishment of the business organization involved; all they typically want is a financial settlement (Steele, 1975: 1138). Criminal cases in general are rarely brought against groups. An even more extreme illustration is legal action against governments. Apart from court orders such as injunctions, the usual claimant demands only compensation. Governments are rarely asked to pay punitive damages or to suffer other penalties. The punishment of governments occurs almost exclusively in international relations, when one nation uses violence against another.

C. Liability and Case Structure

It would be impossible to explore here all the variable aspects of compensation itself. Instead, let us consider only the system of liability,¹⁰ since this will be pertinent to our closing speculations.

Recall that liability is a matter of degree. In the compensatory framework, it is defined by the conditions under which one party's misfortune requires payment by another. The broader these conditions are, the greater is the liability, and in this sense liability is a quantitative variable. As noted earlier, various degrees of liability can be collapsed into several categories: Relative liability arises from both injurious conduct and subjectivity of a particular kind, strict liability arises from injurious conduct alone, and absolute liability arises independently of both injurious conduct and subjectivity. The theory of compensation addresses the social conditions associated with each of these levels of liability. Since systems of liability appear to vary independently of styles of conflict management, however, this discussion addresses a general theory of the subject, not merely compensatory liability. In addition to patterns of compensation, patterns of vengeance and punishment are therefore mentioned to illustrate propositions about the distribution of liability.

Again social distance is a critical factor. Gluckman ([1965] 1972: 231) was the first to make this observation: "The less close the relationship . . . , the more absolute the liability, and the less the regard paid to intention." He refers specifically to how the degree of intimacy between the principals is related to

¹⁰ For a discussion of the relationship between liability and societal structure, see Koch (1984).

liability, and offers a number of examples from the anthropological literature. Cooney's (1987: chap. 3) cross-cultural study also documents this pattern. As relational distance increases, not only does the subjective orientation of the party allegedly responsible for an injury lose importance, but so does the question of responsibility itself. Liability sometimes arises from nothing more than a lack of intimacy with a victim of misfortune, possibly combined with a social connection to the person or group actually responsible. This is illustrated by the phenomenon of collective liability, often seen in tribal and international settings, where everyone in a group becomes liable because of the conduct of a fellow member (see, e.g., Moore, 1972; Koch, 1984).¹¹ The Kwakiutl Indians of the Northwest Coast, for example, may take vengeance for a death by illness or accident involving no human agent at all, and liability in these cases always attaches to outsiders such as members of another tribe or village. In one case, several relatives of a Kwakiutl chief accidentally drowned during a canoe trip, whereupon his fellow tribesmen attacked and killed eight sleeping Sanetch Indians to "let someone else wail" (Codere, 1950: 102, 117).

Liability apparently increases not merely with relational distance but also with other kinds of social distance, such as status and cultural differences. Slaves and modern children may be held strictly or absolutely liable for damage to property (see, e.g., Piaget, ([1932] 1965): 133–134; Wiedemann, 1981: 176),¹² for instance, even when they are very close relationally to those who demand redress. In the slaveholding states of nineteenth-century America, the death of a white person by natural causes was sometimes attributed to poisoning by a slave. As one Kentucky observer commented, "Every disease at all obscure and uncommon in its symptoms and fatal in its termination is im-

¹¹ Vengeance seems to occur when the relational distance between people is both greater and narrower than when compensation is characteristically paid. While compensation is a curvilinear function of relational distance, then, as noted earlier, vengeance appears to be a U-curvilinear function of the same variable (cf. Rieder, 1984: 145–146; see also Black, 1987a: 3–9).

Compensation and vengeance also seem to be kindred phenomena in some respects. Both involve a logic of reciprocity or exchange, for example, and both often appear as major remedies within the same society (see, e.g., Hasluck, 1954; Howell, 1954; Barth, 1959; Peters, 1967; see also Warner, 1958: 162, who speaks of vengeance as "negative reciprocation"; Gouldner, 1960; Sahlin, 1965: 148–149, 176; Rohrl, 1984: 193–194). In his cross-cultural study, Cooney (1987: chap. 3) found that virtually all societies with compensation for homicide have vengeance as well, although many others have vengeance but not compensation.

¹² Very young children are generally not held liable at all. Instead, those in charge of them may be accountable for their damage, much as people are held liable for damage caused by their pets or livestock.

mediately decided to be a case of negro-poison' ” (quoted in Wyatt-Brown, 1982: 424).¹³ Also instructive is that when a man of very high status is caught stealing among the Tlingit Indians, he is assumed to have been bewitched by someone of lower status, often a slave, who is thereupon executed (Oberg, 1934: 149, 155). The relevance of cultural distance is illustrated by cases in which members of different tribes, nations, or ethnic groups hold one another's members collectively liable for injuries committed by their fellows. So-called terrorism is one example. To include other kinds of social separation in our formulation, then, we might restate Gluckman's proposition as follows: *Liability varies directly with social distance*.¹⁴

Liability is also associated with organization. Strict and absolute standards of liability are more often applied to collectivities than to individuals. Evidence from Cooney's survey of societies (1987: chap. 2) shows that there is less concern with the subjectivity of the liable party in cases of homicide between groups than between individuals, and he proposes that this expresses a general principle of social control. In modern societies, grievances between groups such as business organizations as well as those by individuals against groups are associated with a broader conception of liability. Tort cases involving a standard of strict liability, such as recent American lawsuits dealing with defective products, are directed against organizations in virtually all instances (see Lieberman, 1981: 40–47). In many of these, the organization's liability may even appear to be absolute, since it may not seem causally connected to the

¹³ Often the slave accused of a poisoning was a healer who had given the deceased a medical potion of some kind, so it might be argued that the healer was held strictly or absolutely liable for the death of the patient. But simply because the evidence in a case appears extremely weak to an observer does not mean that a strict or absolute standard of liability was applied. Since criminal intent appears to have been attributed to the accused slave in all of these cases, they are more appropriately classified as instances of relative liability, albeit with a broad standard of evidence.

¹⁴ Cooney (1987: chap. 3) speculates that the relational dimension of social distance may have a relevance not considered by Gluckman. Drawing upon diverse materials indicating an inverse relationship between the intimacy of a group and its concern with human motivation and subjectivity generally (particularly Horwitz, 1984: 219–220), Cooney proposes that the relational location of a victim may be associated with the extent to which the subjectivity of the allegedly liable party is regarded as important: The greater the degree of intimacy of the victim's group, he suggests, the less concern with the alleged offender's subjectivity will be expressed.

If the victim's social embeddedness is regarded as a kind of integration into social life, however, such a pattern might indicate that the social status of the victim is associated with the degree of liability that issues from a misfortune: The higher the status, perhaps, the greater the liability. It also seems plausible that the social status of the allegedly liable party would be inversely related to the degree of this liability. These matters await further study.

misfortune in question (for examples, see the list of cases in the next section of this article). Nevertheless, in each instance some kind of injurious conduct is attributed to the organizational defendant. Absolute liability is, however, institutionalized in American programs such as workmen's compensation (which makes the employer liable for all job-related injuries), the no-fault system of automobile insurance (which makes insurance companies liable without regard to the negligence of the drivers involved), and victim compensation in criminal cases (which makes states liable for losses suffered at the hands of offenders whose identities may be unknown). All of this suggests the following proposition: *The liability of groups is greater than the liability of individuals.*¹⁵

In summary, the mission of the sociological theory of compensation is to identify the social conditions associated with the compensatory style of conflict management and with its variable characteristics, such as the amount of compensation demanded and paid, the system of liability applied, and the process by which it is administered.¹⁶ Durkheim's early theory of compensation as an expression of the division of labor has stimulated a search for other factors. Scattered evidence indicates that compensation increases with the number of groups in society and that it is more likely at intermediate distances in social space, in response to upward rather than downward cases, and to group-directed rather than individual-directed cases. The standard of liability also appears to broaden with social distance and against groups. To assess the validity of these propositions would require more evidence. Even so, it is clear that compensation is not inherently associated with particular kinds of misfortune but rather varies with the social structure of each case. The history of compensation will therefore reflect the changing context in which misfortune is experienced.

III. THE EVOLUTION OF COMPENSATION

We can now apply the formulations introduced above to a recent trend in modern society: the increasing compensatory liability of organizations for the misfortunes of individuals. This

¹⁵ It seems likely that liability increases with the degree of organization as well. Large organizations such as major corporations appear to be held to a broader standard of liability than lesser organizations such as small businesses.

¹⁶ Ultimately, a general theory of compensation will also address the conditions associated with voluntary compensation of all kinds. In fact, significant

has been especially noticeable in cases filed and decided in the civil courts of the United States, where organizations are being held to an ever broader standard of liability. The first stage of this development applied a new standard of strict liability to an organization causing harm to an individual, but now a standard of absolute liability seems to be evolving as well (see Lieberman, 1981: 40–47; Malott, 1985). An organization's mere association with an individual's misfortune increasingly leads to demands for compensation. Conceptions of causation and fault continue to be applied, but they grow ever broader. A few recent lawsuits illustrate this trend:

A man tried to commit suicide by jumping in front of a subway train. He subsequently sued the city's transit authority, arguing that the train's operator had not stopped it fast enough. He received a \$650,000 settlement.

A man had a heart attack while trying to start a lawn mower. A jury ordered the lawn mower company to pay him \$1.75 million.

One man shot another with a gun. A court ruled that the manufacturer of the gun was liable.

A man was injured when a drunk driver crashed into a telephone booth. A judge ruled that the company that designed the telephone booth was liable.

A man was robbed and killed on a street near his hotel. His family successfully sued the hotel and the city in which it is located.

A man was killed by the hijackers of the cruise ship on which he was a passenger. His wife sued not only the political organization allegedly associated with the hijacking but also the cruise ship company and the travel agency that issued her husband's ticket.¹⁷

continuities between voluntary and compulsory compensation will probably come to light. Voluntary compensation for labor, for example, is apparently more likely to be given across intermediate distances in social space (rather than, say, within families or friendships), downwardly in status structures, and by groups rather than individuals—conditions that also seem to attract compulsory compensation.

¹⁷ These cases are not meant to be representative of modern lawsuits but only to illustrate the extremes to which the trend toward a broader standard of compensatory liability of organizations has advanced. The ultimate resolution of these cases does not matter for these purposes. The mere fact that they were filed is historically unprecedented and sociologically important.

Cases of this sort are commonly cited to support a general claim that a litigation explosion is occurring in modern America. No such claim is intended here. For critiques of the litigation explosion thesis, see Galanter (1983) and Black (1984a). On the other hand, the present century has clearly seen a significant increase in negligence claims and the size of damage awards in negligence cases (see, e.g., Friedman and Percival, 1976: 281–283; Friedman, 1980: 664–665).

A. *The Devolution of Liability*

Viewed in evolutionary perspective, the tendency to hold organizations strictly or even absolutely liable for the misfortunes of individuals is not altogether new. A related phenomenon occurred in earlier and simpler societies in Africa, New Guinea, and elsewhere. Recall, for example, the Jalé practice of holding a man's clan liable for compensation when his wife dies in childbirth or when someone he invited hunting is accidentally killed during the hunt. Or consider this practice observed among the Suku of the Congo: When a member of clan A steals a goat from a member of clan B, clan B will sometimes seize a compensatory goat from clan C. Liability thus lies with "the surrounding social universe as a whole," and any nearby group serves adequately as a source of compensation (Kopytoff, 1961: 65–66). These practices significantly resemble the modern cases listed above, especially those in which murder victims' families sued what seem to be simply the nearest available organizations. All involve a claim of compensatory liability against a corporate entity that was only remotely associated with someone's misfortune. All effectively recruit—or conscript—a nearby group to compensate people who would otherwise bear the burden of misfortune themselves. In this sense, the increasing compensatory liability of organizations is a devolutionary development, a return to the past (see Black, 1984a: 276–277). How can this be explained? Why is it happening at this moment in history?

It is well known that one of the great transformations across the centuries in many societies, especially since the beginning of industrialization, has been the decline of the family as a major actor in everyday life. Economic, political, and religious roles, wealth, and other elements of social standing came increasingly to reside in individuals rather than in families or clans. As this occurred, moreover, liability in legal and related matters shifted from families to individuals. Whereas once a man's blood relatives shared in his misdeeds and misfortunes, whether by vengeance or by compensation, he increasingly had to fend for himself. The individuation of social life thus resulted in legal and moral individuation as well, and notions such as responsibility, intent, and fault became increasingly refined and important in the determination of liability. Collective liability came to be regarded as a primitive stage of legal evolution (see, e.g., Diamond, 1935; Hobhouse, 1951; Gluckman, [1965] 1972: chap. 7; Moore, 1972).

Now, in retrospect, the individuation of society and law in

the Western world seems to have peaked in the nineteenth century, when compensatory liability was limited to the narrowest conditions ever seen. In the United States, it was restricted by such requirements as proof of the defendant's carelessness, the victim's lack of negligence contributing to the misfortune, the absence of known risk undertaken by the victim prior to the injury, and a rule limiting tort actions to those brought by the victims themselves, which excluded cases involving death (see, e.g., James, 1970; Malone, 1970; Horwitz, 1977: 85–99; Lieberman, 1981: chap. 2). Cases resembling those on the list above were inconceivable. Since then, however, a previously uncommon form of collective life has proliferated and fundamentally altered the course of legal evolution: organizations.

B. Organizational Dependency

The past century has seen a dramatic growth in the number and role of organizations in modern societies such as the United States (see, e.g., Boulding, 1953; Coleman, 1982: chap. 1).¹⁸ Individuals have become increasingly dependent upon organizations much as, in centuries past, they were dependent upon extended families. More and more people earn their livelihood in organizations, obtain life's necessities from them, and learn, relax, and play in them. It is increasingly difficult to do or have anything without the involvement of an organization, whether public or private. This includes the experience of misfortune. Accidents, for example, increasingly occur in, near, or because of an organization, during or after a transaction with an organization, or in circumstances insured by an organization.

The growing dependency of individuals upon organizations is reflected in an ever greater propensity to recruit organizations to compensate people for their misfortunes. In lawsuits such as those listed above, this process is involuntary and entails the application of an ever broader standard of liability by which compensation may be obtained from organizations associated with injured individuals. So returns a system of collective liability resembling practices long thought primitive and even incompetent or ignorant. Meanwhile, in the realm of voluntary compensation, public and private organizations have increasingly established programs to compensate their members for injury, sickness, and other losses. In New Zealand, for example, a government commission provides compensation for literally

¹⁸ One sociologist estimates that the number of organizations in the United States now exceeds the number of individuals, but he includes families and households in the organizational population (Reiss, 1985: 303).

all injuries suffered by anyone in any circumstances whatsoever, regardless of fault, and lawsuits pertaining to injuries have been eliminated (see, e.g., Harris, 1974). An expansion of this "no-fault" approach is being advocated in the United States and elsewhere (see, e.g., O'Connell, 1975; Saunders, 1979). Compensatory liability of this breadth was once the burden of extended families, whether those of the victims or victimizers. After a period of individualism, then, collectivism is reappearing in a new form: *The organization is replacing the family in the compensation of misfortune.*

IV. CONCLUSION

The conscription of organizations to provide compensation is consistent with the formulations presented earlier. An increase in the number of organizations is itself associated with the compensatory style of conflict management. The relational distance between organizations (or insured parties) and aggrieved individuals generally lies in the intermediate range in which compensation is most likely to appear. A fragmentary relationship, such as between a supplier and customer, government and citizen, or employer and employee, commonly exists between the organization (or insured party) and the individual before the injury occurs. Moreover, since the allegedly liable organization has more wealth and social stature than the injured individual in nearly every case, these grievances are virtually always directed upwardly rather than downwardly. The mere fact that the cases are usually brought against an organization rather than an individual is also predictable from the theory of compensation.

The broad standard of liability may be explained with the considerable degree of social distance that typically separates the principals (such as a consumer and the manufacturer of an allegedly defective product). That such cases are brought against a group rather than an individual also conforms to our formulation linking the degree of liability to organization itself. In short, the modern trend in which organizations are held increasingly liable for the misfortunes of individuals conforms to sociological theory.¹⁹

¹⁹ Some readers may notice a seeming anomaly, however. That organizations are the objects while individuals are the initiators of these cases and that the former often lose in court may appear inconsistent with theory proposing that the quantity of law is "greater in a direction toward less organization than toward more organization" (Black, 1976: 92), and that cases brought by individuals against organizations are the least likely to succeed when compared to cases between individuals, between organizations, and by organizations against individuals (*ibid.*, p. 97). But nothing in the present analysis is actually incon-

Conditions for the compensatory liability of organizations are, so to speak, excellent. And since there is presently no end in sight to the increasing role of organizations in modern life, we may expect that the demand for compensation of this sort will continue to grow. Once located in families and clans, the responsibility for misfortune shifts historically first to individuals and then to organizations. The evolution of compensation thus ultimately describes a circle, from one kind of collective liability to another.²⁰

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sistent with these earlier formulations. This would occur only if cases by individuals against organizations were to rise from their present level as the least likely to be brought and to succeed in modern law. As it stands, cases in which individuals seek and win compensation from organizations are important and interesting, but they by no means dominate the legal scene. Organizations are hardly the stepchildren of modern law (see, e.g., Wanner, 1974; 1975).

²⁰ The evolution of compensation should not be equated with social evolution itself, however. The earliest and simplest societies—those of hunters and gatherers—have little or no compensation at all (see n.6 above).

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