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Compensation for the Criminally Injured Revisited: An Emphasis on the Victim

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NOTES

COMPENSATION FOR THE CRIMINALLY INJURED REVISITED: AN EMPHASIS ON THE VICTIM?

> Has crime been committed? Those who have suffered by it, either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity, when its protection has not been effectual.[1]—Jeremy Bentham—circa 1790

> But in directing our full attention to how we can best combat the alarming crime rise we have ignored, unfortunately, certain aspects of the problem. The point has been reached, for example, where we must give consideration to the victim of crime—to the one who suffers because of crime. For him, society has failed miserably. Society has failed to protect its members adequately. To those who suffer, society has an obligation.[2] Senator Mike Mansfield—1971

In the preceding decade, the United States witnessed momentous strides in the ever-advancing development of criminal law. That law has become extremely sensitive in its treatment of the rights and due process of those accused of crime, as well as those convicted of crime. *Escobedo, Miranda, Gideon* have been impressed on the minds of the average man through the results of their sweeping mandates, overturning convictions, changing police procedure, and even penetrating their way into our television programs. The entire concept of criminal procedure has had to be refined and reevaluated in light of newly advance hypotheses as to the criminal, his protected rights, and his rehabilitation. The entire area of the criminal law has taken on a philosophy of fairness and restraint, which governs the investigative and judicial methods of our society with a careful eye toward securing true justice. It is, of course, a little-disputed fact that all these forward strides are initiated to secure for *all* men their constitutionally protected rights. It is also a fact that we have by no means reached the zenith of securing justice for all men. But we are determined and restless in our pursuit of that goal!

In our continued and admirable zeal in seeking more adequate protection for those accused of crime, as well as those adjudged criminals, there remains one element of crime apparently lost from view—the victim! While everyone suffers from the very existence of crime, the one obviously suffering the most is the immediate victim and his family. Surely in most cases he suffers more from the crime than the criminal, who often remains unidentified. In our concern for the treatment and rehabilitation of the criminal, should we not also find a place for his victim? If society has in some way failed the criminal, surely it has failed the victim as well. Without abandoning the crusade for improvement in the criminal law, the plight of the victim must be placed in perspective. A new philosophy and practical solutions for his situation are drastically needed!

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1 1 THE WORKS OF JEREMY BENTHAM 589 (Limited ed. 1962).
2 117 CONG. REC. 1359 (daily ed. Feb. 11, 1971).

I. The History of Victim Compensation

"Compensation to victims of crime is as old as civilization."[3] The roots of compensation to the criminally injured have been traced back to primitive societies where social control was in the hands of the kindred and there was thus no need of a suprafamilial authority. An offense against the individual was an offense against his clan. The punishment exacted from the offender, while not codified, was normally some form of restitution or compensation to the victim. Injury to the person was weighed according to the seriousness of the trespass and the social status of the aggrieved party. In societies based on money and property, such as the Ifrigoa of Northern Luzon, most damages were pecuniary in nature. While blood feud or revenge remained common, as societies developed the recourses open to the victim turned to some form of compensation.[4] Thus emphasis on the victim reigned in primitive societies, though in crude form.

As was the case in primitive societies, the early Western cultural mores called for the offender to make settlements with the injured and his family. In the Code of Hammurabi, circa 2380 B.C., such compensation was codified for certain specified crimes.[5] Sections 22 to 24 of the Code read:

> If a man practice brigandage and be captured, that man shall be put to death. If the brigand be not captured, the man who has been robbed, shall, in the presence of God, make an itemized statement of his loss, and the city and the governor, in whose province and jurisdiction the robbery was committed, shall compensate him for whatever was lost. If it be a life [that was lost], the city and the governor shall pay one mina of silver to his heirs.[6]

The primary motive of the provisions, it has been said, was to protect travelers and develop effective law enforcement.[7] Nonetheless, its importance as a codified provision for victim compensation, effected 4,000 years ago, should not be slighted. The early Hebrews developed a compensation system which applied extensively to personal injuries, and paid the victim for loss of time and caused him to be completely healed.[8] This idea of compensating the victim is reflected in Homeric verse in the Ninth Book of the Iliad, where Achilles is reproached for not accepting the reparation offer of Agamemnon. Achilles reminds him that even a brother's death may be compensated for by a payment of money.[9]

In early Anglo-Saxon legal systems, based largely upon kindred as in other early societies, the

> crime was crime by and against the family; and the family was required to

3 Childres, *Compensation For Criminally Inflicted Personal Injury,* 39 N.Y.U.L. REV. 444 (1964).

4 Wolfgang, *Victim Compensation in Crimes of Personal Violence,* 50 MINN. L. REV. 223, 223-24 (1965). Even among highly organized hunters such as the Cheyenne and Comanche Indians in America, tribal law was all that was necessary. *See* E. HOEBEL, THE LAW OF PRIMITIVE MAN 311 (1954).

5 Childres, *supra* note 3.

6 R. HARPER, THE CODE OF HAMMURABI 19 (1904), *cited in* Childres, *supra* note 3, at n.1.

7 Childres, *supra* note 3. The emphasis of the law was on property, and not physical injury. Wolfgang, *supra* note 4, at 224.

8 Wolfgang, *supra* note 4, at 224.

9 *Id.* at 225.

> atone for the crimes. Consequently, the blood feud was common. In time, however, money payments were fixed as commutations for injury.[10]

By the twelfth century, with its great impression on the criminal law of later days, a blood feud on the kin of the offender was allowed only when an attempt to exact the statutory price of the victim's life, his *wergild,* had failed. This glorified system of revenge met with further limitations in the reign of Edmund. Even the slayer was given twelve months in which to pay the *wer* before he could be attacked, and the feud could not be directed upon his kindred, unless they made his misdeed their own by harboring him. This advance was within Edmund's scheme of suppression of the blood feud. Further advances developed with the increased use of a system of pecuniary compositions, or *bót.* Elaborate lists of injuries included in this system developed and increased until even homicide was emendable—"the *bót* for homicide was the *wergild* of the slain."[11] Along with the *bót* began a scheme of payments or *wíte* to the king. A failure to render this *bót* meant outlawry, or punishment inflicted with the assistance of the whole community.[12]

Gradually, this system of *bót* was done away with altogether, and was replaced by a schedule of damages assessed by a tribunal.[13] Even more gradually, wrongs were regarded as wrongs to the state. The king demanded payment for the participation of the state in the trial process. As the years passed, the victim's share of the payment was increasingly less, until finally the king received the entire payment. The *wíte* was transformed into a new source of revenue for the king, all in the interest of peace, but not primarily in the interests of justice.[14] The emergence of the modern era witnessed the separation of criminal and civil law, where the victim was not allowed to be financially interested in the trial, and his recovery was relegated to the tort process. The advent of the recent "universalistic" approach to crime placed the victim even further in the background.[15]

With the modern division of criminal and civil law, the plight of the victim was completely overshadowed by the humanistic attitude toward the criminal. Few remained to argue the case of the victim. One such individual was Jeremy Bentham, widely acclaimed today for his contributions to jurisprudence and political science. Bentham asserted that compensation was "in order where (1) a crime has been committed (2) on people who have contributed to the maintenance of a society (3) which had the responsibility of protecting them."[16] The intellectual history of compensation dates back to the nineteenth century,

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10 *Id.*

11 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 451 (2nd ed. 1923).

12 *Id.* at 451. Before the union of these two systems, *bot* was compensation for injuries less than death; while the *wergild* was a monetary compensation made to a family if one of its members was killed or injured. Certain crimes, such as secret murder, were "botless," thus calling for recourse in the feud. F. WINES, PUNISHMENT AND REFORMATION 38-39 (1895), *cited in* Wolfgang, *supra* note 4 at 225, n.14.

13 2 F. POLLOCK & F. MAITLAND, *supra* note 11, at 459.

14 Wolfgang, *supra* note 4, at 228. Wolfgang refers to this as a cause of a growing sense of corporal punishments, since the social retribution was increasingly "de-individualized." This, he feels, helps to account for an increase in extralegal treatment of criminals in the form of riots and lynchings. *Id.* at 229.

15 Schafer, *Restitution to Victims of Crime — An Old Correctional Aim Modernized,* 50 MINN. L. REV. 243, 245-47 (1965).

16 Childres, *supra* note 3, at 446-47. See *supra* note 1.

where a plan of compensation *distinct* from any punishment to the criminal was first envisioned. However, little progress was made in establishing acceptance of the idea due to the changes of the Industrial Revolution with its accompanying laissez-faire philosophy. Italian positivists such as Garofalo and Ferri did leave their influences, including defects, in the compensation cause. It was their premise that no free will existed, therefore causing the need for a new structure in criminal law. This was to be accomplished by making the civil and penal liability of a criminal indistinguishable.[17] Ferri argued:

> . . . the State should take into account the rights of the victim, paying him an immediate satisfaction, especially when blood has been shed, looking to the offender to reimburse it for its expense, as well as for the expense of trial. Penal evolution, as we have said, is a decisive proof of the necessity of such reforms. At first, reaction against crime was an exclusively private affair; then its severity was mitigated, . . . leaving the injured party the poor consolation of demanding and obtaining indemnity before a different court. . . . The establishment of a fund to meet the indemnity formed by the interest of the fines and indemnities perhaps, refused by the victims, will be the final and complete recognition of this principle.[18]

Mexico adopted this idea in 1929 with Article 2 of the Mexican Code, making reparation by a criminal the character of the criminal sanction. This Mexican attempt to carry this principle into action has proven to be a failure.[19]

Agitation toward victim compensation returned in full force in Great Britain in 1954, when Margery Fry began her campaign for a practical compensation scheme. Prodding the British public with the knowledge that they were ignoring individuals with claims on them, she stirred Parliament into action. Following a study by the committee of Justice—the British Section of the International Commission of Jurists—the government proceeded to promulgate a comprehensive compensation plan.[20]

II. The Case For Compensation

In 1965, the economic impact of violent crimes against persons in this country totalled in excess of $815,000,000. This figure includes out-of-pocket expenses, loss of earnings and the expenses of dependent families. The figure is a combination of the impact felt by homicides ($750,000,000) and assaults and other violent crimes ($65,000,000).[21] Between that time and the end of 1968,

17 Childres, *supra* note 3, at 448-49. Garofalo argued that "it will be a long step in advance when the State comes to regard as a public function, the indemnification of the person injured by criminal delict." R. GAROFALO, CRIMINOLOGY 435 (1914).

18 E. FERRI, CRIMINAL SOCIOLOGY 511-12 (1917), cited in Wolfgang, *supra* note 4, at 232.

19 Childres, *supra* note 3, at 449-51. The Mexican attempt may have failed from a lack of funds, and not from the novelty of the idea. *Id.* at 451.

20 *Id.* at 451-52. This resulted in Home Office and Scottish Home and Health Department, Compensation for Victims of Crimes of Violence, Cmnd. No. 2323 (1964), the British plan for compensation. This plan was preceded by the Criminal Injuries Compensation Act, 1 New Zealand Stat. No. 134 (1963), the first program of its kind in the world.

21 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 3 (1967), *citing* UNIFORM CRIME REPORTS OF THE FEDERAL BUREAU OF INVESTIGATION. At the same time, public law enforcement spending, including police, the courts, and correctional institutions, totaled $4,212,000,000. *Id.*

the rate of violent crimes against persons had risen over 71 percent.[22] The risk of becoming a victim of serious crime increased 16 percent in 1968 alone with over two victims per each 100 inhabitants.[23] The overall crime rate has increased 85 percent since the advent of the Sixties, while at the same time the percentage of violent crimes against persons has increased 106 percent.[24] In 1968 there were 13,650 homicides, or 12.9 percent more than in 1967. At the same time there were 282,000 aggravated assaults, or 11.5 percent higher in number, and 31,060 forcible rapes, up 14.6 percent over the 1967 figure.[25] The National Commission On the Causes and Prevention of Violence, in their final report, declared the 1960s to be one of the most violent in our country's history, with the rate of violent crime 300 percent greater in 1968 than it was in 1933.[26] The Commission has stated that

> [w]e have endured and survived other cycles of violence in our history. Today, however, we are more vulnerable to violence than ever before. Two-thirds of our people live in urban areas, where violence especially thrives. Individual and group specialization have intensified our dependence on one another.[27]

These facts, added to the additional facts that police solutions of serious crimes have declined 32 percent since 1960,[28] and that the rate of conviction for serious crime is only six percent,[29] emphasize the need for some program to assist those unfortunate enough to have become victims of violent crimes.

The advocates of compensation programs for the victims of violent crimes hope to offer such a program for these unfortunates. Arguments for compensating these victims proceed along various defined approaches. The moral argument has two bases: (1) that the responsibility of the state exceeds that of the victim, and (2) that given the premise that criminal violence is endemic to society, the only tolerable way to sustain damage is to share it in common.[30] Arthur Goldberg, then Associate Justice of the Supreme Court, once stated that the "victim

22 J. HOOVER, CRIME IN THE UNITED STATES 3 (1968). This compilation is better known as the UNIFORM CRIME REPORTS, published annually by the Federal Bureau of Investigation.

23 *Id.* at 1.

24 *Id.* at 3.

25 *Id.* at 5. The National Opinion Research Center has developed another method for compilation of statistics on crime, based on surveys rather than police reports, as used by the FBI, relying on victims themselves to give the answers. P. ENNIS, CRIMINAL VICTIMIZATION 2-3 (1967). The Center believes the homicide rate to be less than the Uniform Crime Reports indicate, while the rate for forcible rape and aggravated assault to be surprisingly higher than the Reports indicate. *Id.* at 12.

26 FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, xiv-xv (1969). Daniel Bell, Professor of Sociology at Columbia University, on the other hand, believes that the reports as to violence are "overdrawn," and that violence is less a factor in American life today than it was fifty or one hundred years ago. K. MENNINGER, THE CRIME OF PUNISHMENT 144 (1968).

27 FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *supra* note 26, at xvi.

28 J. HOOVER, *supra* note 22, at 1.

29 FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *supra* note 26, at xviii.

30 Childres, *supra* note 3, at 455-56. Some jurisdictions presently having such programs deny such responsibility and refer to compensation as a matter of legislative grace. *See infra,* note 47.

of a robbery or an assault has been denied the 'protection' of the laws in a very real sense, and society should assume some responsibility for making him whole."[31] Most advocates will agree that primary responsibility must ordinarily be assigned to the injuring criminal, and that he should be required to repair his damage (otherwise freedom of the will is denied).[32] The argument, however, that the victim's civil recourse will suffice entails gross defects. First of all, very often the offender is never identified, let alone apprehended by the authorities. If he is found, he is often insolvent, or has placed his assets beyond the reach of the law in advance of his crime. Much of his existing resources, if any, are consumed in the course of his trial, and are thus unavailable in a subsequent civil suit by the victim.[33] If convicted, he is normally imprisoned, thus eliminating any source of appreciable revenue he might have had which could have been obtained by the victim. Thus, to a degree, the state is responsible for the fact that the criminal cannot compensate his victim. This, added to the fact that a failure of police protection is a prerequisite to any crime, creates the advocates theory that the state should compensate the victim for his injuries.[34]

The second moral rationale proceeds on the theory that violence and criminal damage are endemic to our society, and that the damage ought therefore be spread among all potential victims. Accordingly, Professor Childres suggests there are but two alternatives based on this premise—state compensation or compulsory state insurance. Compulsory insurance would have to be bought by the government, with the premiums paid by its citizens. If these premiums were thrust on the public, many of the more than 38,000,000 people in this country with incomes of less than $4,000 a year would find it impossible to pay them.[35] Childres believes that private enterprise is not the solution, since the problem involves every citizen equally. Also, speaking practically, he notes that the Veterans Administration, funded by the government, has a ratio of administrative costs to benefits paid of one to six, while privately insured organizations such as workmen's compensation programs, have a ratio of three to one. It costs the Veterans Administration, therefore, seventeen cents to distribute one dollar in benefits, while it costs the insurance industry *three to four dollars!* Also, private insurers could not participate in the quasi-judicial functions available to a governmental scheme. Therefore, either solution would operate best as a governmental operation, with compensation being by far the most equitable and effective.[36]

Proponents of compensation often analogize to other systems of state compensation. Many states have passed statutes allowing recovery against the state for damage inflicted by mob violence.[37] The rationale behind these enactments appears to be that the injury would not have occurred unless enforcement officials

31 Goldberg, *Equality and Government Action,* 39 N.Y.U.L. Rev. 205, 224 (1964). The article is derived from a speech given by Goldberg in the James Madison Lecture series at New York University in February of 1964.

32 Childres, *supra* note 3, at 445.

33 Goldberg, *supra* note 31 at 224, n.95.

34 Childres, *supra* note 3, at 256.

35 *Id.* at 457. It should be noted that the Crime Commission has found that victimization rates for violent crimes are much higher in the lower income groups. Final Report of the National Commission on the Causes and Prevention of Violence, *supra* note 26, at 25.

36 Childres, *supra* note 3, at 457-58.

37 *See, e.g.,* Conn. Gen. Stat. Rev. § 7-108 (1949); Ohio Rev. Code § 3761.05 (1953); W. Va. Code Ann. § 61-6-12 (1921).

had made a mistake in calculating the need for or the extent of police protection under the circumstances. Recovery in these circumstances thus encourages municipal authorities to maintain order and influences taxpayers to resist organized lawlessness. It is argued that the same criteria could well be used to compensate the victims of crime.[38] The great obstacle which must be surmounted, however, is the concept of sovereign immunity, based on the dual theory that the king can do no wrong and that liability would hamper the effective functioning of government. Even when these barriers are statutorily broken down, the courts tend to preserve nonliability through a labeling system which protects the state in its "governmental" as opposed to its "proprietary" role.[39] Advocates of a compensation system were thus delighted by the outcome of the celebrated *Schuster* v. *City of New York* case in 1958.[40] There, a police informer was promised protection and was killed when it was withdrawn. The case held that the city owed a special duty to one who cooperates to protect all citizens, and that the city had breached that duty, thus permitting the victim to recover. Proponents argue that the fact that money in the form of taxes is received from all citizens, plus the fact that a private citizen's powers to prevent crime have been curtailed, make out a similar case for all citizens.[41]

Another often used analogy utilized by the advocates of compensation for criminally inflicted injuries involves the workmens' compensation laws. Under these laws, the employee receives compensation for injuries due to his membership in the collective labor group. He assumes risks in his occupation, and his employer, therefore, is obligated to compensate him when he is injured. Similarly, argue the advocates, the criminally injured victim is also a member of a group—society. He, more often than not, is a productive member, supporting law enforcement agencies for the protection of society. Due to violations of the law, certain risks are involved in merely living in our society. Therefore, it is argued, the victim should be compensated due to a lack of adequate police and/or their inability to cover everything.[42] This argument is perhaps aided by recent holdings which proclaim that if employment is the occasion of injury, compensation is to be paid regardless of whether it is the proximate cause of the injury.[43] Being a "member" thus becomes the only criterion.

Perhaps the primary reason for failure of compensation programs to take a firm hold in the majority of jurisdictions in this country is due to the apparent apathy prevailing in our society. The overriding assumption seems to be that the claims of the victim are sufficiently satisfied if the offender is punished.[44] In

38 Kutner, *Crime-Torts: Due Process of Compensation for Crime Victims,* 41 NOTRE DAME LAWYER 487, 494 (1966).

39 *Id.* at 492, 494. Prosser states that the government is immune from tort liability when it performs a function only it could effectuate effectively. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 1005 (3d ed. 1964).

40 5 N.Y. 2d 75, 180 N.Y.S. 2d 265, 154 N.E. 2d 534 (1958).

41 Kutner, *supra* note 38, at 496-97.

42 Wolfgang, *supra* note 4, at 232-33. Opponents often express the inequity of a system which has no regard for your prior loss record or imprudence in reflecting the amount of premiums. Mueller, *Compensation for Victims of Crime: Thought Before Action,* 50 MINN. L. REV. 213, 215-16 (1965).

43 *See, e.g.,* Whetro v. Ankerman, 383 Mich. 235, 174 N.W. 2d 783 (1970).

44 Comment, *Victims of Violent Crime: Should They Be an Object of Social Effection?* 40 MISS. L.J. 92, 95 (1968).

any case, the state prosecutes on behalf of all the people, and not the victim *per se,* assuming there is a criminal to be prosecuted. "Once the immediate reactions of anger, fear, and vengeance regarding a particular, recently reported crime have been verbally expressed, the average citizen washes his hands of all responsibility and leaves it (silently) to the official avengers."[45] Victims, due to their unfortunate and precarious positions, do not have an effective pressure group to plea their case and educate the public. However, "[n]o institution should be allowed to stand—or to be stillborn—merely because of its weight in the scales of power. Victims of violent crime deserve more from society than to be ignored . . . ."[46]

III. Reflection on the Theory: Some Reservations

Despite the logic, the rationale that the state is primarily responsible for violent crimes inflicted upon its citizens has met with little acceptance even among proponents. One reason is the fact that property damage would also have to be included, raising the cost to astronomical proportions. Another is that this argument is too vague a criterion upon which to base a right of reparation. The British rejected the vicarious liability theory because they felt the state did not have an absolute duty to protect all citizens at all times.[47] Still another argument states that society, if it has failed these victims, has also failed the victims of torts and accidents. It is felt that society performs a wrong by agreeing to compensate one group more fully than another. Even if the criteria were left at some general type of reliance on the protection of the state, by those who could have protected themselves, many situations would still arise where those other than the criminally injured could recover.[48] On its surface, one of the most persuasive reservations as to compensating victims has developed around the study of "victimology," a new trend in criminology which maintains that crime can properly be understood only if one considers the victim as well as the perpetrator.[49] This theory has perhaps signaled the decline of the objective and isolated responsibility of the offender. Schafer, after tracing the history of our present penal structure, with its displacement of the victim, has concluded that the universalistic approach to crime has started to release the victim from his exclusion from the administration of justice. In the future, he predicts that society will look to the relationship of victim to

45 K. MENNINGER, THE CRIME OF PUNISHMENT 144 (1968).

46 Childres, *supra* note 3, at 448.

47 Comment, *Victims of Violent Crime: Should They Be an Object of Social Effection? supra* note 44, at 98-99. However, the British have adopted a compensation plan *ex gratia.* "The public does . . . feel a responsibility for and sympathy with the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation on behalf of the community." HOME OFFICE AND SCOTTISH HOME AND HEALTH DEPARTMENT, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, CMND. NO. 2323 (1964), at 4.

48 Rothstein, *State Compensation For Criminally Inflicted Injuries,* 44 TEXAS L. REV. 38, 43-45 (1965). A possible solution would be to allow compensation where there was an inadequate remedy at law, as the French have done. *Id.* at 43, n.23.

49 This area was pioneered by Hans von Hentig who used psychological, social and biological factors in his search for categories of victims. His research distinguished between society-made, and born victims, and disclosed thirteen categories, each with special qualities. *See* H. HENTIG, THE CRIMINAL AND HIS VICTIM, STUDIES IN THE SOCIOBIOLOGY OF CRIME 404-38 (1948).

offender for a more extensive concept of "functional responsibility," rather than the mere isolated criminal action of the present.[50]

Studies in victimology have accounted for some rather amazing disclosures as to the victims of crime. In a study conducted by Marvin Wolfgang as to 588 homicide cases, it was learned that the sex ratio among victims is approximately three male to every one female, and five males to every one female among offenders. Victims are more likely to be females and are usually older than the offender. Homicide rates are highest among Negroes in September, as opposed to May for whites. Half of the victims had been drinking prior to their murder, and half had previous records of criminal offenses. Altercations and domestic quarrels accounted for most of the deaths. The main outcome of Wolfgang's research was the conclusion that the offender and his victim were *mutually interacting participants* in the demise.[51]

It has been estimated recently that 80 percent of *all* violent deaths result from an interpersonal relationship between the killer and the victim.[52] In any event, it is firmly established that more than two-thirds of all homicide and aggravated assault victims know their offender, who is often a member of their family.[53] Houts has concluded that in a great many cases, the murderer was a rather reasonable, normal person, while the victim was the discordant individual, possessing "strange quirks of personality and character that contributed mightily to their own demise. . . ."[54] It appears that quite often the victim invites the violence visited upon him, thus detracting somewhat from his role as an innocent object of pity. While an individual victim should not be judged by statistics, any program to compensate such a class must be viewed in the light of these findings.

Thus, compensation may have its inherent drawbacks, and any such program should be made to answer these legitimate reservations.

IV. Methodology and Implementation of a Compensation Program

After a decision is made on the merits of compensation, the first object in implementing such a program is to define its scope—for what crimes should victims be compensated? Almost universally, advocates have disclaimed a desire to include property damage, due largely to the immense cost involved and the fact that most property is insured. Furthermore, such damage does not destroy the victim's only indispensable asset—his ability to earn a living![55] A survey con-

50 S. Schafer, The Victim and His Criminal—"Victimology" 9-10 (1967).

51 *Id.* at 22-29. Most male victims are under 21 and most female victims are over 60. Females commit violent crimes most often against spouses — three times more frequently than the opposite! Another interesting fact is that most crimes of violence occur during the daylight hours. *Id.* 27-29.

52 Houts, They Asked for Death, 229 (1970).

53 The President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society 3 (1967), *citing* the Uniform Crime Reports; Final Report of the National Commission on the Causes and Prevention of Violence, *supra* note 26, at 25.

54 Epton, *Book Review*, 57 A.B.A.J. 165 (1971). *See generally* Houts, *supra* note 52.

55 Childres, *supra* note 3, at 459; Note, *Compensation for Victims of Crime*, 33 Chi. L.J. 531, 543-44 (1966). It should be noted that damage to property accounts for 80 percent of all economic losses due to crime. The President's Commission on Law Enforcement and Administration of Justice, *supra* note 21, at 33.

ducted by Wolfgang indicates that public sentiment is higher with regard to bodily injury than to any corresponding property loss.[56] To further limit compensable crimes, some advocates suggest provision be made that the crime be serious enough to merit in excess of a certain amount. Some go even further and would exclude certain nonviolent sex crimes such as indecent exposure which cause only mental injury.[57] To define offenses for which compensation is to be received, it has been suggested that the best policy is to strike a balance between listing specific offenses and utilizing a general definition. While dishonest claims might be more prevalent under a general formula, a schedule of offenses might lack needed flexibility. Another danger of a specific listing of offenses is the fact that the injured victim's assailant might be convicted of another crime not appearing on the schedule.[58]

Another factor worthy of much analysis is that of victim eligibility. As has been stated, crimes result often from close personal relationships between victim and offender. While this alone does not establish the crime as being outside the sphere of public responsibility, the involvement of the victim is enough to warrant exclusion in many cases. It has been suggested that a new definition of fault, outside the context of criminal or tort law, is needed since the former assesses the victim's conduct only as it affects the culpability of the offender and the latter's allocation of loss has no adequate bearing on the allocation between the victim and the community.[59] Perhaps the answer lies in determining partial responsibility as a middle ground between a full award and no award at all. Another aspect of this particular problem concerns the victim as a relative or intimate of the offender. Many theorists advocate strict exclusion under these circumstances, due to the strong possibility of collusion and indirect benefit to the offender. Others, however, seeing the risk as no higher than in other situations, believe the innocent should not suffer in these cases.[60] A final category within victim eligibility is whether to consider financial circumstances in determining whether or not to compensate. While many advocates believe the programs should be based on need, other disagree on the grounds that all victims are equal before the law and the gravity of harm should alone govern the degree of compensation.[61] In drafting a model compensation act, Harvard law students felt that the award was not a gratuity but a legal right under a social insurance

56 Wolfgang, *supra* note 4, at 236. The New Zealand program calls for violent crimes against persons; the British require crimes of force. No in-depth analysis will be made of the programs effectuated by these foreign pioneers. For an excellent account of the British compensation plan, *see* Samuels, *Compensation for Criminal Injuries in Britain,* 17 U. TORONTO L. REV. 20 (1967). For the New Zealand experience, *see generally* Cameron, *Compensation for Victims of Crime: The New Zealand Experiment,* 12 J. PUB. L. 367 (1963).

57 Note, *Compensation for Victims of Crime,* 33 CHI. L.J. 531, 545 (1966).

58 Comment, *Compensation for Victims of Crime — Some Practical Considerations,* 15 BUFF. L. REV. 645, 648-49 (1966). This problem can be alleviated by making provision for compensation regardless of a conviction. *Id.* at 649.

59 Note, *Compensation for Victims of Crime, supra* note 57, at 548. Both the British Cmnd. 2323, at 6, and New Zealand, New Zealand Stat. No. 134 § 19 (7) (a), take degrees of fault into account when making awards. *See also* Childres, *Compensation for Criminally Inflicted Personal Injury,* 50 MINN. L. REV. 271, 274 (1965).

60 Comment, *Compensation for Victims of Crime — Some Practical Considerations, supra* note 58, at 651. *See also* Note, *Compensation for Victims of Crime, supra* note 57, at 547-48.

61 Wolfgang, *supra* note 4, at 234-35. Victims ought not be required to maintain existence at minimal level to qualify. Childres, *supra* note 3, at 462.

program to be utilized by all citizens when injured.[62] This seems to be the most logical and equitable conclusion, though no doubt the most costly.

Serious controversy has developed over the amount and kind of damages to be awarded under compensation claims. Proponents are generally in agreement that the amount should be less in tax-supported cases than in cases involving a jury verdict for personal injury. The question centers around whether the victim should be paid on a common law pattern for medical expenses, present and future loss of earnings, and pain and suffering. Opponents feel common law damages are improper due to the lack of a ceiling. They suggest compensation limited to income and loss of services due to the violence, with a ceiling based on average family income.[63] The pain and suffering element has met the most resistance due to its highly speculative nature, permitting a high possibility of fraudulent claims, windfalls and the destruction of the system.[64] Wolfgang's survey has shown, however, that, in the eyes of the public, the payment of hospital bills and lost wages is not considered adequate for the suffering endured.[65] Another controversy within the sphere of damages is the reduction of the award in the amount of other payments. Little disagreement occurs over the idea that other public payments should be subtracted from the award to prevent double recovery. However, much discussion has been raised as to reductions in light of private insurance recoveries. The recognition that actual losses may not be compensated by the award and that private insurance may be similarly limited, suggests that

62 Note, *A State Statute to Provide Compensation for Innocent Victims of Violent Crimes,* 4 HARV. J. LEGIS. 127, 129 (1966). Others have stated:

> [t]hose compensation programs which have come into existence have clearly been restricted to legislative manifestations of community sympathy. Moreover, compensation in this country has been relegated to purely a welfare role. This is an anomalous and objectionable pattern. If we are to decide that public concern expressed in monetary terms should be only for the indigent citizen, there appears to be no reason to do more than expand our present welfare system so as to meet the special needs of impoverished victims. However, if we are to accept the theory of indemnification as opposed to aid, the plan should indiscriminately encompass all citizens and be fully severed from any welfare philosophy. Thus the vital issue is whether we want socialized criminal loss insurance or merely a program of public assistance. Hybrid substitutes do no more than create expensive and needless administrative procedure.

Comment, *Victims of Violent Crime: Should They Be an Object of Social Effection? supra* note 44, at 120.

63 Childres, *supra* note 3, at 462-63. Other arguments against the use of common law damage include:

(1) Common law damage would not be limited to compensation.
(2) Common law damages would have no ceiling.
(3) The delay is unsatisfactory.
(4) A lump-sum judgment is unsatisfactory.
(5) The necessity to retain a lawyer and pay him as much as one-third or more of the judgment should be avoided.
(6) Technical questions, such as admissibility of evidence, should play no part in compensation
(7) Questions of the identity or responsibility of the injuring party should play no part in the compensation.
(8) The common law courts, jury and all, would add needless expense. *Id.* at 462.

64 Note, *Compensation for Victims of Crimes of Violence,* 30 ALBANY L. REV. 325, 332 (1966). Both Great Britain and New Zealand provide nominal damages for pain and suffering. But in those jurisdictions, other damages are reduced due to free medical care and other public benefits. Note, *Compensation for Victims of Crime, supra* note 57, at 552.

65 Wolfgang, *supra* note 4, at 235-40. The element could be used to compensate for mental anguish in the case of rape. Comment, *Compensation for Victims of Crime — Some Practical Considerations, supra* note 58, at 653.

allowing both is not going to result in double payment. It thus seems preferable to regard compensation as a supplement rather than a substitution for insurance.[66]

Evidentiary problems and their solutions present another serious debate in the implementation of an effective compensation system. The first consideration must be what degree of proof is required to prove that a crime was committed. If proof beyond a reasonable doubt is required, there is not much of a chance for recovery in many cases. If less is required, many feel that the recovery should be in the area of tort law rather than state compensation.[67] Another aspect of the evidentiary problem concerns one of the basic arguments for providing a compensation system—the fact that in most jurisdictions, evidence of a criminal conviction is not admissible in subsequent civil actions. This is due largely to the lack of similarity of objects, issues and degrees of proof in the two trials. Should the state, upon subrogation to the rights of the victim, be allowed to use the fact of conviction against the offender in a subsequent civil action? Should the victim be allowed to pursue the offender with evidence of such conviction in the event he is not made whole by his award? Some authorities feel that the conviction could serve as conclusive evidence of a crime in a subsequent civil action since the parties in both actions are actually the same. In the criminal action, the state represents the people, including the victim; in the civil action the parties remain the victim and the wrongdoer.[68] Others feel that while the victims ought to be bound by a decision that the crime did not occur, the contrary determination should not be utilized by the victim due to the difference in parties.[69]

A final consideration in devising any compensation program is the type of machinery needed to carry out the intended plan. Advocates are in basic agreement that a small governmental agency can best carry into effect the provisions of any such program. The state prosecuting officer could certify to the agency that all claims were valid; the agency would then investigate the claim, determining the loss and its extent. That agency, in turn, would have the responsibility of pressing subrogated claims against the injuring criminals to recover the loss. An interesting feature in many proposals calls for one member of the agency to hear and investigate the claim, with appeal provisions to the full board in the event of a dissatisfied claimant,[70] thus affording a two-level process within the same administrative agency.

What has been accomplished in this country toward the goal of victim compensation? Various federal and state proposals have been introduced in recent years, meeting with varied amounts of success.

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66 Note, *Compensation for Victims of Crime, supra* note 57, at 551-52. It has been suggested that the reduction of private insurance payments may be unconstitutional as a violation of the fourteenth amendment. Weihofen, *Compensation for Victims of Criminal Violence,* 8 J. PUB. L. 191, 210 (1959).

67 Mueller, *Compensation of Victims of Crime: Thought Before Action,* 50 MINN. L. REV. 213, 215 (1965). Jurisdictions adopting compensation plans have invariably required only a preponderance of the evidence.

68 Covey, *Alternatives to a Compensation Plan for Victims of Physical Violence,* 69 DICK. L. REV. 391, 399-400 (1966).

69 Rothstein, *supra* note 48, at 48.

70 *See, e.g.,* Childres, *supra* note 3, at 465; Note, *Compensation for Victims of Crime, supra* note 57, at 555.

V. Federal Proposals 1965-1971

The United States first became involved in a consideration of compensation plans for victims of violent crimes on the federal level when Senator Ralph W. Yarborough introduced the Criminal Injuries Compensation Act on July 17, 1965.[71] Senator Yarborough echoed the sentiments of many reformers in stating that the common law, which provided a right to bring civil action against a criminal, was in essence an "empty right." He disgarded ideas of guaranteeing compensation so long as the claims are asserted against an individual criminal since that criminal must be caught, identified and convicted,[72] thereby precluding payment in more situations than not. The philosophy behind the Yarborough proposal was, therefore, that our modern democracy accepts the idea of compensating needy members of a particular class, and that in this case a direct relation existed between the class in need of compensation and the recognized duty of the state to protect its citizens from criminal action. To accomplish this ideal, however, the Senator felt it better to have a social welfare program rather than a true legal right of action against the government, as in the Federal Tort Claims Act. The advantage of such a system would be a separate dispensation of criminal justice and compensation of the victim. Also, the criminal guilt of the defendant would not be an issue in compensation cases; evidence beyond a reasonable doubt would not be necessary—a preponderance would suffice.[73] Prime concern would focus on the victim, not the criminal.

The Criminal Injuries Compensation Act of 1965 drew heavily on the world's first modern compensation enactment, passed by New Zealand in 1963,[74] with modifications based on precedents from American statutes.[75] Jurisdiction under S. 2155 would have been limited, of course, to the area of federal police power, including, among other areas, special maritime control and the District of Columbia. This would be in accord with the area of general federal police responsibility for protecting citizens, the individual states having their own responsibility for protecting citizens within their jurisdictional limitations. Following the suggestion posed by the New Zealand experience, the American plan called for a controlling commission which would be a quasi-judicial administrative authority called the Violent Crimes Compensation Commission, consisting of three appointed members serving eight-year terms.[76] This commission would have the power to compel the attendance of witnesses and the production of documents. The strict rules of evidence would not have to be followed in this administrative proceeding, as is the case with other administrative bodies. Proof

71 S. 2155, 89th Cong., 1st Sess. (1965), 111 CONG. REC. 13997 (1965). Many similar bills on the subject were then introduced in rapid succession by others, including H.R. 10896, 89th Cong., 1st Sess. (1965); H.R. 1211, 89th Cong., 1st Sess. (1965); H.R. 11291, 89th Cong., 1st Sess. (1965); H.R. 11552, 89th Cong., 1st Sess. (1965); H.R. 11818, 89th Cong., 1st Sess. (1965).

72 Yarborough, *S. 2155 of the Eighty-Ninth Congress — The Criminal Injuries Compensation Act*, 50 MINN. L. REV. 255, 256 (1965).

73 *Id.* at 256-57.

74 New Zealand Stat. No. 134 (1963). See *supra* note 20.

75 Yarborough, *supra* note 72, at 258.

76 S. 2155, 89th Cong., 1st Sess. § 201-02 (1965). This proposal called for one of the members to be a lawyer, to assure the preservation of a legal format, and is similar to the comparable New Zealand section. Yarborough, *supra* note 72, at 259.

of final criminal conviction would constitute conclusive evidence that the offense had been committed,[77] thus preventing collateral attack on the finality of the criminal conviction. Anyone with a substantial interest would have the right to be heard, including, of course, the alleged criminal. This right encompassed the corresponding rights of producing evidence and cross-examining witnesses.[78] The order of the commission was to be final, with no right to litigation in court, nor a trial de novo on the facts.[79]

The victim under this type of program would be limited to compensation for personal injuries caused by the commission of a violent crime.[80] He is barred from recovering if he is a relative of the offender or a member of his household.[81] Compensation may be awarded, however, regardless of whether there is a criminal prosecution. If a criminal prosecution is pending, the Attorney General may ask for a suspension of the the proceeding until after the verdict, in much the same manner as provided in the New Zealand provision. In determining the amount of compensation, the commission would be obliged to inspect all the circumstances of the case, including any insurance the victim might have. Section 305b mandates that the commission deduct any other recovery received from the offender or on his behalf, or received from the government, such as social security for children. The commission, in turn, would be subrogated to any right of action the victim might have had against the offender, and may sue to recover the payments it has made, although this would most often be a futile effort.[82] The victim under this proposal could recover an award of up to $25,000 for his injuries caused by a lack of "adequate police protection."[83]

S. 2155 never reached the floor of the Senate in 1965, but Senator Yarborough "reintroduced it in each succeeding year."[84] A similar Yarborough bill with a different number was thus on the docket in each succeeding session, although meeting with little apparent success.[85] But the former senior senator from

77 S. 2155, *supra* note 76, at § 205. The anticipated legal expertise of the members would have enabled the members to weigh the relevance and value of evidence. Yarborough, *supra* note 72, at 259.

78 S. 2155, *supra* note 76. It was felt that such an informal inquiry ". . . between three antagonistic parties fully preserves the benefits of the adversary system." Yarborough, *supra* note 72, at 260.

79 S. 2155, *supra* note 76, at § 207. The object was to provide speedy compensation by a simple administrative proceeding. This also is similar to the New Zealand and British proposals. Yarborough, *supra* note 72, at 260. However, constitutional issues have been raised on such a stipulation. *See infra* note 126. The newest federal proposal calls for judicial review of the commissioner's order.

80 S. 2155, *supra* note 76, at § 102. Recovery beyond that for personal injury was rejected in view of the astronomical costs and the fact that private insurance adequately protects loss to property. Yarborough, *supra* note 72, at 261.

81 S. 2155, *supra* note 76, at §304. This provision, modeled after the New Zealand Act, may have been too broad. A bar on recovery limited to parent-child or husband-wife relationships could have proven adequate, according to the Senator. Yarborough, *supra* note 72, at 262. However, all successfully enacted bills by the states have provisions at least as strict as this section.

82 Yarborough, *supra* note 72, at 262-64.

83 S. 2155, *supra* note 76, at § 304 (b). Attorney fees under this act would be restricted to fifteen percent of any award over $1,000. *Id.* at § 206. This provision, taken from the Federal Tort Claims Act, might prove to be a detriment in receiving good legal advice according to Yarborough, but it was inserted in view of the novelty of the bill. Yarborough, *supra* note 72, at 260.

84 117 CONG. REC. E603 (daily ed. Feb. 9, 1971).

85 S. 9, 91st Cong., 1st Sess. (1969), 115 CONG. REC. 768 (1969); S. 646, 90th Cong., 1st Sess. (1967), 113 CONG. REC. 1491 (1967).

Texas was not dissuaded from action. In 1969, he also introduced a plan applying only to the federally governed District of Columbia.[86] This bill was sent to committee like the others, but it did not die there as the others had, instead emerging as a small part of an anticrime measure involving the District of Columbia. However, the provision was eliminated before final passage of the bill.[87] Once again, the Congress of the United States had rejected a plan to compensate victims of violent crimes, without the full and independent hearing the idea so well deserves.

In December of 1970, Senate Majority Leader Mike Mansfield introduced another version of the 1965 bill.[88] This bill, now the Criminal Injuries Compensation Act of 1971, was reintroduced in the Senate on February 9, 1971, was read twice and referred to the Committee on the Judiciary.[89] The primary motive behind such a bill is to "give consideration to the victim of crime—to the one who suffers because of crime."[90] Two days earlier on February 9, Representative William J. Green of Pennsylvania introduced the House counterpart to the Mansfield proposal—H.R. 3963.[91] Representative Green noted the momentous forward strides in our criminal law and procedure, and offered H.R. 3963 to update our thinking as to the victim and his forgotten position. He expressed that

> . . . we have not considered with the same dedication and sensitivity the third sector of any criminal act—the victim. The victim of violent crime has become the "forgotten victim." His plight and suffering have too often been dismissed as the unfortunate byproduct of violent attacks. . . . Yet, if government has the obligation to protect its citizens . . . so too does it have the obligation to help and care for the innocent it fails to protect.[92]

Toward this end, the Congress will once again have the opportunity to consider the plight of the victim of crime and what should be done to assist him.

Both the Mansfield and Green bills are replicas of the Yarborough attempts of former years. Little effort was made to change the basic format of the original proposal as it was introduced in 1965. A few changes, however, were introduced based on the experience of states which have adopted compensation programs in the intervening years. For example, the orders and decisions of the commission were final under section 207 of the Yarborough plan. The latest attempts provide that those orders and decisions shall be reviewable in the appropriate court of appeals, although no trial de novo of the facts is allowed.[93] Another provision eliminates the fixed percentage provided for attorneys' fees and merely

86 S. 2936, 91st Cong., 1st Sess. (1969), 115 CONG. REC. 26266 (1969).
87 U.S. NEWS & WORLD REPORT, April 5, 1971, at 42.
88 S. 4576, 91st Cong., 2nd Sess. (1970), 116 CONG. REC. 19904 (daily ed. Dec. 10, 1970).
89 S. 750, 92nd Cong., 1st Sess. (1971), 117 CONG. REC. 1359 (daily ed. Feb. 11, 1971).
90 *Id.*
91 H.R. 3963, 92nd Cong., 1st Sess. (1971), 117 CONG. REC. 588 (daily ed. Feb. 9, 1971). A companion bill, H.R. 5205, was introduced by Representative Eilberg in March. 117 CONG. REC. 1082 (daily ed., March 1, 1971). Bills with similar provisions include H.R. 191 and H.R. 2333. U.S. CODE CONG. & AD. NEWS x (March 25, 1971).
92 117 CONG. REC. E602 (daily ed. Feb. 9, 1971).
93 S. 750, 92nd Cong., 1st Sess. § 306 (1971); H.R. 3963, 92nd Cong., 1st Sess. § 306 (1971).

gives the commission power to ascertain that an excessive fee not be charged for services.[94]

The truly substantial innovation of these new bills is the provision for grants to the states to pay the federal share of the costs of state programs for compensation. To become eligible for such a grant, the state must have an agency to hear claims for compensation, and must provide payments in the form of expenses incurred, loss of earning power, pecuniary loss to dependants, pain and suffering and other reasonable losses.[95] The state must establish adequate fiscal controls and submit periodic reports evaluating the effectiveness of payments received under the Act.[96] The federal share covered by the state plan would be 75 percent in any fiscal year, paid in installments.[97] These grants may be withheld upon a finding that the state failed to substantially comply with any of the controls within the Act.[98] The only divergence between the two bills occurs in the presence of an added subsection in H.R. 3963 which would make the state provide a program of information and advertisement to inform the citizenry of the availability of compensation.[99]

Chances for passage of any such act this session have been regarded as dim. Senator Mansfield, however, has been given assurances that the proposals will at least get a hearing, and backers are hopeful that the idea will gain momentum in years to come. Representative Green, while not highly optimistic of passage this year, feels that the program is "an idea whose time has come."[100] The time *has* certainly arrived when Congress must meet the issues head on and, after careful hearings and full debate, reach some determination. Then, perhaps, the public will make its sentiments known on this pressing issue.

VI. Existing State Compensation Plans

Since the advent of serious consideration for compensating the victims of crime in the United States, six jurisdictions have promulgated laws establishing such systems, and several other states have measures pending in their legislatures.[101] New York, Massachusetts, Maryland, California, Hawaii and Nevada all have compensation plans in operation at the present time. The statutes vary according to the legislative philosophy behind their enactment. Several are based on a social welfare policy, with financial hardship as the prime requisite to recovery, while others are formulated on the "of right" principle, open to all who have been injured by criminal acts. A few allow recovery for property damage in addition to physical injury, while the rest provide for recovery only to the extent of physical violence. The ceiling on recovery also differs greatly, as

94 *Id.* at § 304. Yarborough himself was against the fixed fifteen percent fee for awards over $1,000. *See supra* note 83.
95 *Id.* at § 502.
96 *Id.* at § 503.
97 *Id.* at § 505.
98 *Id.* at § 506.
99 H.R. 3963, at § 503 (6). Representative Green cited a history of ineffectiveness where programs of outreach are not conducted, thus achieving an unequal distribution among citizens. 117 CONG. REC. E603 (daily ed. Feb. 9, 1971).
100 U.S. NEWS & WORLD REPORT, April 5, 1971, at 40.
101 Illinois, Ohio, Michigan, Arkansas and New Jersey are presently in the process of such considerations. U.S. NEWS & WORLD REPORT, April 5, 1971, at 42.

do the monetary prerequisites to eligibility. All of the plans, however, have one basic and overriding principle in common—a concentration on the victim and his plight as a result of criminal acts.

The first state to adopt such a compensation program in this country was California in 1965, when the legislature added section 11211 to the Welfare and Institutions Code and section 13600-13603 to the Penal Code, the latter covering the situation of injury to a private citizen in an attempt to prevent a crime.[102] Of primary concern was the fact that need for such compensation was a prerequisite to eligibility for such aid under section 11211, based on the same standard as was used for aid to families with dependant children.[103] The plan was further hampered by the fact that only $100,000 was allotted for expenditures in the first fiscal year of its existence. In 1967, the legislature retracted their former provision and formulated new considerations.[104] The first such new article, now entitled Victims of Crime, provides for indemnification to those needy California residents or domiciliaries who are injured as a consequence of criminal acts while in the state, or while temporarily in another jurisdiction, if the said act would constitute a public offense in California. Again, eligibility is prefaced by a showing of need.[105] When an individual becomes the victim of a crime of violence, he or his family or dependants may file an application for indemnification with the State Board of Control within one year after the occurrence.[106] The board sets a date for a hearing and notifies all interested parties such as the alleged offender and the attorney general, who prepares a report based on an investigation of the occurrence. The board, as a whole, then hears the evidence as to the nature and circumstances of the crime, the extent of injury, and the need of the claimant.[107] If on a preponderance of the evidence, the board holds in favor of the claimant, it approves the claim for payment, unless the claimant has not cooperated with the police in the apprehension of the criminal committing the crime.[108]

In the event an award is made, the act provides that the claim may not exceed the amount necessary to indemnify or reimburse the claimant for expenses of hospitalization or medical treatment, loss of wages or support, and other necessary expenses related directly to the injury, and in no case in excess of $5,000. Partial awards may be made and reconsidered, based on continued hospitalization or treatment. The claim must be reduced to the extent of

102 Note, *Compensation for Victims of Crimes of Violence,* 30 ALBANY L. REV. 325, 329 (1966). *See generally* Geis, *Prospectus for Research on Victims—Compensation in California,* 2 CAL. WESTERN L. REV. 85 (1966) for a study on this jurisdiction's initial enactment.

103 Consideration of financial necessity was a radical departure from the New Zealand and British schemes. Comment, *Victims of Violent Crime: Should They Be an Object of Social Effection? supra* note 44, at 107-08. This indicates strict adherence to a welfare philosophy in a compensation scheme. *Id.* at 108, n.93. A proposed new bill, last amended in July, would apparently do away with this need basis. See AB 2552, § 8870.

104 CAL. GOV'T. CODE §§ 13960 (1967) *et seq.*

105 *Id.* at § 13963.

106 *Id.* at § 13962.

107 Other jurisdictions provide that one member of the board hears the application, with the whole board operating as an appellate stage within the administrative framework. It has been suggested that this provision establishes a better safeguard, and is less time consuming than a judicial appeal. Note, *Compensation for Victims of Crime,* 33 CHI. L. REV. 531, 555 (1966). A.B. 2552 envisions such a procedure in § 8889, by providing an appeal to the proposed Victim Compensation Commission.

108 CAL. GOV'T. CODE § 13963 (1967).

indemnification from *any* other source[109] including private insurance, although the constitutionality of such a provision has been questioned.[110] Furthermore, when the claim has been paid, the state is subrogated to the rights of the claimant against any person causing the injury, and may intervene or bring a separate action to so recover.[111]

Another unusual feature of the California plan is the right of the court to impose, in addition to other penalties, a fine "commensurate in amount with the offense committed," on one convicted of a crime of violence causing death or injury. The proceeds are deposited in the Indemnity Fund and are used to indemnify claimants. This provision is discretionary, the defendant's economic condition being of prime importance.[112]

The second article of California's present compensation plan[113] is the successor to sections 13600-13603 of the Penal Code and is entitled "Citizens Benefiting the Public." Like its forerunner, it is a "Good Samaritan" statute and operates on a theory of indemnification for actual losses, with financial need *not* an element of determination. This provision seeks to make whole private citizens damaged in their persons or their property while preventing the commission of a crime, apprehending criminals, or rescuing a person in danger of injury or death as a result of catastrophes. The citizen or his widow and surviving children are eligible "to the extent they are not compensated for the injury, death, or damage from any other source."[114] The unique feature of this enactment is that the claimant may also receive compensation for damage to his *property*, regardless of other injuries. As in the case of the Victims of Crime Act, the attorney general must investigate all claims and recommend action accordingly. The board, considering the nature of the crime or catastrophe, the directness of the consequences, the contribution made by the citizen to the apprehension of the criminal, prevention of the crime, or rescue of the person in danger, determines whether the state should compensate. Upon a favorable determination, a report of facts and conclusion is submitted to the legislature which may provide an appropriation not in excess of $5,000.[115]

Many jurisdictions observed the development and implementation of the California plan with watchful awareness due to a combination of the novelty of such a program and its importance. From the general compensation plan's inception in 1967 through June of this year, 1410 claims have been filed. Of these, 387 were granted for total awards of $652,625. Claims still pending as of June totaled 264.[116] Under the "Good Samaritan" statutes, in effect since 1965 and revised in 1969, there have been only 50 claims, of which 32 have been granted for total awards of $137,000. It should be noted that one award

109 *Id.*
110 *See* Weihofen, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 191, 210 (1959).
111 CAL. GOV'T. CODE § 13963 (1967).
112 *Id.* at § 13964.
113 *Id.* at § 13970 (1969) *et seq.*
114 *Id.* at § 13973. *See also* Worthington v. State Bd. of Control, 266 Cal. App. 2d 697, 72 Cal. Rptr. 449 (1968).
115 Report of the State Board of Control (July 1971).
116 *Id.*

under this provision amounted to $79,500.[117] Awards under this provision are now limited to $5,000. A total of $12,222 has been paid out of the Indemnity Fund to aid in covering these claims, which have increased threefold since the inception of this act.[118]

The second pioneer in the field of compensation for criminally inflicted injuries, New York, enacted its program in 1966, although the provisions did not take effect until March 1, 1967.[119] The program is administered by the crime victims compensation board, consisting of three members appointed by the governor with the advice and consent of the state senate.[120] Again, as with the California statute, an award will not be granted unless the claimant would otherwise "suffer serious financial hardship . . ." as a result of such injury.[121] The victim, his *surviving* spouse and dependants, and others dependent on the victim for their principal support are eligible for such compensation.[122] The claim must be filed within ninety days of the occurrence or the death of the victim, with extensions of up to one year granted for good cause. Proceedings by the board are deferred if a criminal prosecution is pending upon the same alleged crime.[123] A minimum of $100 out-of-pocket expenses or loss of two weeks earnings or support is necessary for action on a claim.[124]

Unlike the California provision, the New York enactment calls for a determination by one member of the board, based on an investigation, the papers filed, and a hearing, if necessary.[125] The claimant may, within thirty days, make application to the full board for consideration of an unfavorable decision, which upon their determination, becomes final to the claimant.[126] The attorney general or the state comptroller may still, within thirty days, proceed in the appellate division of the supreme court for a review of a decision which they judge to be improper or excessive.[127] The board is permitted to grant an award only upon a finding that a crime was committed resulting in physical injury or death and that it was reported within forty-eight hours, unless the delay was justified. No award may exceed $15,000, except for medical expenses, and this is further limited in that loss of earnings or support may not exceed $100 for each week. The award must be reduced by other payments received as a result of the injury. The New York provision is unlike California's in that it specifies that the board

117 U.S. NEWS & WORLD REPORT, April 5, 1971, at 42.
118 Report, *supra* note 115.
119 N.Y. SESS. LAWS, ch. 894, § 3 (1966).
120 N.Y. EXEC. LAW § 622 (1966).
121 *Id.* at § 631 (6). Although both Great Britain and New York recognize no moral obligation or duty to compensate victims of crime, and term such aid as legislative grace, Britain has nevertheless chosen to compensate all victims regardless of wealth. It has been suggested that New York should do likewise. *See* Comment, *Compensation for Victims of Crimes of Violence — New York Executive Law Article 22*, 31 ALBANY L. REV. 120, 123 (1967).
122 N.Y. EXEC. LAW § 624 (1966).
123 *Id.* at § 625.
124 *Id.* at § 626.
125 *Id.* at § 627. A total of 99 claims were reviewed in this manner in 1970. Annual Report of the Crime Victims Compensation Board 15 (1970).
126 N.Y. EXEC. LAW § 628 (1966). The question of whether a legislature can completely deny a claimant all judicial review without violating due process of the federal and state constitutions has been raised. The danger seems to be a chance of divestment by the legislature of review of agency decisions in the future. *See* Comment, *Compensation for Victims of Crimes of Violence—New York Executive Law Article 22*, ALBANY L. REV. 120, 125-27 (1967).
127 N.Y. EXEC. LAW § 629 (1966).

must reduce the award in proportion to the extent the victim contributed to his injury, unless attributable to efforts by the victim to prevent the crime or apprehend a criminal.[128] The state, upon payment of a claim, becomes subrogated to any right of action of the claimant.[129]

An interesting innovation of New York's plan is the provision for emergency awards. If it appears to a board member that a claim will be granted, and the claimant will suffer undue hardship if immediate payment is not made, an emergency payment may be granted pending final decision. This amount is subtracted from the ultimate award and must be repaid if no final award is made. The amount of this emergency award may not exceed $500.[130]

According to L. Van Rensselaer, chairman of the New York Crime Victims Compensation Board, the average payment to a crime victim has been about $1,410. The average award to dependants of a victim killed in a crime is $3,000, and the average payment to a disabled victim is $4,071 a year.[131] In the past fiscal year, there were 826 decisions by the board, with 336 awards made and 490 denied.[132] In all, 929 official claims were taken, an increase of 410 over the preceding year.[133]

Perhaps the most comprehensive of the present compensation programs was promulgated in 1967 when Hawaii adopted its Criminal Injuries Compensation Act. The victim, his dependants in case of his death, and anyone responsible for his maintenance who suffers pecuniary loss or expenses as a result of the victim's injury is eligible for compensation. No requirement of need is present in this act, as was the case in the former jurisdictions considered. To make an

128 *Id.* at § 631. One author feels that a combination of lump sum payments and periodic payments achieves best results. Floyd, *Victim Compensation Plans,* 55 A.B.A.J. 159, 160 (1969).
129 N.Y. Exec. Law § 634 (1966).
130 *Id.* at § 630.
131 Annual Report of the Crime Victims Compensation Board, State of New York 12 (1970).
132 *Id.* at 10.
The reasons for denial were as follows:

Withdrawn	45
Provocation	6
No principal support	17
Did not meet minimum requirements	126
No serious financial hardship	104
No crime committed	23
Ineligible — over 1 year	31
Failed to furnish information	79
Ineligible — claimant	5
*Good Samaritan	3
No police report	20
Member of family	9
Motor vehicle	2
Unable to locate claimant	6
Workmen's Compensation pending	8
Claimant deceased	1
Disability benefits	1
Social Security benefits	2
Other — pending lawsuit and criminal case	2
Total	490

* Claimants filed under New York City Good Samaritan law. *Id.* 11.

133 *Id.* at 5.

order for compensation, however, the Criminal Injuries Compensation Commission must find that a crime did occur and that the victim's injury or death was attributable to such occurrence. The commission, in determining whether to make an order, may consider the behavior of the victim, and his responsibility for the crime that caused his injury or death. They may then reduce his award in accordance with their assessment of the degree of such responsibility.[134] Payments made by the offender or the federal or state governments and their agencies for the injury or death must be deducted from the award.[135] No mention is made of an intent to include private insurance of any kind, a controversial question in other jurisdictions. Application must be made within eighteen months after the injury or death, and the commission is limited to a maximum award of $10,000.[136]

When an application is filed, it is heard by the commission sitting as a whole. The applicant and any other person with a substantial interest—thus, the alleged offender—has a right to be heard. This right includes presenting evidence and cross-examining witnesses. Unless an appeal is pending, proof of a conviction in the matter is conclusive evidence that the offense was committed.[137] Upon a payment, the commission may institute a derivative action against any person convicted of the offense, in the name of the victim or his dependants who have been awarded such compensation. Any recovery belongs to the state, with the reservation that the commission will amend its order of compensation to provide for payments of any recovery in excess of the compensated amount to the claimant in a proportion it deems appropriate.[138] The commission, in its discretion, may make its order for compensation in lump sum or periodic installments, as well as apportioning the award or holding it in trust.[139]

Several new and somewhat unique features in the philosophy of compensation plans have surfaced in the Hawaiian scheme. Perhaps the most interesting is the provision made for compensation for pain and suffering in addition to

134 HAWAII REV. LAWS § 351-31 (1967). Several other jurisdictions give their compensating agencies authority to reduce the amount of the award in proportion to the degree of responsibility on the part of the victim. However, they do not decide *whether to make an order* on this basis. *See* N.Y. EXEC. LAW § 631 (5) (1966); CAL. GOV'T. CODE § 13963 (1967); MASS. GEN. LAWS ch. 258A, § 6 (1968). Only Nevada has a similar discretionary provision in its statute. NEV. REV. STAT. § 217.180 (1969). The Maryland pronouncement allows the board to reduce *or* reject the claim. MD. ANN. CODE art. 26A, § 12 (1968). Last year, there were 13 cases where the Commission determined shared responsibility on the part of the victim. Recovery was denied in 7 of them, and reduced in 6 others. THIRD REPORT OF THE CRIMINAL INJURIES COMPENSATION COMMISSION, STATE OF HAWAII 4-5 (1970).

135 HAWAII REV. LAWS § 351-63 (1967). The Attorney General has stated that welfare payments are not to be deducted from the award under this provision. HAWAII ATT'Y GEN. OP. 69-27 (1969). The Commission, citing cases of double recovery through private insurance, has suggested this section be amended to preclude such double recovery under the collateral source doctrine. Letter from Wilfred S. Pang, Executive Secretary of the Criminal Injuries Compensation Commission, July 7, 1971, on file with the *Notre Dame Lawyer*.

136 HAWAII REV. LAWS § 351-62 (1967).

137 *Id. at* § 351-14.

138 *Id.* at § 351-35.

139 *Id.* at § 351-61. *See supra* note 128. Since victims in this jurisdiction, as well as in others, sometimes do not fulfill their financial obligations after being compensated, the Commission has recommended that this section be amended to provide for discretionary direct payment to providers of services, such as hospitals and funeral parlors. Letter from Wilfred S. Pang, Executive Secretary of the Criminal Injuries Compensation Commission, July 7, 1971, on file with the *Notre Dame Lawyer*.

actual expenses and loss of earning power.[140] No other jurisdiction in this country provides specifically for pain and suffering caused by a criminal injury as a factor in their award. Another seldom used approach is a specific listing of all the crimes which are considered violent and which render the victim eligible for an award upon their occurrence.[141] Still another unusual feature in Hawaii's enactment is the separate section dealing with compensation to private citizens who are injured while preventing a crime or apprehending a criminal or assisting the police in so doing. The only other state to have such a treatment is California. Unlike California's, however, this statute makes no provision for compensating those injured in an attempt to rescue persons faced with a catastrophe, although, like California's statute, this statute does provide compensation for pecuniary loss directly resulting from damage to the citizen's *property*.[142]

Hawaii has faced mounting costs since the birth of its compensation plan. In 1968, three awards were made for a mere $1,000 total in payments. In 1969, there were 47 awards from 84 claims for a total of $111,945. In 1970, $267,157 was disbursed to 121 claimants out of 135 applicants, for an average payment of $2,167 each.[143] Of last year's total, $138,323.28 was awarded in lump sum payments, $117,862.15 was awarded in vested periodic payments, and $5,991.71 in nonvesting payments which revert to the state upon a change in the conditions of the award.[144] In all, the Hawaiian program, while not having been tested to the extent of California's or New York's, appears to be functioning very effectively.

"The Massachusetts plan was signed by Governor Volpe in January 1968, and marked the beginning of a new era in the Commonwealth regarding the plight of victims."[145] Unlike former treatment by sister jurisdictions, Massachusetts' bill was recommended by a special legislative commission after it found that the state owed compensation to those it failed to protect from crime.[146] Eligibility is met by being the victim of a crime, or a dependant in case of the victim's death, with the offender, his accomplice, family or one living with or

140 HAWAII REV. LAWS § 351-33 (1967). While unusual in this country, foreign compensation plans have specifically provided for this element of damage. *See, infra* note 153.

141 HAWAII REV. LAWS § 351-52 (1967). The proposed federal bill has such a list.

142 *Id.* at § 351-32. *See* CAL. GOV'T. CODE § 13970 (1969) *et seq.* However, Nevada, while not having a special division of its act devoted to this, does not mention a certificate for "meritorious citizen's service." NEV. REV. STAT. § 217.200 (1969).

143 Letter from Wilfred S. Pang, Executive Secretary of the Criminal Injuries Compensation Commission, July 7, 1971, on file with the *Notre Dame Lawyer*. Last year, the breakdown of awards was as follows:

(i)	Medical expenses	23.2%
(ii)	Funeral and burial expenses	10.2%
(iii)	Loss of earning power	49.1%
(iv)	Pecuniary loss	Less than 1%
(v)	Pain and suffering	17.5%

THIRD REPORT OF THE CRIMINAL INJURIES COMPENSATION COMMISSION, STATE OF HAWAII 4 (1970).

144 THIRD REPORT OF THE CRIMINAL INJURIES COMPENSATION COMMISSION, STATE OF HAWAII 3 (1970). The Commission believes "that the utilization of monthly periodic payment of both vested and nonvested portions of an award is consistent with the best purposes of the statute." *Id. See also supra* note 128.

145 Floyd, *Massachusetts' Plan to Aid Victims of Crime*, 48 B.U.L. REV. 360, 362 (1968).

146 *Id.* Most jurisdictions have concluded that any such plan is effectuated by legislative grace, and not out of any actual duty on the part of the state. *See supra* note 121.

maintaining a sexual relationship with the offender excluded.[147] The claim must be filed within one year of the occurrence or within ninety days after the death of the victim, whichever is earlier. Like its preexisting counterparts, this jurisdiction's plan calls for an investigation and report by the attorney general and assures the claimant of the right to present evidence and testimony and to retain counsel if he so desires.[148] As with New York's plan, this plan sets a minimum limit of $100 out-of-pocket expenses or loss of two weeks earnings or support and requires that the crime be reported to the police within forty-eight hours unless any delay has been justified.[149]

Perhaps the most unique feature of this plan is its method of administration. Unlike prior and subsequent compensation plans, Massachusetts' enactment does not provide for an administrative board to receive and hear the claims; rather, the district courts of the Commonwealth have jurisdiction to determine and award such compensation. The relevent statute reads:

> Such claims shall be brought in a district court within the territorial jurisdiction in which the claimant lives. A judge who has heard a criminal case in which the crime alleged as the basis of such claim shall not sit in determination of such claim. A judge who has heard such a claim shall not sit in a criminal case arising from a crime alleged in such claim.[150]

Such a provision has obvious shortcomings in view of the overcrowded condition of the courts today. Such disadvantages or shortcomings include, among others:

(1) the substantial additional workload placed upon the courts;
(2) the potential delay in adjudication that seems inherent in the judicial process; and
(3) the more rigid setting which usually accompanies judicial proceedings as compared to the more freewheeling administrative proceedings.[151]

The court, in determining the amount of compensation, is limited to compensating to the extent of out-of-pocket loss plus loss of earnings or support; but in no case may the award exceed $10,000.[152] No amount may be awarded for pain and suffering, following the set trend in this country. Such an element of damage is allowable under both the New Zealand and British programs.[153] The award must be reduced by any amount received from the offender, from public funds, or insurance programs. As was the case with other plans, no distinc-

147 MASS. GEN. LAWS, ch. 258A, § 3 (1968). The apparent reason for exclusionary provision is due to a high probability of collusion and precipitation, and the possibility of benefiting the offender. However, Floyd and others have asked

> [s]hould we rule out the entire class solely on the basis of the existence of a familial relationship or household connection? The results of two research projects indicate that twenty-five percent of all violent crime is precipitated. Assuming a figure twice as great, are we going to rule out the innocent fifty percent?

Floyd, *supra* note 145, at 364.

148 MASS. GEN. LAWS, ch. 258A, § 4 (1968).

149 *Id.* at § 5.

150 *Id.* at § 2.

151 Floyd, *supra* note 145, at 363; Floyd, *Victim Compensation Plans,* 55 A.B.A.J. 159, 161 (1969).

152 MASS. GEN. LAWS, ch. 258A, § 6 (1968). Under the New York plan it is possible to receive more than the stated amount, if your actual expenses exceed $15,000. *See* N.Y. EXEC. LAW § 631 (2) and (3) (1966).

153 *See* Note, *Compensation for Victims of Crime, supra* note 57, at 552.

tion is made between private and public insurance. The court is further ordered to consider the conduct of the victim and reduce the award accordingly if a finding that he contributed to his injury is present. Again, this is waived if the victim's contribution was involved with preventing a crime or apprehending a criminal.[154] The state is subrogated to any right of action accruing to the claimant or victim to recover payments resulting from the crime, to the extent of its compensation to the claimant.[155] One element not found in this jurisdiction's plan, which has caused considerable criticism, is an emergency award provision such as New York's. There are many cases in which extreme financial hardship will develop before an award can be made,[156] especially in a system wherein the *court* must decide each claim presented.

What has been the cost of this program to the state's taxpayers? Since its beginning two and a half years ago, awards have totaled only about $100,000. The relatively small figure has been attributed to a lack of awareness of this law on the part of the public.[157] Maryland became the fifth state to adopt a compensation program, effective since July of 1968. Its eligibility list includes the victim of a crime, a surviving spouse or child, any other surviving dependant of the victim, anyone injured or killed attempting to prevent a crime or apprehend a criminal, and their surviving spouse, child or other dependant. Any of the above may be excluded if criminally responsible for the crime causing the injuries, or if a member of the family of one who so caused them.[158] The claim must be filed not later than 180 days after the occurrence of the crime or after the death of the victim; however, an extension of up to two years from the occurrence may be allowed upon a showing of good cause. If a criminal prosecution is pending upon the alleged crime, the compensation proceedings may be deferred until its conclusion.[159]

To administer this program, the Criminal Injuries Compensation Board, consisting of three members was established within the Department of Public Safety and Correctional Services.[160] Fashioned similarly to New York's provision, the Maryland statute calls for a determination to be made by one member of the board after an adequate investigation of the claim.[161] Within thirty days, the claimant may apply for a consideration of the decision by the whole board. The action of the full board, whether favorable or not to the claimant, is to be final.[162] As was the case under the New York provision, the attorney general may still seek judicial review of a decision thought to be improper, and such matter would have precedence over all civil cases in such court.[163] In any case, to order compensation the board must find that a crime was committed resulting in physical

154 MASS. GEN. LAWS, ch. 258A, § 6 (1968). This is an almost exact statement of New York's coverage on the point. *See* N.Y. EXEC. LAW § 631 (5) (1966).
155 MASS. GEN. LAWS, ch. 258A, § 7 (1968).
156 Floyd, *supra* note 145, at 370.
157 Letter from Daniel M. O'Sullivan, Director of the Massachusetts Legislative Research Bureau, August 5, 1971, on file with the *Notre Dame Lawyer.*
158 MD. ANN. CODE, art. 28A, § 12 (1968).
159 *Id.* at § 6.
160 *Id.* at § 3.
161 *Id.* at § 8.
162 *Id.* at § 9.
163 *Id.* at § 10. The constitutionality of such a one-sided appeal has been questioned. *See supra* notes 107, 126.

injury, and that it was reported to the police within two days of the occurrence, unless good cause for a delay has been shown. If the board member determines that the victim contributed to his own injury, he may reduce the amount of the award or reject the claim altogether, unless the injury resulted from an attempt to apprehend a criminal or prevent a crime. In all situations, however, no compensation may be ordered unless it appears that the claimant will otherwise suffer serious financial hardship.[164]

Unlike all other jurisdictions, Maryland does not set a statutory limit on the maximum amount of compensation available within its provision. Rather, a precise scale of benefits and degree of disability found in section 36 of article 101 of the Code is used in the computations.[165] If it appears to a member that a claimant will in the meantime suffer undue hardship, an emergency payment may be made pending final decision. The amount of such award is limited to $500, which is deducted from any subsequent award.[166] Acceptance of any award subrogates the state to any right of action accruing to the claimant or victim as a result of the crime.[167]

In similar fashion to California, Maryland imposes an additional cost of five dollars on all persons convicted of a crime, with the two exceptions of those involving motor vehicles and natural resources. Such sums are paid over to the comptroller to be placed in the general funds of the state.[168]

The state which most recently adopted a compensation plan was Nevada in 1969, with passage of the Compensation For Victims of Criminal Acts. Those eligible for awards under this act include the injured person, those responsible for his maintenance who have suffered pecuniary damages as a result of the injury to the victim, and the victim's dependants in the event of his death.[169] Relatives of the offender, members of his household, and anyone with whom he was maintaining a sexual relationship may not receive such compensation under any circumstances. A victim who violated a penal law of the state in receiving his injury, as well as one who was injured by the operation of a motor vehicle, boat or airplane, unless used as a weapon, are also precluded from recovery.[170] Awards are limited to expenses actually incurred, loss of earning power of the victim, pecuniary loss to dependants, and any other loss resulting from injury or death which the state board of examiners deems reasonable.[171] No award may be granted after two years from the date of the injury or death, nor if the incident was not reported to the police within five days of the occurrence or within five days of when it could reasonably have been made.[172]

Applications are filed with the state board of examiners, and a hearing is

164 MD. ANN. CODE, art. 28A, § 12 (1968). *See supra* note 103.
165 MD. ANN. CODE, art. 28A, § 12 (1968). The manner of payment of awards is also governed by § 36 of article 101. *Id.* at § 13.
166 *Id.* at § 11.
167 *Id.* at § 15.
168 MD. ANN. CODE, art. 28A, § 17 (1969). However, California only assesses its fine on those convicted of a crime of violence, and the assessment is discretionary, based on whether the criminal's family would then become dependent on public welfare. CAL. GOV'T. CODE § 13964 (1967).
169 NEV. REV. STAT. § 217.160 (1969).
170 *Id.* at § 217.220.
171 *Id.* at § 217.200.
172 *Id.* at § 217.210.

held by the board or its hearing officer. The claimant and anyone else having a substantial interest in the outcome of the proceeding may appear and be heard and produce evidence and cross-examine witnesses either in person or by his attorney. Orders and decisions of the board are final.[173] No standards appear in the statute delineating what is required as to the establishment of a crime as a prerequisite to compensation, but they can be assumed to exist since it is provided that when a person is convicted of an offense with respect to the act on which the claim is based, proof of conviction is conclusive evidence that the offense has been committed.[174] Compensation is awarded when a person is injured or killed as a result of a serious crime, or in an attempt to prevent the commission of a crime or to arrest a suspected criminal.[175] No award may exceed $5,000, and all payments are made in lump sum.[176] Upon any payment, the board is subrogated to the cause of action of the applicant against the person or persons responsible for the injury or death, to the extent of such payment. Any excess is paid to the applicant.[177]

Nevada has had little experience as yet in their new endeavor of victim compensation. As of this July, only five claims have been submitted to the Board of Examiners for their review. Of these five, three have been awarded the maximum of $5,000 plus a certificate for meritorious service from the governor. One claimant was awarded $59 special damages, and the fifth claim "has just been received and is now pending."[178]

VII. Alternatives to Compensation

Putting aside the obvious fact that a compensation program is the most effective instrument to assure the victim of a remedy to his situation, there are other existing possibilities and proposals for future action capable of effectuating the same approximate result. These alternatives, offered as solutions to the problem for those who feel the long arm of the government grasping for a total welfare state, are also suggested with but one aim—to recognize and ease the plight of the forgotten man—the victim.

One such proposal, presently imbedded in great controversy, is to develop a new approach to penal reform, which is still embroiled in the same theories of deterrence and retribution it has experienced for centuries. "Punishment in the above sense may look at the avoidance of future victims, but it ignores prior victims."[179] What is thus suggested as a remedy is the renovation of a system of

173 *Id.* at § 217.110. The lack of adequate judicial review has created considerable controversy in a sister jurisdiction, New York. *See supra* note 126.

174 NEV. REV. STAT. § 217.120 (1969).

175 *Id.* at § 217.010(2). If the claim is based on injuries received while assisting a police officer to prevent a crime or apprehend a suspected criminal, however, no compensation is allowed unless the police officer files an affidavit in support of such claim with the board. *Id.* at § 217.190.

176 *Id.* at § 217.220. The value of combinations of periodic and lump sum payments has been explored by Floyd. *See supra* note 128.

177 NEV. REV. STAT. § 217.240 (1969).

178 Letter from Howard E. Barrett, Clerk of the Board of Examiners, July 20, 1971, on file with the *Notre Dame Lawyer*. The main reason for so few claims appears to be that few Nevadans are aware of the new law's existence. U.S. NEWS & WORLD REPORT, April 5, 1971, at 42.

179 Schafer, *supra* note 15 at 243.

restitution to be employed in the criminal process. Presently, where such systems exist, they are limited in scope; where they are nonexistent, the victim is left with inadequate tort law remedies in the absence of a compensation program. This restitution, consisting of "compensation" to the victim, would become part of a criminal's punishment—thus appeasing the victim and conciliating an aggrieved society through the bloodless punishment of the guilty party. It would thus be possible to apply criminal proceedings to the individual victim, as well as society. Presently, the victim is allowed only "spiritual restitution," and even this is meaningless in a society which concentrates not on the gravity of the loss but on the personality of the offender. The result is that the victim is uncompensated, while the offender feels no futher obligation, either to the victim or to society as a whole, having "paid his debt" by serving time.[180] Schafer and others therefore feel that a joinder of the criminal and civil recourses is in order through a restitution action by the victim, for

> [t]he universalistic view of criminal law, recognizing man's relationship to his society, should not cause continued indifference to restitution to the victims, but on the contrary, should logically help its rejuvenation. Under the universalistic view, the victim cannot be regarded as just somebody who was involved in a crime situation. The victim has played a role in the crime, and is important in many respects. The law must regard him in every respect.[181]

This system of restitution would be based on a fines system, guaranteeing recovery to the victim. The offender should be made to understand that he has injured the victim as well as the state; therefore, this system would not only redress the injury or loss to the victim, but would also aid in rehabilitation.[182] A majority of jurisdictions in the United States today, as well as foreign countries, have reparation systems permitting restitution as a condition to probation. A majority of these limit such restitution to the pecuniary harm proximately caused by the act for which the probationer was convicted.[183] What remains important, however, is that the foundation for a restitutional system is already present in most jurisdictions. An offender would thus face the dilemma of compensating the victim or going to jail to serve his sentence. Many have argued that it is merely a sophisticated technique employing the threat of imprisonment for debts; however, proponents of such a system believe the condition may be viewed in its rehabilitative light which is a legitimate penal purpose. To them, it is merely a matter of changing the way one views the process.[184]

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180 *Id.* at 244-45. The universalistic approach to the criminal law accounts for this attitude, according to Schafer, who traces the roots of this problem through a history such as was seen in the beginning of this work. *Id.* at 245-47.

181 *Id.* at 248. This joinder would only be allowed when the civil action did not disrupt the criminal proceeding. The prosecutor would then be able to plead the case for the state *and* the victim. Covey, *supra* note 68, at 402.

182 Schafer, *supra* note 15, at 249. Margery Fry once said that "to the offender's pocket it makes no difference whether what he has to pay is a fine, costs or compensation. But to his understanding of the nature of justice it may make a great deal." M. FRY, ARMS OF THE LAW 124 (1951).

183 Note, *Use of Restitution in the Criminal Process: People v. Miller,* 16 U.C.L.A. L. REV. 456, 460 (1969). *See, e.g.,* N.Y. PENAL CODE § 65.10 (1909).

184 Note, *Use of Restitution in the Criminal Process: People v. Miller, supra* note 183, at

What becomes essential to a proper functioning of such a system is that a balance be struck so that the rich offender is not unduly favored at the expense of the poor offender by his access to funds. Without such a balance, the system would be of little reformative value. But neither should the poor offender have his sentence extended due to an inability to pay the compensation. What has been suggested is that the offender be allowed to work while in prison, with release assured when the debt is paid.[185] While employment at prison rates might make reparation appear an impossible task, new experiments with work-release programs perhaps could be utilized for the cooperative prisoner. The offender could also be made to continue his payments even after serving his punishment, thus retaining the reformative character of the process. This could be effectuated most efficiently by making such a provision a part of the original sentence rather than an extension of it.[186]

One does not have to venture far to uncover defects in the practicality of such a system, though it may remain solid in theory. First of all, a large number of discharged inmates do not become law-abiding members of society—the rate of recidivism is over 50 percent. Therefore, the chances are high that a given offender will find his way back to prison, thus obviating prison as a threat for nonpayment, and eliminating the prospect of payment from his outside employment. In prison, the jobs are negligible and few prisoners are actually employed —most jurisdictions can employ less than 50 percent of their inmates. In addition, what nominal money the prisoner earns normally has to be used to support his family.[187] The British rejected such a system as being impractical, favoring instead their compensation program. Other opponents have, as mentioned above, asserted that this amounts to imprisonment for debt, a taboo in modern societies. Others have observed that such systems have failed to work whenever they were attempted in the past.[188] Constitutional questions could also develop if the offender was ordered to pay restitution for acts other than those for which he was specifically convicted. This might have the effect of producing an adverse reaction to the administration of justice in some circumstances.[189] In theory, perhaps the greatest offering of such a system is that the offender is made to realize the loss suffered by the victim due to his actions. Schafer, after conducting extensive surveys in various penal institutions, has concluded that there is little remorse and desire to make reparation to victims on the part of prisoners. He attributes this not to deviant logic, but to an inability to understand crimes in

461. Many statutes can be cited which employ language as to making amends if it will lead to "reformation and rehabilitation" of the criminal. The main concern is that there be a relationship between the conditions of probation and the criminal act. *Id.* at 462-63.

185 Schafer, *supra* note 15, at 252-53; Mueller, *supra* note 67, at 218-19.

186 *Id.* Such work might weaken incentives to learn if all the earnings are taken from the criminal. It has, therefore, been suggested that a complicated schedule of apportionment, such as is utilized in Chapter VIII of the Bankruptcy Act, be established. Note, *Compensation for Victims of Crime, supra* note 57, at 535.

187 Floyd, *supra* note 145, at 361.

188 Note, *Victims of Violent Crime: Should They Be an Object of Social Effection? supra* note 44, at 118-19.

189 *See* Note, *Use of Restitution in the Criminal Process: People v. Miller, supra* note 183, at 473-74.

the context of harm to victims.[190] The introduction of a system of restitution might enable these individuals to feel the loss in such context.

Another alternative to this idea of compensation is, of course, private insurance coverage. In addition to avoiding many of the defects involved in the other systems, the insurance program offers an almost unlimited variety of plans in amounts, terms and coverage. Recent surveys show that over 77 percent of the nation's civilian population have some type of medical or hospitalization insurance.[191] Proponents of insurance feel that all persons should be afforded an opportunity to seek indemnity through private insurers for all provable damages, with governmental participation kept to a minimum. They object that under either the compensation theory or the restitution proposal the prosecutor, in effect, no longer has the discretion as to whether or not to prosecute the offender. This is felt to be a bad policy. These proponents of insurance feel that criminal proceedings should not be the place for recovery of civil damages.[192] Thus, to them, private insurance seems to be the only solution.

At least two variations of the insurance proposal have been suggested. One is the idea of compulsory insurance analogous to the "assigned risk" plans involved in compulsory automobile insurance. But, while the state's control over the public highways gives it the necessary state interest to require automobile insurance, the same logic may not be true as to crime control. Also, such compulsory insurance is vulnerable to legal challenges on the basis of probabilities. That is to say that while automobile risk is equal for each driver, the same is not true in the case of criminal conduct—crimes are not subject to homogeneous classification. Another suggested variation of the insurance proposal is a "special risk" policy, which offers protection to interests ordinarily considered to be uninsurable. These would be used to permit coverage of potential victims in high crime areas where a person might not otherwise be afforded protection. However, due to a need for a high rate of acceptance in order to allow feasible rates, this program is not really practical at the present time.[193]

And so reliance must be placed on the existing forms of life, accident and health policies for such a system to operate. Many such policies, however, have specific exclusions where the injury or death was suffered through "any violation of law" or "illegal act of any person." Since the magnitude of risk is not high enough to warrant these exclusions in comparison with other injuries, it is believed that the companies are concerned over the possibility of the victim's own misconduct as well as the possibility of fraudulent claims.[194] Perhaps these

190 Schafer, *supra* note 15, at 250-51.

191 Starrs, *A Modest Proposal to Insure Justice for Victims of Crime,* 50 MINN. L. REV. 285, 293 (1965).

192 *Id.* at 297.

193 *Id.* at 296-301.

194 *Id.* at 301-02. *See* n. 58-63 for cases in this respect. Normally, in *absence* of a provision to the contrary, where the insured is intentionally injured or killed by a third party, not a result of his own misconduct, and unforeseen, that injury or death is considered accidental within the meaning of the policy and the insurer is liable. *See, e.g.,* Employer's Indem. Corp. v. Grant, 271 F. 136 (6th Cir. 1921); Supreme Council of the Order of Chosen Friends v. Garrigus, 104 Ind. 133, 3 N.E. 818 (1885); Bulton v. American Mut. Acci. Asso., 92 Wis. 83, 65 N.W. 861 (1896).

When the policy specifically excludes recovery in such cases, however, they are considered valid and binding contracts, and effect is given them. *See, e.g.,* Ruvolo v. American Casualty Co., 39 N.J. 490, 189 A.2d 204 (1963).

fears could be alleviated by a statute requiring inclusion of such coverage, or at least notice as to the exclusion, thus alerting the future insured as to his position.

Another feasible improvement in this area might be a "majority occupational" policy or rider, which would afford benefits more nearly approximating the actual wages of the insured. All compensation proposals seem to fall down in this area of covering actual damages. Another provision could provide for a "pain and suffering" rider to the existing contract,[195] thus giving the victim the payment he speculatively would receive in a civil suit against the offender were he apprehended and solvent.

Perhaps another alternative to state-operated compensation plans could be constructed of an amalgamation of all these suggested proposals. Many states have funds to compensate victims of both personal and property damage inflicted by uninsured motorists. The fund is at least partially created by the fees charged these uninsured motorists to register their automobiles.[196] While it is not feasible to exact a fee by the registration of former criminals, it is possible to assess a fine *in addition* to any penalty upon conviction of a crime.[197] This would afford a sizeable source of replenishment for the "indemnity fund." As the present systems now operate, anyone having a cause of action against the owner or driver of the uninsured vehicle may apply for payment out of the fund, after which the secretary of state is subrogated to their claim.[198] The same provisions could be utilized in formulating an indemnity program for the criminally injured. The victim is thus assured of payment if he possesses a legitimate claim; the state could then proceed against the offender, being in a better position to so act. It might also be possible for the government to furnish insurance for those desiring added coverage, such as people living in large cities where the majority of violent crimes are committed. The state, being in charge of crime prevention, would thus enhance its position as insurer by effective performance of its aforementioned duty. The state, after a payment to the victim, could proceed against the criminal by two possible methods. Provision could be made for a type of restitution action to be incorporated into the criminal proceeding. Upon conviction, the offender would thus be obligated to pay the assessed amount back into the fund for subsequent use. Provision could be made for the criminal to forfeit a certain percentage of his prison or work release wages. His sentence could stipulate that he still be liable for payments after his prison term expires. This type of program is of course somewhat unrealistic in our present society. The other method would provide a civil cause of action *after* a conviction. In either case, by requiring payment into the "indemnity fund," the state brings home to the criminal something he may not have contemplated—that not only was society in general offended by his conduct, but also a particular member of society was made to suffer.

195 Starrs, *supra* note 191, at 305-08.
196 *See, e.g.*, MICH. STAT. ANN. §§ 9.2801 *et seq.*, known as the Motor Vehicle Claims Act.
197 *See*, CAL. GOV'T. CODE § 13964 (1967). While this provision limits the fine to those convicted of a crime of violence causing injury or death, such fines may be charged in other cases. *See* MD. ANN. CODE art. 28A, § 17 (1969).
198 *See, e.g.*, MICH. STAT. ANN. §§ 9.2801 *et seq.*

VIII. Conclusion

It must be noted that the complete divorce of criminal and civil law, with the resulting sophistication and refinement of each, has seemingly accounted for a devaluation or loss of emphasis on the victim of crime and his particular plight. This evolution of the criminal system can aptly be observed by a contemporary definition of crime:

> A crime is any act or omission prohibited by the public, and made punishable by the state in a judicial proceeding in its own name. It is a public wrong, as distinguished from a *mere* private wrong or civil injury to an individual.[199]

While such a use of words is undoubtedly meant to do no more than demonstrate that a crime involves something in addition to a civil wrong, what has developed is that society has been given the sole consideration. The victim, with his *mere* private injury, must normally await society's appeasement, and then proceed against the individual offender, who is then usually in no position to make restitution due to the preceding criminal action. Thus, our legal system, which purports to provide the victim with an independent civil remedy against the offender, has, in fact, denied *recovery* from the offender as a result of his worsened position due to the very workings of the system. This separation of the criminal process has accounted for another basic obstacle with respect to recovery for the victim. The offender, when punished for his wrongdoing against society, most often feels his "debt" to society has been paid in full. The individual victim is considered to be compensated as a member of society in general. But this philosophy ignores the very purpose of separating the two systems. While the offender may have "paid his debt" to society through punishment for the crime, he has still to return the individual victim to his former position. The aforementioned proposals are workable means of seeing that both are accomplished.

In any proposal which seeks to aid the victim of crime, the proposed recovery should be a matter of right for all in the same position rather than a welfare payment. The payment is for suffering due to criminally inflicted injuries, and not for one's status in society. No matter what the proposal, a person's wealth or his own personal insurance should not be considered in the award or payment. A knife will physically injure the insured individual to the same extent as the next person. To consider a person's financial or insurance status in formulating a recovery is totally inconsistent with the common law teachings of evidentiary relevance.

Consideration of various methods to gain recovery for victims should not be eliminated from society's concerns due to recent studies in victimology. Granted that many criminally inflicted injuries are perpetrated as much by the victim as by the criminal offender, but should such facts negate a just recovery for a whole class of society having unfortunately achieved the status of victims?

199 CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES 79 (rev. 1958) '(emphasis added).

A more reasonable solution would be to devise a system of selective exclusion and reduction in benefits for those having participated in their own injuries or demise. Such a standard could be applied to any type of program designed to better the position of the victim.

The basic theme of this work has been to argue the case for the victim and to offer suggestions as to what could and is being done to remedy the problem. The present necessity is for society to turn a sympathetic eye toward the victim, in the same manner as it is presently doing for the criminal. Both need our attention and concern, and a balance must be achieved to assure solutions for both classes. When contemplating the unfortunate position of the criminal, one should also consider the position he may have devised for his victim. No matter what course society takes regarding the previously mentioned propositions, it is hoped that by reviewing each of them thoroughly, the victims will be rediscovered in our midst. By moving forward with any such proposal, society will once again place due emphasis on the victim and his plight!

John F. Schmutz

APPENDIX

STATE	JURISDICTION	ELIGIBILITY	RESTRICTIONS	AMOUNT
CALIFORNIA Cal. Gov't Code §§ 13960-13966 (1967); §§ 13970-13974 (1969).	State Board of Control (hearing)	1. Victim 2. Dependants — in case of pecuniary loss from his injury *or* death	Need basis	Not in excess of $5,000
HAWAII Hawaii Rev. Law §§ 351-1, -351-70 (1967).	Criminal Injuries Compensation Commission (hearing)	1. Victim 2. Dependants — in case of his death 3. Other — person responsible for victim's maintenance where pecuniary loss results from victim's injury	General	Not in excess of $10,000
MARYLAND Md. Ann. Stat. art. 26A, §§ 1-17 (1968).	Criminal Injuries Compensation Board (single member with right to appeal to whole)	1. Victim 2. Dependants — in case of his death 3. Other—dependant on victim for their principal support 4. Anyone injured or killed in attempting to prevent a crime, and his dependants	Out-of-pocket loss of $100 or two weeks' earnings + "Serious financial hardship"	Art. 101, § 36 schedule used
MASSACHUSETTS Mass. Gen. Laws ch. 258A, §§ 1-7 (1968).	District Court	1. Victim 2. Dependants—in case of his death	Out-of-pocket loss of $100 or two weeks' earnings	Equal to loss up to $10,000
NEW YORK N.Y. Exec. Law §§ 620-635 (1966)	Crime Victims Board (single member with right to appeal to whole)	1. Victim 2. Dependant — in case of his death 3. Other — dependant on victim for their principal support 4. Anyone injured or killed in attempting to prevent a crime, and his dependants	Out-of-pocket loss of $100 or two weeks' earnings + "Serious financial hardship"	Not in excess of $100 per week earnings or support, nor an aggregate award of more than $15,000
NEVADA Nev. Rev. Stat. §§ 217.180-217.260 (1969).	State Board of Examiners (hearing)	1. Victim 2. Dependant — in case of his death 3. Other — person responsible for victim's maintenance where pecuniary loss results from victim's injury	GENERAL	Not in excess of $5,000
		PROPOSED FEDERAL PLANS		
	Violent Crimes Compensation Commission (hearing)	1. Victim 2. Dependant — in case of his death 3. Other — person responsible for victim's maintenance where pecuniary loss results from victim's injury 4. Anyone suffering pecuniary loss for funeral expenses		Not in excess of $25,000

SUBROGATION	ATTORNEY FEES	LOSS OF PROPERTY	DETERMINATION
State subrogated to rights of claimant against offender to the extent of payment of the claim. May intervene in claimant's action against offender or bring own	Not in excess of 10%	To private citizen in preventing crime or apprehending criminal, or rescuing a person	May refuse to compensate for lack of cooperation with police in apprehension of offender
State may bring derivative action against the convicted offender in the name of the victim or dependants awarded compensation. Excess recovery given to claimant	Commission as point of order may award reasonable attorney fees, not in excess of 15% of an award over $1,000 — out of the award	To private citizen in preventing crime or apprehending a criminal	Reduce compensation to extent victim was responsible for the crime that caused his injury
Subrogated to the extent of the award to recover payments resulting from the crime			Reduce compensation to extent victim contributed to his injury. May be disregarded if victim attempted to aid a victim or prevent crime or apprehend a person after he committed a crime.
"To the extent of compensation," any amount received by claimant from any source exceeding the actual loss to the victim may be recovered	Court as point of order may award reasonable attorney fees, not in excess of 15% of an award over $1,000 — out of the award		SAME
To the extent of the award to recover payments resulting from the crime			SAME
Subrogated to the cause of action of the applicant against the offender and may bring an action for the amount of damages sustained by the applicant. Excess recovery paid to claimant	Board as a point of order may allow reasonable attorney fees, not to exceed 10% — out of the award		In determining whether to make an order for compensation, the board shall consider provocation, consent, or any other behavior of the victim
Attorney General may maintain action against offender for recovery of the whole or specified amounts of the compensation	Reasonable attorney fees		In determining whether to make an order, the behavior of the victim is considered, unless the injury resulted from lawful attempt to prevent the commission of a crime or apprehend the offender