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## How the Uniform Crime Victims Reparations Act Works

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A.B.A. J., Dec. 1974, at 1531-1535

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# How the Uniform Crime Victims Reparations Act Works

by Paul F. Rothstein

The Uniform Crime Victims Reparations Act, approved by the American Bar Association's House of Delegates, has been submitted to state legislatures. This timely act seeks recompense for the victims of crimes, but also incorporates numerous safeguards to prevent abuse.

**T**HE AMERICAN BAR ASSOCIATION's House of Delegates, meeting in Houston on February 5, 1974, approved an idea whose time is rapidly approaching—the Uniform Crime Victims Reparations Act. The act is the product of a committee of the National Conference of Commissioners on Uniform State Laws for which I served as consultant and reporter over its three years of deliberations. The conference approved the act in 1973 and recommends adoption in all states.

The act establishes a state-financed program of reparations to persons who suffer personal injury, and to dependents of persons killed, as the result of certain criminal conduct or attempts to prevent criminal conduct or apprehend the perpetrators. A specially constituted board determines, independent of any court adjudication, the existence of a crime, the damages caused, and the other requisites for reparations, except that a final conviction determines that a crime has occurred. "Preponderance of the evidence" is the standard used. Reparations cover economic loss—medical expenses, rehabilitative and occupational retraining expenses, loss of earnings, and the cost of actual substitute services.

Justification for such an act is variously stated. Some persons say the state owes this to victims, having induced citizens to lay down their own arms in reliance on state protection and then having failed to prevent crime. Others urge parity between the expensive concern society lavishes on offenders—constitutional safeguards, free counsel, prison accommodations—and the concern shown their victims. This disparity often is enormous—private rights of recovery are largely illusory, offenders being untraceable or impecunious.

Probably the principal explanation for the burgeoning interest in this kind of act is simple humanitarianism—a recognition that we all share an interest in the well-being of our neighbors and an increasing willingness to distribute the cost of catastrophe.

Similar programs already exist in fifteen foreign common law jurisdictions, beginning with New Zealand in 1963 and Great Britain in 1964, and spreading to several provinces of Canada, Australia, and Ireland. Twelve of our states have joined them, including Alaska, California, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Nevada, New Jersey, New York, Rhode Island (tentatively), and Washington. The United States Senate in 1973 passed S. 300, covering federally governed locales and providing for a 75 per cent federal financing of state programs complying with federal standards. Prospects for eventual House passage seem good.

Some of the positions taken by the uniform act on a number of important issues dividing the field of criminal injuries compensation follow.

## Should Compensation Depend on Financial Need?

Should criminal injuries compensation be a welfare measure, allowed only to the extent the crime creates severe financial hardship? Several plans, notably those of New York and Maryland, provide so. The uniform act recommends against any approach that considers financial ability. Since some states may disagree, the act provides an optional financial means test, which rejects linking compensation to "needs," "poverty," or "financial hardship," and adopts instead the somewhat innovative concept of "financial stress." This seeks to prevent too great an impact on a claimant's customary way of life, whether rich, poor, or middle class. "Financial stress" is a refinement of an idea found in the federal proposal and draws heavily on the New York Criminal Injuries Compensation Board's seven years of experience under a stricter standard.

The drafters note that a financial ability provision is not all savings: it entails administrative costs in determining eligibility. The act allocates the burden of economizing to other provisions, such as those limiting the elements of compensable damage and placing amount limits on awards. There is, for example, an upward ceiling of \$50,000 a victim (not per claimant), an optional \$100 minimum that losses must exceed to be compensable (does the expense of investigation of eligibility exceed any savings?), a \$200 a week lost income limit,

and a \$500 limit on funeral and related expenses. Lost services not actually replaced for a cost are excluded. Medical and other similar expenses are confined to semi-private accommodations and reasonable, customary, and necessary charges.

#### **Should Pain and Suffering Be Compensable?**

The uniform act, like most others, does not compensate "pain, suffering, inconvenience, physical impairment, and other nonpecuniary loss." This should allow more people to be at least partly compensated, although it can be extremely harsh on the unemployed housewife, for instance, who has lost an eye or arm but still manages to do her housework and whose insurance absorbs her medical costs. Despite real damage, she receives nothing. But a crime victim's reparation act does not affect private rights the claimant may have against the offender. Thus, the claimant is not being deprived of existing entitlements to damages for pain and suffering, as is the case under no-fault insurance.

#### **Should Property Damage Be Included?**

In accord with most existing programs, property damage is excluded. Limited resources can embrace only the most compelling injuries. Property losses could rapidly deplete resources. Besides, private insurance is often available. The act rejects the distinction made by the federal bill between "victims" and "good Samaritans." The latter and their surviving families are encouraged by being entitled to property reparations.

#### **Should a Board or a Court Administer the Plan?**

Existing programs use a board or a court to administer the plan. Some use the workmen's compensation board. Like most programs, the uniform act believes that the number of cases and questions peculiar to this area justify a special board rather than a workmen's compensation board or a court.

#### **Should the Board Function like a Court?**

A more formal judicial model was adopted even though a less formal approach is economical of time and resources, because the rights dispensed seem as fundamental and important as any others. Claimants are entitled to lawyers, transcripts, detailed notice, and discovery, with special provisions governing the waiver of medical privilege and granting the board subpoena powers. Attorneys' fees are board awarded over and above compensation. Larger fees are illegal. The state attorney general is notified and may intervene on either side. A full record is kept, and decisions must be based on evidence in the record, with written findings of fact and law and judicial review. Interested parties have ample opportunity to confront the evidence and examine the record. Decisions and rules or policies bearing on decisions are made public. Rule making is exempted from the public notice and challenge process of state administrative procedure acts because of the lack of

demonstrable effect on identifiable interests and parties.

#### **How About Payments from "Collateral Sources"?**

A program which stretches limited state dollars requires that some deduction from the state award (or some reimbursement to the state) be made for other payments received by the claimant for the same injury. Whether the state should be credited only when the sum from these collateral sources is for elements of damage recognized in the compensation award has been debated. Some even go further and argue that the complainant should be allowed to receive the total state award plus all collateral sums, even if duplicative, without any reduction or reimbursement, until he has a total amount sufficient to "make him whole" for all his actual, tort law damages, including those elements that could not be recognized under the compensation act.

Under some of these approaches, problems could arise in determining what the collateral payment is for, what a claimant's total actual tort law damages are (the board only determines economic loss), how to allocate payments partially satisfying collateral awards among the various elements, whether to deduct for "clear" collateral rights even if they have not yet been pursued and determined, how to ascertain if they are "clear," and whether and how to have state subrogation.

The state compensation award is inadequate in many cases because of the various limitations on damages. The "make-him-whole" approach tends to compensate the claimant for more of his total tort law losses without the state expense of making them directly compensable under the act. The claimant receives the benefit of premiums paid and remains willing to insure. This approach, however, requires perhaps an unnecessary ascertainment of the claimant's total tort law losses. And the determination may be required after the compensation hearing is over, *i.e.*, when the collateral source pays. The state coffers also must forgo the benefit of collateral recoveries unless and until the "make-him-whole" point is reached.

Unlike the federal bill, the uniform act rejects the "make him whole" approach. A middle ground is taken: only collateral payments to the claimant on elements of damage covered by a compensation award (economic loss) are to be deducted or reimbursed, while others (pain and suffering) are not. Rules are provided for determining what various collateral payments represent.

#### **Should Members of the Family Be Excluded?**

When a claimant is a member of the offender's immediate family or lives in his household, possibilities arise of fraud, collusion, or that the offender may benefit from the award either directly or by being relieved of support. Indeed he may injure for gain, some argue.

Disqualifying from compensation persons having these affinities to the offender or his accomplice seems tempting. But the victim may be a wholly innocent spouse or child of the offender, trapped by the relation-

ship. Varying degrees of estrangement are possible. A large proportion of all violent crime does, in fact, take place within the family or household, so excluding these crimes may defeat compensation when it is most needed.

Most acts do have a "relationship" exclusion usually covering the immediate family living with the offender and his household. Some accomplish this by excluding certain persons, others by excluding certain crimes, *e.g.*, crimes against members of the family or household. The latter has the undesired side effect of cutting off from compensation a nonhousehold, nonfamily bystander who happens to be injured.

The intention of the exclusion is to avoid payment to the offender's family who live with him and others having a similar relationship. Some persons challenge this aim. The only justifiable reason for the exclusion, is to prevent fraud, collusion, or unfair benefit, they argue. Cannot cases arise in which the prohibited relationship exists, but there is no fraud, collusion, or unfair benefit, or the need to help the victim outweighs the benefit? Safeguards can be designed. Fraud, collusion, and unfair benefit arise in cases outside the exclusion, too.

If this is so, there should be no relationship exclusion. All claims should be scrutinized for fraud, collusion, and unfair gain to the offender. This is the approach taken by the uniform act. Any claim may be disallowed or reduced on grounds of "unjust benefit" to the offender or his accomplice. "Unjust benefit" encompasses all the concerns of the standard relationship exclusion, at least when read in context with the remainder of the act, which requires proof of a genuine claim.

The act includes an optional alternative that excludes the immediate family or those in the same household as the offender or his accomplice "unless the interests of justice otherwise require in a particular case." The philosophy is the same: the amount of risk of unjust benefit and the strength of the circumstances suggesting compensation, rather than the relationship of the claimant, are determinative. The optional language, out of solicitude for problems of proof, assumes that the risk justifies exclusion in the case of relationship unless shown otherwise.

A common addition to the relationship exclusions—"maintaining sexual relations with the offender"—is not found in the act. Instead, those sexual relationships that warrant an assumption of unjust benefit, including fraud or collusion, would probably be encompassed by the "unjust benefit" language or the optional language excluding persons "living in the same household" or excluding the "spouse." More transient sexual relationships might disentitle under the general provision dealing with "contributory misconduct."

#### **What Is the Offender's Restitution Duty?**

Should the offender be required as part of the penal process to make partial or complete restitution to the state for the award, either out of private means or through some "work-it-off" program? Perhaps a special fine could

be added to any other penalty. In the federal bill all criminal fines go into the criminal compensation fund, but this is hardly a restitution measure. The uniform act rejects the restitution approach because it risks creating more social problems than it solves. How much benefit anyone would actually receive is questionable. Restitution could hinder rehabilitation by heaping on the offender more obligations of the kind he could not meet previously and which may have helped lead to his criminal actions. Do we get anywhere by diverting funds away from one social problem, the offender's family, to another? While we could try to separate the cases that are appropriate for restitution, the cost of the necessary machinery and the restructuring of legal procedures does not seem worth the expected gains.

#### **Should the Crimes Covered Be Specified?**

Some acts list the particular crimes to be covered, and others state "any crime" or "any violent crime." Of course, a personal injury arising from the crime must always be shown.

The problem with listing crimes is the difficulty in predicting every crime that might give rise to personal injury. Some crimes that are ordinarily harmless to life and limb and are not in their statutory nature violent may be dangerous when committed under particular circumstances. One example suffices: criminal fraud consisting of a misrepresentation that an automobile has been repaired.

Including "any crime" resulting in personal injury may be too broad. A crime should be excluded if it is both ordinarily nonviolent in nature and committed under apparently nondangerous circumstances but through a weird concatenation of circumstances results in personal injury. For example, suppose a criminal misrepresentation concerning stock values produces a heart attack in an apparently normal individual. Of course, deft handling of the proximate cause issue could avoid this result, even under an "any crime" approach, but much would depend on the administering board.

The language chosen for the uniform act, therefore, defines the covered "criminally injurious conduct" as "conduct posing a substantial threat of personal injury or death" and "punishable by fine, imprisonment or death," occurring or attempted in the state. In accord with most existing acts, motor vehicle offenses are specifically excluded except when personal injury or death is intended. The rationale is economic. These injuries will normally fall within other existing or projected compensation mechanisms, especially the no-fault scheme.

#### **Should Compensation Be Limited to Crimes?**

Several concepts in criminal and tort law are designed to relieve persons of liability to the extent that they were not at fault, for example, they did not have the capacity to contemplate or foresee the harm. Should the inflicter's fault be relevant when the inflicter may not



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be a party to the proceedings and will not as a result of those proceedings be punished or required to part with private funds? Wasn't the concept of fault designed to limit the liability of the inflicter? Shouldn't the only issues be the extent of the loss and the victim's innocence?

But that argument goes too far. It suggests compensation for any catastrophe that befalls an innocent victim, something for which the public is not yet ready. The uniform act, like many others, requires a crime but not capacity, this being aimed principally at infancy and insanity. Part of the definition of compensable criminally injurious conduct is that it must be "punishable . . . [or would be] but for the fact that the person . . . lacked capacity to commit the crime under the laws of this state." This language avoids the ambiguity inherent in similar language under other acts.

#### Will the Act Improve Law Enforcement?

Some law enforcement personnel fear that criminal injuries reparations will divert funds from law enforcement, especially under the pending federal bill in which federal funding of state plans is to come through the Law Enforcement Assistance Administration.

While there is no real answer to this problem, it is hoped that legislators will view these programs as additional to law enforcement with no impact on the funds appropriated for law enforcement. The two are directed toward different parts of the social problem of crime. Indeed, it is perhaps the failure of law enforcement that produced the impetus for victim compensation, and it would be ironic if that compensation resulted in less enforcement.

The need to appease law enforcers, the need to justify the use of the L.E.A.A., and plain good sense have stimulated interest in ways in which criminal injuries compensation can aid law enforcement and crime prevention.

Some persons argue that victim compensation reinforces psychological barriers against crime by creating

strong social norms contributing to prevention. Society will demonstrate the sincerity of its moral condemnation by showing concern for the victim and treating the injury as something of enormity.

Whatever the merits of this argument, several specific provisions can help enforcement and prevention. They also safeguard against fraudulent or undeserving claims. The act, for example, requires that, in order for the claimant to obtain compensation, the crime must be reported to law enforcement officers "within seventy-two hours unless the board finds there was good cause for the failure to report in that time." Programs vary respecting the time period and the presence of the "unless" clause.

A related requirement enables the board to take measures if the victim has not co-operated fully with police. There may be convincing reasons, such as threats, for not co-operating. It was deemed inadvisable to flag these in specific statutory language and risk improper inducement. The act merely provides, therefore, that the board in its discretion may to any extent reduce, deny, or reconsider the award for failure to co-operate with law enforcement.

Another provision allows "contributory misconduct" to influence an award. Some plans mandate complete denial of award on a "contributory negligence" as opposed to a "comparative negligence" model. The uniform act grants the board maximum discretion to decide what is contributory misconduct and its effect. The discretion is not unlimited, as there must be misconduct and it must be contributory. Negligence, provocation, consent, the duty to mitigate damages, and, possibly more debatable moral notions, also will play a role.

A fourth provision may encourage "good Samaritans" to help fellow citizens under criminal attack, or to help prevent escape, or to help officers. An assumption is made that the act can encourage and that encouragement will lead to fewer rather than more injuries.

This provision allows these "helper citizens" or their surviving families to claim reparations. But should they be included if they are mistaken or even negligent when they intervene? Should a request for assistance be required in the case of aiding officers? The acts take different viewpoints. The solution may depend on one's assessment of how overcautious people are today, the effectiveness of the police, and whether encouragement will mean fewer or more injuries.

The uniform act provides: " 'Victim' means a person who suffers personal injury or death as a result of . . . (2) the *good faith* effort of any person to prevent criminally injurious conduct, or (3) the *good faith* effort of any person to apprehend a person suspected of engaging in criminally injurious conduct." (Emphasis added.)

Why is a special provision needed? Aren't these people included under the other provisions compensating persons and their families injured as a result of crime? The quoted special language provides that situations of

suspected crime are also encompassed in the case of helpers. These situations seem to have been overlooked in other acts. Beyond this, specifying that voluntary intervenors are not responsible for their own injury precludes a possible proximate cause or contributory conduct problem. Finally, it is best to address directly those you hope to encourage.

The approach of the federal bill—to favor helpers and their families by awarding them their property damage in addition to their regular damage and to relieve them of the “financial stress” test—was rejected in the uniform act on the same rationale that led to rejection of these approaches for ordinary claimants, and because it is doubtful that any encouragement would ensue.

### Publicizing the Act

Widespread citizen ignorance of the availability of existing acts is a problem. A legislative tendency not to publicize a costly program, a legislative insensitivity to the proportions of the problem, and a limited budget for awards may be responsible. The uniform act obligates the board to publicize it. While particular measures are not specified, possibilities could include postings in emergency rooms and public transport, educating medical personnel, spot media announcements, and a “Miranda” type of notification by police to victims of their reparations rights.

### Disparities between the Federal and Uniform Acts

Pending federal financing has triggered enormous interest in criminal injuries compensation programs. The federal bill would provide 75 per cent of the funds for a

state plan that conforms to federal standards. The federal standards, while being left to future administrative determination, will require some conformity to the federal bill's proposed compensation program for federal localities. There is at least one glaring difference between that program and the recommended version of the uniform act. The latter omits a financial ability test. There are other differences as well. Won't states, to be safe, merely wait and carbon copy the federal compensation program, leaving no room for a competing uniform act?

Some considerations influenced the uniform act's drafters to proceed nonetheless. These are: (1) The federal bill may not yet be in final form. A uniform act could influence its shape. (2) Total conformity will not be required for federal financing. (3) Even substantial nonconformity will not totally defeat federal financing. As the federal bill now stands, certain conforming expenditures will be federally financed despite the complex accounting this entails. (4) The federal bill may be delayed or never enacted, although this seems unlikely. (5) State acts can be changed if and when federal financing becomes a reality. (6) A state may choose to engage in an activity even though it may be outside the ambit of federal financing.

Current interest in compensating innocent victims and their families injured by crimes marks a step forward in modern Anglo-American law that will pay dividends to society. The uniform act is an attempt to put together and articulate in an improved fashion what has been learned from existing acts and their administration in a way that can be given serious consideration by all the states and by the federal government. ▲

### 1975 ROSS ESSAY CONTEST

The following information is furnished for contestants in the 1975 Ross Essay Contest, which is conducted by the American Bar Association pursuant to the terms of the bequest of Judge Erskine M. Ross.

**Time for Submission:** On or before April 1, 1975.

**Amount of Prize:** \$5,000.

**Subject:** “Property Rights and First Amendment Rights—Balance and Conflict.”

**Eligibility:** The contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1975 (except previous winners, members of the Board of Governors, officers and employees of the Association), who have paid their annual dues to the Association for the fiscal year in which the essay is to be submitted.

**Essay Requirements:** No essay will be accepted unless prepared for this contest and not previously published. Each entrant will be required to assign to the Association all right, title, and interest in the essay submitted. It is the policy of the Association to return all but the winning manuscript after the judges have made their decision and to release the assignment of rights.

**Instructions:** All necessary instructions and complete information with respect to the number of words, number of copies, footnotes, citations, and means of identification may be secured on request to the Ross Essay Contest, American Bar Association, 1155 East Sixtieth Street, Chicago, Illinois 60637.