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COMPENSATION TO VICTIMS OF VIOLENT CRIME

GLENN FLOYD*

I

INTRODUCTION

"Man Beaten By Four Others — Condition Critical!" Such a headline is not an unusual one. With crime as prevalent as it is today, we are so conditioned to this sort of news report that it probably no longer shocks us unless the victim is a personal acquaintance, friend or relative.¹

The days following the headline usually produce accounts concerning the search for the perpetrators, their apprehension and prosecution. The reporters will also keep the public informed as to the condition of the victim—at least for a few days. It is at this point that public concern for the victim starts to wane, and understandably so. People have their own problems and there is ordinarily a new victim of another crime who has by this time captured the headlines.

It is this phenomenon of the forgotten victim that motivated the late Margery Fry, of England, to focus attention during the 1950's on the inadequacies of existing remedies for securing compensation available to the victims of crime. She used a most illustrative example to show the ineffectiveness of a program under which the criminal would be held responsible for compensating the victim. She cited the case of a man who had been blinded as a result of a crime and who was subsequently awarded approximately \$32,000.00 compensation for his injury. His two assailants were ordered to

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¹ TASK FORCE REPORT: CRIME AND ITS IMPACT — AN ASSESSMENT ch. 2, *The Amount and Trends of Crime*, at 14-41 (1967).

pay him five shillings (approximately seventy cents) weekly. It would take them about 442 years to pay the award!² This was convincing enough to the government that a committee was formed and a study authorized with the aim of correcting such a shortcoming in the system.

Miss Fry's criticism was not empty; she also proposed a scheme of compensation by the state for those who had suffered such injuries. The committee set about examining her proposal in detail. Not surprisingly, the committee pointed out that "in the public mind the interests of the offender may not infrequently seem to be placed before his victim."³ This may well be the situation that exists today in the United States. We are dedicated to insuring that due process is accorded to all persons accused of crime; and we are also concerned with rehabilitating the criminal — and justly so! But we need also to concern ourselves as energetically with the plight of the *victim* and his rehabilitation.

After having studied Miss Fry's plan and other proposals, the committee presented its report to Parliament in June of 1961.⁴ Two possible approaches to the solution of the problem were outlined.

In the first, which was broadly similar to the United Kingdom's Industrial Injuries Scheme, weekly payments were to be made to persons who suffered injuries as a result of a crime of violence, and in addition, payments might be made to dependents of persons killed. The second scheme was one in which the victim, or dependent of a deceased victim of a crime of violence, could make a claim against the Home Secretary similar to the claim for damages which he

² Fry, *Justice for Victims*, The Observer (London), July 7, 1957, at 8, col. 2. Reprinted in 8 J. PUB. L. at 191 (1959).

³ HOME OFFICE, PENAL PRACTICE IN A CHANGING SOCIETY — ASPECTS OF FUTURE DEVELOPMENT, CMND. No. 645, at 7 (1959).

⁴ HOME OFFICE, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, CMND. No. 1406 (1961).

could already make against the wrongdoer under existing law. Entitlement to compensation was to be decided by the courts unless a settlement were reached out of court. The Home Secretary was to have the right to recover from the wrongdoers as much as possible of any compensation awarded to the victim.⁵

The report stimulated much discussion and ultimately a plan was enacted by Parliament which became effective in June, 1964.⁶ Great Britain's was not, however, the first "modern" scheme to be enacted. A few months earlier New Zealand had taken the lead with its own statutory scheme.⁷

The New Zealand and British ideas were not completely original. Restitution to victims of crime had been an integral part of many ancient legal systems.⁸ One writer suggests that the idea of compensation from the "state" for victims of crimes may have originated with Hammurabi.⁹ The Code of Hammurabi states:

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 he lost. If it be a life, the city and governor shall pay one mina of silver to his heirs.¹⁰

⁵ CHAPPELL, *Compensating Australian Victims of Violent Crime*, 41 AUSTRALIAN L.J. 3 (1967).

⁶ HOME OFFICE AND SCOTTISH HOME AND HEALTH DEPARTMENT, *COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE*, CMND. No. 2323 (1964) [hereinafter cited as BRITISH COMMAND PAPER].

⁷ CRIMINAL INJURIES COMPENSATION ACT, ACT No. 134 OF 1963 (N.Z.). [hereinafter cited as NEW ZEALAND ACT].

⁸ See generally SCHAEFER, *RESTITUTION TO VICTIMS OF CRIME* (1960).

⁹ See note, *Compensation for Victims of Crimes of Violence*, 30 ALBANY L. REV. 325 (1966).

¹⁰ HARPER, *THE CODE OF HAMMURABI* §§ 22-24 (about 1760 B.C.) (2d ed. 1904).

Another ancient system which had a program of restitution was the Mosaic system. The Law of Moses required fourfold restitution for a stolen sheep and five fold for a stolen ox.¹¹ This system may have been imposed to increase the criminal's punishment, or to appease the instinct for revenge, and not necessarily in the interest of helping the victim.¹²

In early Anglo-Saxon law the "state" controlled the amount of compensation to be paid by the wrongdoer to the victim and began to take for itself a share of the payment for its own use. In the post-conquest period the Crown became the sole recipient of the criminal "fine." Compensation to the victim was separated from the criminal law and became a civil remedy.¹³ This system prevailed until after the Second World War, although there had been a certain amount of clamor for re-establishment of victims' rights to compensation by government during the nineteenth century.¹⁴

One sees that the post-war activity in this area, and which continues to thrive, is not an original and unique movement, but is a contemporary bit of testimony to the vitality of ideas and their refusal to become forever submerged. For the resurrection of these ideas, Miss Fry and her followers deserve much credit.

As related above, the pleas of Miss Fry did not go unheeded. After New Zealand¹⁵ and Great Britain¹⁶ enacted their

¹¹ See M. FRY, *ARMS OF THE LAW*, 124 (1951).

¹² BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 287 (3rd ed. 1959).

¹³ S. SCHAEFER, *RESTITUTION TO VICTIMS OF CRIME* 7 (1960).

¹⁴ A plan for a system of reparation was outlined by Bonneville de Marsangy in 1847. See SUTHERLAND AND CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 278 (6th ed. 1960).

¹⁵ See note 7 *supra*.

¹⁶ See note 6 *supra*.

plans in 1963 and 1964, California¹⁷ followed in 1966 with the first United States plan. New York¹⁸ and Massachusetts¹⁹ were not far behind.

Other jurisdictions are considering such plans²⁰ and it appears such legislation may even take on epidemic characteristics as did the enactment of "battered child statutes" and "Good Samaritan statutes" during the late 1950's and early 1960's. On the other hand, those two programs involved very little, if any, government financing and far fewer politico-philosophical differences of opinion than the criminal victim compensation schemes. Thus, it may be overly optimistic to predict such a rapid development, but it can be said with complete confidence that more of these plans will be established in the next few years.*

This article is intended to serve as an aid to those who will be called upon to make decisions concerning the possible adoption of such compensation plans. The discussion will focus on the following: The alternatives to state compensation schemes; the various philosophical questions concerning

¹⁷ CAL. WELFARE AND INSTITUTIONS CODE § 11211 (West 1966) (repealed 1968, now CAL. GOV'T CODE §13960 et. seq. (West Supp. 1968).

¹⁸ NEW YORK EXEC. LAWS § 620 (McKinney Supp. 1969).

¹⁹ MASS. GEN. LAWS ch. 258A (Supp. 1969).

²⁰ Various proposals have been introduced: H.R. 11818, 89th Cong., 1st Sess. (1965) (introduced by Rep. Green); S. 2155, 89th Cong., 1st Sess. (1965) (introduced by Sen. Yarborough) [hereinafter cited as YARBOROUGH PROPOSAL]. Representative Green proposed a plan for national compensation at the federal level. Senator Yarborough proposed a compensation scheme which encompasses only the limited areas of general federal responsibility. This plan was framed to serve as a model for state schemes. State plans have been proposed as of this writing in Oregon, Wisconsin, and Maryland.

* Editors note: Since this article was submitted, two additional states, Hawaii and Maryland, have enacted Compensation plans.

the desirability of such compensation schemes; the problems involved in the administration of such a program and some safeguards that are available for avoiding some of these problems; and an analysis and comparison of those programs presently operating.

II

ALTERNATIVES TO STATE COMPENSATION SCHEMES

Perhaps the first question that should be asked when considering the creation of a state compensation scheme is what alternatives are available — either presently existing or which could be enacted.

A. Governmental Liability

A very narrow aspect of the problem of injury to victims was the subject of a fairly recent New York case, *Schuster v. City of New York*.²¹ In *Schuster* the decedent supplied information to the police which led to the arrest of a criminal. Schuster's act was widely publicized and as a result the city police furnished him with police protection. Later this protection was withdrawn and Schuster was killed by a person or persons unknown. His administrator brought an action for wrongful death against New York City. The ultimate decision was in favor of the administrator. The New York Court of Appeals held that a special duty of protection by the police was due the decedent and that it had been negligently unfulfilled.²² The court emphasized that the informer status created a superior duty on the city to protect a citizen who had fulfilled his duty to aid law enforcement. A problem of this same general type could arise in Oklahoma either under the same fact situation or under other situations where a citizen is required to aid in the enforcement of laws. By statute in Oklahoma a person present at the scene of a riot can be com-

²¹ 5 N.Y. 2d 75, 154 N.E. 2d 534 (1958).

²² *Id.*

manded by police officers to aid them in making arrests.²³ Also, an officer may ask assistance in executing process,²⁴ and refusal or neglect, without lawful cause, to aid the officer is deemed a misdemeanor.²⁵ We find other duties imposed upon private citizens which require a person, if asked by the officer, to aid the officer in executing a warrant.²⁶ Any person commanded by an officer to aid him in making an arrest, who refuses to so aid him is guilty of a misdemeanor.²⁷ In light of these statutorily imposed duties, one can argue, *quid pro quo*, that the state should compensate any citizen who, while aiding an officer, is injured in the process.

Under our citizen's arrest statutes, individuals are encouraged to make arrests but must meet certain requirements in making them.²⁸ What if a person is injured in making such an arrest? Is he entitled to compensation from the State under the general theory of the *Schuster* case? Another argument in favor of the citizen's recovery may be found in another Oklahoma citizen's arrest statute: "Any person making an arrest *must* take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken."²⁹ Does this imposition of duty upon the arresting citizen not place similarly upon the state a certain obligation in the event the citizen is injured while carrying out his duty? Of course, circumstances such as these comprise only a small part of the problem under consideration.

B. Recovery of Damages in Civil Action

The fact that an offender is convicted and punished for

²³ OKLA. STAT. tit. 21, §1318 (1961) *See also* OKLA. STAT. tit. 22 §§ 102, 103, 105 (1961).

²⁴ OKLA. STAT. tit. 22, §91 (1961).

²⁵ *Id.* §93 (1961).

²⁶ *Id.* §188 (1961).

²⁷ *Id.* §537 (1961).

²⁸ *Id.* §202 (1961).

²⁹ *Id.* §206 (1961) (emphasis added).

his crime does not preclude the victim from bringing an action in tort against him for damages. As a practical matter though, other factors generally do preclude the victim from bringing a civil action against the perpetrator. The perpetrator may not be identifiable. Although identifiable, he may not have been apprehended. Although identified and apprehended, the perpetrator may be insolvent. Such problems too often leave the victim without an effective remedy. Also, the likelihood of the criminal paying while in prison is negligible. The fact is that criminals generally belong to a financially irresponsible class.³⁰ There may also be evidentiary problems encountered in attempting to introduce the criminal conviction into evidence in the civil action.³¹ Thus the right of suit for damages is hardly a solution to the problem.

C. Penal Fines

A possible partial solution to the problem could perhaps be found in providing for a fine to be levied and payable to the victim instead of to the state. This solution does not, however, solve the problem when the criminal is never identified, never apprehended, never tried, or is financially insolvent. Neither will it solve the problem where the criminal dies or is killed shortly after the perpetration of the crime. It is therefore suggested that penal fines are not a practical solution to the problem.

D. Restitution as a Condition of Probation or Parole

One writer has suggested making restitution a condition of probation or parole.³² He points out:

This provision is likewise ineffectual in meeting the compensation needs of the great majority of victims

³⁰ Note, *Compensation for Victims of Crime*, 33 U. CHI. L. REV.

³¹ For a more complete discussion of the evidentiary problems, see Covey, *Alternatives To a Compensation Plan for Victims of Physical Violence*, 69 DICK. L. REV. 391, 398 (1965).

³² Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 ST. LOUIS L. J. 238, (1965).

because probationers and parolees are either insolvent or, if employed, do not earn enough to exceed basic needs. In addition, not all offenders are apprehended; many may be juveniles; some will be incapable of responsibility due to mental illness; others may be acquitted due to technical or legal reasons; and many will not be granted probation or parole.³³

He also points out that in Missouri, where such a plan exists, "Restitution as a condition of parole is almost unheard of"³⁴

E. Prison Wages as Compensation

Another plan sometimes suggested for compensating victims is the use of prison wages. It has many objections. Generally such wages are so low they are almost negligible. Also, few prisons can employ many of their prisoners. Most prisons in the United States are never able to employ over half their prisoners.³⁵ Another factor is that many prisoners have families on the outside, and they generally claim what little money the prisoner does make. To deprive them of this income may mean that they will ultimately become dependent upon state support. This would not prove to be a financially sound proposition. The one program along this line which might have some workability would be a work-release program whereby prisoners are released during the day to work on the outside. Until this practice becomes more widespread, however, it offers no solution.

F. Personal Insurance

One might take the attitude that individuals should be expected to protect themselves by securing private insurance. This would be an alternative to distributing the burden of compensation among the class of taxpayers. Of course, many people would not buy such insurance and many others could

³³ *Id.* at 243.

³⁴ *Id.* at 244.

³⁵ BARNES & TEETERS, *see* note 12 *supra* at 541.

not afford to buy it. There are indications that the cost of this kind of insurance might prove to be very high.³⁶

G. Victim to Stand His Own Loss

The state may always elect to remain out of the matter, enforcing the victim to stand his own loss. This has its objections. It can result, however unlikely, in victims or their families resorting to self-help and inflicting injury upon the criminal or his family as retribution—a social condition which it has always been the purpose of law to prevent. Private retribution could result, however, even under a scheme where the victim is compensated. Compensation would surely mitigate the likelihood and severity of retribution. It seems the real objection to this plan is its failure to promote the desirable concept of the concern of one man for the welfare of his fellow man. The effects of a position of indifference by the state toward victims of crime will be fully explored later.

H. Victim's Family to Stand the Loss

Related to the alternative by which the victim stands his own loss is the system whereby his family would stand the loss. It is probably the closest approximation to our present situation in which victim and his family ultimately bear the loss. The shortcoming of this plan, which is, in effect, no plan at all, is that it throws the burden on someone who is perhaps no more responsible for the injury than any general taxpayer. Additionally, the family may be in no position to help the victim stand the loss. The result is spreading the loss, but spreading it among a very small group. Should this small group bear this extra burden merely because of the familial relationship?

It is submitted that the above plans do not offer a solution to the overall problem. It is further submitted that their

³⁶ Comment, *A State Statute to Provide Compensation for Innocent Victims of Violent Crimes*, 4 HARV. J. LEGIS. 127, 129 (1966).

overall limited, if not merely speculative, effectiveness leads one to conclude that a meaningful remedy can result only under a plan under which the state assumes the responsibility. The question arises as to whether it is a proper function of the state to compensate victims of crime, and, if so, upon what rationale the assumption of such function can be justified. These questions we now consider.

III

STATE COMPENSATION SCHEMES: RATIONALE

Senator Ralph Yarborough of Texas proclaimed the desirability of state involvement in the problem of victim compensation when he said:

In this country today we have the peculiar situation that a worker who is disabled while on the job may receive thousands of dollars of compensation even though his negligence in part contributed to the injury, while the same wage earner if disabled from a criminal attack for which he bore no responsibility whatsoever must face a future without any compensation at all. That such a situation should exist in this, the richest nation in the world, I find deplorable.³⁷

This indictment has led to much concern and discussion about the various aspects of a state compensation scheme. Upon what rationale can such a scheme be adopted? The following have been suggested: (A) Restitution; (B) Duty of the state to protect its citizens; and (C) Social welfare.

A. Restitution

The idea of restitution, that is, the restoring of a person to his former status, as much as possible, has some historical significance. Restitution was once awarded to victims as an incident of criminal prosecution.³⁸ This, however, has changed,

³⁷ 111 Cong. Rec. 13,533 (daily ed. June 17, 1965).

³⁸ Under the system, the offender or his family were obligated to make payments to the victim and his family with the possibility of the offenders also being required to make a

and now the victim must seek restitution in a civil action.⁸⁹ As discussed earlier, this civil action proves to be of little value in most cases and is not an effective remedy. Furthermore, when the state prosecutes and convicts the alleged perpetrator, the prospect of any recovery by the victim from the criminal is usually diminished. The offender is incarcerated and thus unable to earn enough to recompense the victim. The victim is expected to cooperate with the state in this prosecution, so he is, in effect, being asked to help in reducing the probability of his ultimate recovery. It can be argued, therefore, that the state should step in and provide him compensation—at least partially as a reward for his cooperation in helping the state achieve its objective, the punishment of a lawbreaker.

B. Duty of the State to Protect Its Citizens

When a group of people organize a government to which they pledge their allegiance, they give up some of their individual rights. What are they due in return? This question can perhaps be answered by looking to the purpose of their original plan. Generally, it can be said that one of the pur-

payment to the King. See 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 449-462 (2nd ed. 1898); Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 227-228 (1965); Comment, *Compensation for Victims of Crime*, 33 U. CHI. L. REV. 531, 533 (1966).

⁸⁹ Generally, the actions may be brought in any order and the decision in one does not affect the other. W. PROSSER, *THE LAW OF TORTS* §§2, 7-9 (3rd ed. 1964). One must be aware, however, that evidence of a criminal conviction is generally not admissible in a subsequent civil action. For a discussion of this problem, see Note, *Hearsay Evidence*, 5 OKLA. L. REV. 345, 374 (1952). This rule has been under attack and some breakdown may be occurring. See Bush, *Criminal Convictions as Evidence in Civil Proceedings*, 29 MISS. L. J. 276 (1958). See also C. MCCORMICK, *LAW OF EVIDENCE* § 295 (1954); WIGMORE, *EVIDENCE* § 1671(a) (3rd ed. 1940); UNIFORM RULES OF EVIDENCE 63(20) (1953).

poses of the organization of a government is the attainment of mutual protection and security. This proposition can certainly be substantiated by basic historical facts prevalent in the early development of this country and others. This premise is also supported by the very existence of police and armed forces. The establishment and general support of police forces and other law enforcement bodies constitute an acknowledgment by the governmental body of this obligation and represent a response to popular demand for such protection.

Despite the demand for and the desirability of protective forces, no police system can be foolproof. It goes without saying that there will be breakdowns in the system. If we recognize this inherent shortcoming in a protection system, then to what extent does this affect the basic obligation of the state to protect its citizens? Is compensation for injury resulting from such breakdowns within the overall obligation of the state to protect its citizens? An affirmative answer to this question can be supported by pointing to the civil remedy which is accorded the victim. The provision of a civil remedy constitutes an acknowledgment on the part of the state that the victim is entitled to relief. Does it constitute an acknowledgment that the state should afford the relief if it cannot be obtained from the criminal? Perhaps this inference can be drawn.

Mr. Justice Goldberg expressed the view that because the state has a duty to protect its citizens it has a corresponding duty to help them when the protective duty is not fulfilled.⁴⁰ On the other hand, some writers contend that the assumption of public responsibility for victims of crime cannot be justified because the public as a whole is not to blame for the victim's loss and is not a group so closely related to the wrong-

⁴⁰ Address by Justice Goldberg, *Equality and Governmental Action*, James Madison Lecture, N.Y.U. Law School, February 11, 1964. Printed in 39 N.Y.U. LAW REV. 205 (1964).

doers as to justify the imposition of liability.⁴¹ One writer has suggested that to find a duty in the state to compensate would "require a fundamental reconsideration of the role of the government" in the performance of its many functions.⁴²

C. Social Welfare

If justification for state compensation cannot be founded on the basis of restitution or a state duty, then perhaps it can be supported on the basis of social welfare. We have general plans such as unemployment insurance, old age benefits, workmen's compensation and veteran's compensation. These seem to be a part of a general plan of social responsibility for dealing with unfortunate events. They are, of course, redistribution schemes which result in some inequities.

We know that different locales have different crime rates.⁴³ This is sometimes the result of active steps taken by a community to suppress criminal activity. These steps involve expenditures of money—for more and better street lighting, higher police salaries, better police training programs, etc. Should these communities be forced to subsidize a plan which inures more to the citizens of communities with higher rates? Certainly this seems patently unfair, as well as discouraging, perhaps, to those communities which have taken active steps and expended money in cutting their crime rate. On the other hand these differing crime rates may be dependent upon factors other than those mentioned above, for example: higher density of population; composition of the population with reference particularly to age, sex, and race; economic status and mores of the population; relative sta-

⁴¹ Miller, *Comment on the Proposal, Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 203, 205 (1959).

⁴² Comment, *Compensation for Victims of Crime*, 33 U. CHI. L. REV. 531, 539 (1966).

⁴³ See TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT Ch. 4, *Crime and the Inner City*, at 60-76 (1967).

bility of population, including commuters, seasonal and other transient types; climate, including seasonal weather condition; and others.⁴⁴ Notwithstanding the lack of control by communities over some of these factors, those communities with lower crime rates would be, in a sense, subsidizing the other communities under such a program. But this same argument can be raised regarding any particular general social welfare program. For instance, it is common knowledge that some communities have higher unemployment rates than others. It is arguable, then, that an overall balance is achieved when one considers all of the social welfare programs taken as a whole. This writer submits that the so-called "one community subsidizing another" argument should not be controlling. The general idea that ought to control, it is proposed, is that of public sympathy and generosity toward those in unfortunate circumstances. Victims of crime clearly fall into that category. This general social welfare attitude has been relied upon, at least to some extent, in some of the schemes now in operation.⁴⁵

One writer has said:

[L]ittle would seem to be achieved by searching for some abstruse legal or social peg upon which to hang a crime compensation scheme. The most satisfactory justification for such a scheme is a purely pragmatic

⁴⁴ See Note 1 *supra*.

⁴⁵ Great Britain's position is that "Compensation will be paid *ex gratia*. The Government does not accept that the state is liable for injuries caused to people by the acts of others. The public does, however, feel a sense of 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, Comnd. 2323 at 4 (1964). See also Cameron, *Compensation for Victims of Crime: The New Zealand Experiment*, 12 J. PUB. L. 367, 369-70 (1963).

one—that on humanitarian grounds the state should provide assistance to victims of crimes of violence, just as it helps the victims of other forms of misfortune.⁴⁶

This same approach was suggested by Professor Gilbert Geis, who wrote:

I am content to do without theoretical justification. . . . After all, these are questions of public welfare and they should be determined by public opinion. Human needs account for the most of the Welfare State, and its evolution has nothing to do with tortuous lines of reasoning. . . . If there is a widely recognized hardship, and if the hardship can be cheaply remedied by state compensation, I should have thought that the case for such a remedy was made out, provided the practical difficulties are not too great. The hardship in these cases is undoubtedly widely recognized. . . .⁴⁷

An argument most likely to be raised in opposition to the enactment of compensation schemes will be the old standby, "creeping socialism." If veterans' compensation plans, Workmen's Compensation plans, old age benefits and unemployment benefits are "socialistic," then certainly a scheme for the compensation of victims of crime would be. This writer fails to appreciate the significance of attaching a label to a program. The attachment of labels will only generate much argument and debate over whether such a plan does fit under the label. Call it what you like—the problem still exists, and present solutions are not effective. The important question is: Do we continue to ignore the problem, or attempt to cope with it? The question should answer itself.

⁴⁶ Chappell, *Compensating Australian Victims of Violent Crime*, 41 AUSTL. L. J. 3, 5 (1967).

⁴⁷ G. Geis, *State Compensation to Victims of Violent Crime*, printed in TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, at 173 (App. B, 1967), quoting R. GROSS, *Compensating Victims of Violence*, 29 LISTENER 815, 816 (1963).

IV

ADMINISTRATIVE AND OPERATIONAL PROBLEMS

Once the decision is made to enact a state compensation scheme, a multitude of questions present themselves. Among them are questions concerning administration of the plan, payments under the plan and appellate review. The answers to some of these problems will be dependent upon the basic philosophy underlying the plan. For example, if either restitution or the duty of the state to protect its citizens is the basis for such a program, then the economic situation of the victim should not be a relevant factor in deciding whether the victim is to receive compensation. On the other hand, if the plan is based on a social welfare philosophy, then need would be a relevant factor. A financially independent victim could meet his own loss and thus would not fall within the group sought to be covered by such a plan. The answers to some of the questions will be determined on a more practical basis. The decision of where to set the upper limit of any award will probably be the result of a consideration of economic factors more than of philosophical considerations.

We now turn to an examination of some of the problems that will be met in the enactment and administration of a state compensation scheme.

A. For What Crimes Shall Compensation Be Made?

Generally, the factors relevant in determining the crimes for which compensation will be allowed are economic and fraud avoidance factors. For these reasons, the plans generally provide for compensation for personal injury and not for property damage. It is felt that crimes against property would be highly susceptible to fraud, whereas it is far less likely that people would wound themselves or procure someone else to inflict an injury in order to collect an award.⁴⁸ It is also fore-

⁴⁸ Fry, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 191, 193 (1959).

seeable that the expense involved in the operation of a system compensating for property damage would be excessive.⁴⁹ There is also the fact that much property is insured, and the financial burden caused by damage is alleviated by that coverage. Also the social welfare approach best supports the idea of covering personal injury and not property damage. Practically speaking, concern for a fellow man seems to be somewhat greater when he has suffered personal injury than when his property has been damaged. Of the plans now in operation, all are limited to aid for personal injuries.

For what criminal acts causing personal injury should compensation be made? Should a single battery resulting in a blackened eye be compensable? The approaches to this question have varied. The Yarborough proposal lists a schedule of offenses derived from the District of Columbia and United States Codes attempting to include every type of violent crime that might result in personal injury.⁵⁰ Another approach would allow the administrative board to exercise some discretion in making the awards. They would not be forced to "pigeon-hole" every award.⁵¹ It has also been suggested that a plan incorporating a schedule of offenses coupled with general wording allowing board discretion would be more functional.⁵²

Some writers suggest that perhaps the victims of sexual offenses should not be compensated because of the possibility that they themselves may have, to some degree, provoked

⁴⁹ In 1965, in the United States there were 9,850 murders, 22,467 forcible rapes and 206,661 aggravated assaults, compared with 118,916 robberies, 1,173,201 burglaries, 762,352 larcenies of \$50 and over, and 486,568 auto thefts. *UNIFORM CRIME REPORTS* at 51 (1965).

⁵⁰ See Yarborough, *S. 2155 of the 89th Congress—The Criminal Injuries Act*, 50 *MINN. L. REV.* 255 (1965).

⁵¹ Comment, *Compensation for Victims of Crime—Some Practical Considerations*, 15 *BUFF. L. REV.* 645, 649 (1966).

⁵² *Id.*

their misfortune.⁵³ This possibility is not reason enough to rule out the entire class of victims. It should, however, serve as notice to administrative boards that, in sex offense cases, the investigation should be extremely thorough in order to screen out those claims which are unjustified.

Another area in which, some have argued, there should be no compensation is that of injuries caused by motor vehicle.⁵⁴ This exculsion would seem to be justified in jurisdictions having compulsory liability insurance supplemented by uninsured motorist coverage.⁵⁵ For states that do not have such plans, such an exclusion should not be made. In the absence of insurance coverage, where is the difference in the fact that an automobile was the instrument used to inflict the injury rather than a brick-bat?

B. Which Victims Should Be Compensated?

Once we decide on the general classification of criminal acts for which compensation is to be paid, we then must consider the victim. Should all victims be compensated?

1. *Should the victim's relationship to the offender have a bearing on an award?* It has been suggested that if the victim is a relative of the offender or living within the household, then he should not be allowed to recover. The reasoning is that in such a case there exists a higher probability of collusion. It is also feared that because of the relationship the compensation may very well inure to the benefit of the offender. This ignores the fact that the offended may have been completely innocent. It is said that twenty-five (25)

⁵³ See RADZINOWICZ, *SEXUAL OFFENSES* 83 (1957); Schultz, *The Violated: A Proposal To Compensate Victims of Violent Crime*, 10 ST. LOUIS U. L. REV. 238, 247 (1965); Trankell, *Was Lars Sexually Assaulted?* 56 J. ABN. SOC. PSYCH. 385 (1958).

⁵⁴ See note 51 *supra* at 650.

⁵⁵ *E.g.*, N.Y. INS. LAWS § 330 (McKinney 1966).

per cent of all violent crime is victim precipitated.⁵⁶ Assuming a figure twice that, could we, even then, deny relief to the innocent fifty (50) per cent? Should an entire class of potential victims be excluded merely on the basis of a familial relationship or household connection? Some authorities suggest that the familial relationship be ignored completely.⁵⁷ Others point out that such claims should be allowed, relying on a careful hearing to sift out possible collusion.⁵⁸

The Yarborough plan excludes compensation for criminal-ly inflicted personal injury within the family.⁵⁹ So does the New Zealand plan.⁶⁰ Under the British plan, there is no compensation for offenses committed against a member of the offender's household living with him at the time of the alleged crime because it is felt this would lead to fraud.⁶¹ The California statute, on the other hand, does not preclude from compensation members of the offender's family.⁶² The Model Act drafted by the Harvard Student Legislative Research Bureau makes no exclusion because of familial relationship.⁶³ Section 202 of the Harvard Model Act does, however, impose this restriction: "Compensation shall not be awarded under this Act to any person who committed, provoked or aided in the commission of the compensable crime."⁶⁴ This section is

⁵⁶ Schultz, *The Spouse Assaulter*, 6 J. Soc. THER. 103 (1960); Wolfgang, *Husband-Wife Homocide*, 2 J. Soc. THER. 263 (1956).

⁵⁷ E.g., Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 ST. LOUIS U. L. REV. 238, 247 (1965).

⁵⁸ See note 51 *supra* at 651.

⁵⁹ YARBOROUGH PROPOSAL § 304.

⁶⁰ NEW ZEALAND ACT § 18(2).

⁶¹ BRITISH COMMAND PAPER Para. 17.

⁶² CAL. GOV'T. CODE 13960-6 (West Supp. 1968).

⁶³ *A State Statute to Provide Compensation for Innocent Victims of Violent Crimes*, 4 HARV. J. LEGIS. 127 (1966) [hereinafter cited as HARVARD MODEL ACT].

⁶⁴ *Id.* at 136.

addressed to *any* precipitation, fraud or collusion thus only indirectly to familial relationships. Exclusion of *any* claimant would be based on a finding of *actual* wrongdoing.

Under the New York Plan, a person who is criminally responsible for the crime upon which a claim is based, or an accomplice of any such person, or a member of the family of such person is not eligible to receive compensation.⁶⁵ The act defines the phrase "family of a person" to mean "(a) any person related to such person within the third degree of consanguinity or affinity, (b) any person maintaining a sexual relationship with such person, or (c) any person residing in the same household with such person."⁶⁶ Similarly, the Massachusetts program provides that an offender and any accomplice of an offender are ineligible for compensation. Furthermore, a member of the offender's family and persons living or maintaining sexual relations with the offender are likewise ineligible for compensation.⁶⁷

2. *Should the victim's conduct be a factor for consideration?* If victim and offender collude, then certainly it seems that recovery should be barred and a prosecution of both initiated. But what of the situation where the victim precipitated the attack? Should this preclude his recovery? Some argue that we should de-emphasize blameworthiness and be concerned with the injury—not how it occurred.⁶⁸ It has also been suggested that in such a case the amount of the award be adjusted according to "comparative fault." One writer said:

In view of the diverse range of victim-precipitation possible within any penal couple's relationship, the compensation commission should be allowed discretion in adjusting compensation size in accordance with their appraisal of the relationship."⁶⁹

⁶⁵ N.Y. EXEC. LAW §624(2) (McKinney Supp. 1969).

⁶⁶ *Id.* at §621(4).

⁶⁷ MASS. GEN. LAWS ch. 258A §3 (Supp. 1969).

⁶⁸ See note 57 *supra* at 247.

⁶⁹ *Id.*

Under the New Zealand plan, the victim's behavior is considered by the administering board. In deciding whether to grant compensation the "tribunal may have regard to all such circumstances as it considers relevant, and shall have regard to any behavior of the victim which directly or indirectly contributed to his injury or death."⁷⁰

These three views represent three possible approaches to this problem. If the victim is found to have precipitated the incident a plan may then: (1) deny him any recovery at all; (2) take into consideration the precipitation in setting the amount of recovery; or (3) consider the precipitation as irrelevant and allow recovery with no reduction because of the victim's behavior.

It is submitted that the nature of the victim's behavior should also be relevant. That is to say that if the victim started a verbal argument and the response of the offender went clearly beyond that which could be reasonably expected in response, then the victim's behavior should not be an absolute bar to his recovery. But it should be taken into account in setting the amount. On the other hand, if the response to the provocation was clearly that which could reasonably be expected, then perhaps the victim's conduct should stand as a complete bar to his recovery.

The problem of victim precipitation in violent crimes seems to have its highest incidence in sex offenses and family or domestic arguments involving physical violence. One study shows that with victims of rape or seduction a significant number consented and many engaged in provocative conduct.⁷¹ It has also been shown that many murders result from family quarrels.⁷² These two particular situations illustrate the dif-

⁷⁰ NEW ZEALAND ACT § 17(3).

⁷¹ See Weihofen, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 209, 212 (1959).

⁷² See H. WEIHOFEN, *THE URGE TO PUNISH*, 158 (1956) (reports a study of 1,000 murders committed in New Jersey, showing that 67% of them arose out of unpremeditated quarrels with wives, mistresses, sex rivals, or acquaintances).

difficulty in classifying a person as an "innocent victim." The compensation board's job will be difficult, and the necessity for effective guidelines is clear—no matter which of the three alternatives suggested above is chosen.

It appears that the determination of whether a victim is totally innocent or only partially so will be one of degree in many instances. Thus it seems that "ease of administration" cannot be used as an argument supporting either of the first two possible solutions suggested earlier. In fact, if ease of administration is our goal, then the third alternative—viewing the victim's behavior as irrelevant to the question of his recovery—should be adopted. This could result, however, in a very expensive program. Adjustment of recovery on the basis of comparative fault seems to be the best and most reasonable approach.

The approach most often employed thus far has been to establish a program whereby the victim is precluded from recovery if he was not completely innocent. The British plan provides that compensation should be paid only for "unprovoked assaults upon innocent persons."⁷³ As was indicated

⁷³ BRITISH COMMAND PAPER Para. 15. Although the plan seems to provide for no recovery if the victim was not innocent, the board seems to follow a more flexible standard. Mr. Alec Samuels, writing in *Compensation For Criminal Injuries in Britain*, 17 U. TOR. L. J. 20, 30 (1967) reports:

"The Board is required to scrutinize all sexual cases with particular care. In rape cases the awards appear to have been rather on the low side, probably because the Board has been alive to the danger of abuse, and also because there are no precedents in civil cases for awards of damages for rape. A clear distinction appears to have been drawn between the wholly innocent victim of rape and the victim who was to some extent to blame. Thus a girl of thirteen who was the victim in a very bad case, and suffered severe emotional shock, received 850 pounds. A girl of nineteen received 750 pounds, and a girl of twenty who escaped with an attempt received

earlier, New Zealand has also adopted the approach of excluding from compensation all victims who contributed directly or indirectly to their injuries.⁷⁴ The Yarborough proposal adopts the same standard.⁷⁵ Under the New York plan, "persons criminally responsible for the crime" cannot receive compensation.⁷⁶ The California plan makes no mention of non-innocent victims.⁷⁷ Under the Massachusetts plan, the court is to consider the conduct of the victim and reduce the award or deny it altogether in the event that the conduct of the victim contributed to the infliction of his injury. The court is to make an exception to this rule where the victim was aiding another victim or attempting to prevent a crime being committed or attempted in his presence. The conduct of the victim also does not preclude his recovery in the event his injury results from an attempt to apprehend a person who had committed a crime in his presence or had in fact committed a felony.⁷⁸

3. *Should need of the victim be a factor for consideration?*

A very difficult question is whether the victim's financial condition should be taken into consideration in deciding whether

225 pounds. A woman of forty-six received 500 pounds, as did another woman of unspecified age. A woman aged fifty-four received 175 pounds in respect of an indecent assault. A single woman aged sixty-six who was raped received 400 pounds. By contrast, the single girl, aged twenty-two with sexual experience, who thumbed a lift at night and was rewarded with rape, received 250 pounds. The woman of thirty who invited a man to her home for a meal and was very violently raped and injured, he subsequently being committed to Broadmoor special hospital, received 1,000 pounds, reduced by twenty percent because of her own measure of responsibility." (citations omitted).

⁷⁴ NEW ZEALAND ACT § 17(3).

⁷⁵ YARBOROUGH PROPOSAL § 301(d).

⁷⁶ N. Y. EXEC. LAW §620 (McKinney Supp. 1969).

⁷⁷ See CAL. GOV'T. CODE §§13960-6 (West Supp. 1968).

⁷⁸ MASS. GEN. LAWS ch. 258A; §6 (Supp. 1969).

he is to receive compensation? The answer to this question seems directly related to the philosophy underlying the plan. Since most plans have been founded on the social welfare basis, it would be supposed that this would be reflected in a requirement that need must be shown before recovery can be had. Therefore it is surprising that Great Britain does not take into account the need of the victim, yet bases its plan on the idea that "the public feels a sense of 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."⁷⁹ This seems to be at least a quasi-social welfare basis and is clearly not founded on the state's duty to protect its citizens. New Zealand, like Britain, does not take into account the economic condition of the victim.⁸⁰ Two of our state plans do otherwise. In California compensation is paid if the claimant can show need for such aid.⁸¹ New York's plan is similar to California's in that it does not allow an award if the claimant does not suffer "serious financial hardship."⁸² Under the Massachusetts plan, the victim's need is not taken into account in determining his award of compensation.⁸³ The Model Act would provide compensation based on the economic loss and not on the basis of need.⁸⁴

C. Provision Concerning the Award

Once the determination has been made regarding which crimes are compensable and which victims are eligible, we face the problem of determining what the amount of compensation shall be. The state has an interest in keeping the cost of such a scheme as low as possible. On the other hand,

⁷⁹ BRITISH COMMAND PAPER, Statement of Purpose.

⁸⁰ NEW ZEALAND ACT § 17.

⁸¹ CAL. GOV'T. CODE §13963 (West Supp. 1968).

⁸² N. Y. EXEC. LAWS §631 (6) (McKinney Supp. 1969).

⁸³ MASS. GEN. LAWS ch. 258A (Supp. 1969).

⁸⁴ HARVARD MODEL ACT; See note 63 *supra*.

if the scheme is to fulfill any of its objectives, the compensation must be more than nominal. Thus an accommodation of these demands must be formulated. Another factor which must be kept in mind is the administration of the program. A system or procedure for setting the amount of compensation should be such that it can operate with relative ease. This could perhaps be accomplished quite easily by merely setting a statutory amount for each injury—such as \$1,000 for a lost arm. The shortcoming of such a system is readily apparent. It would be impossible to set an amount for each such injury—except on a very arbitrary basis. This would ignore the fact that the loss of an arm would be a greater loss to some people than to others. The loss of a pitching arm would indeed be a great financial loss to a professional baseball pitcher and yet might not constitute a substantial financial loss to a law professor. This approach would also necessitate listing each possible injury that could occur and then deciding upon an amount to assign to that injury. There are, however, certain aspects of such a program which can be dealt with by setting general standards. The legislature can prescribe the broad outlines of such a program and then allow the administrative board to operate within those boundaries.

1. *Provision for minimum claims.* The demands on the administrative board's time can be lessened by providing that only claims above certain amounts will be entertained. This seems clearly to be necessary although this conclusion may not be as justifiable as it appears at first blush.⁸⁵ An unpro-

⁸⁵ Under the British plan, evidently not much administrative time is saved. It is reported that "the administrative costs tend to be incurred anyway in investigating a claim to see if it is eligible or not, and there is in fact very little saving except perhaps that some potential claimants are deterred from making any claim at all. It would be more sensible to impose no lower limit, leaving it to the discretion of the Board to make no award in a trivial or insubstantial case." Samuels, *Compensation for Injuries in Britain*, 17 U. Tor. L. J. 20, 38 (1967).

voked battery resulting in a black eye with no loss of wages, no medical expense and no permanent injury could conceivably demand as much administrative time as a much more serious claim. These small claims could also be more susceptible to collusion. It seems that these factors dictate that some sort of minimum be set. On the other hand, setting a minimum may result in encouraging claimants to file inflated claims. These, of course, could be recognized by the board and screened out.

Another factor worthy of consideration in determining whether to set a minimum is the alleged fact that most violent crimes occur in poverty-stricken urban areas.⁸⁶ Assuming that to be true, the victims will most likely be persons in lower income brackets or on welfare. Thus the loss to them of even a small amount will be much more significant than a loss of the same amount to a person of wealth. This may be reason enough not to require a minimum amount.

The existing programs are varied in their treatment of the matter. Some have set minimums, some have not; and some proposals have taken the "deductible" route—setting no minimum requirement for consideration, but deducting a fixed amount once the justification for compensation has been established.

The New Zealand plan requires no minimum claim. Under the British plan, a requirement that must be met before the Criminal Injuries Compensation Board will entertain the claim is a showing of an appreciable degree of injury, defined as "an injury giving rise to at least three weeks loss of earning or, alternatively, an injury for which not less than 50 pounds compensation would be awarded."⁸⁷

⁸⁶ TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT ch. 2, *The Amount and Trends of Crime*, at 15 (1967). See also *Id.*, Ch. 4, *Crime and The Inner City*, at 60-76 (1967).

⁸⁷ See Horford, *BRITISH COMMAND PAPER* Para. 22. *The Criminal Injuries Compensation Boards: Its Work and Its*

The California plan makes no mention of a minimum. Evidently all claims will be entertained, no matter what the size. In New York, the minimum allowable claim is set at an out-of-pocket loss of at least \$100.00 or a loss of at least two weeks' earning or support.⁸⁸ Similarly in Massachusetts, the victim is not entitled to any compensation unless he has incurred an out-of-pocket loss of at least \$100.00 or has lost two continuous weeks of earnings or support. This out-of-pocket loss covers "unreimbursed or unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary, as a result of the injury upon which such claim is based."⁸⁹ This would apparently cover such expenses as ambulance fees and travel for medical care. There is in the same section a clause which provides that one hundred dollars is to be deducted from any award.

Under Senator Yarborough's plan, there is no provision setting a minimum figure in order to qualify for compensation.⁹⁰ The Model Act, does not directly preclude a claim because of its small size, but does provide that payment once made, is subject to a \$25.00 deduction. This will serve to discourage a mass of small claims and yet not preclude anyone from seeking compensation. Commenting on this provision of the Act, the drafters noted that:

The \$25.00 deductible feature is designed to eliminate the mass of small claims, especially those resulting from minor brawls, which would require an expense and administrative burden out of proportion to their importance or urgency.⁹¹

2. *Provision for a maximum award.* Under the general

Scope, CRIM. L. REV. 356 (1966) for a description of the board and the scope of its function.

⁸⁸ N. Y. EXEC. LAW §626 (McKinney Supp. 1969).

⁸⁹ MASS. GEN. LAWS ch. 258A, § 5 (Supp. 1969).

⁹⁰ See Comment, *Compensation for Victims of Crime — Some Practical Considerations*, 15 BUFF. L. REV. 645, 649 (1966).

⁹¹ HARVARD MODEL ACT §301 [comment]

principles of the common law a person seeking a civil remedy for injuries caused him by another could recover whatever amount he could convince the jury that he was entitled to. These awards were, of course, generally subject to review on appeal and subject to possible reduction by the appellate courts. One of the features of the compensation programs prescribed by statutes is that they usually set limits beyond which an award can not go. This can be attributed partially to the relaxation of the need to show someone at fault. It is usually said that the victim is allowed to recover without all the requirements of the common law, but, correspondingly, the amount of his recovery is limited.

Another factor which partially accounts for this limitation is that of cost. There will be, theoretically, at least more awards under the relaxed system, and thus the upper limits are set in order to keep the cost manageable. Consideration of the question of whether to set a maximum cannot be complete without a discussion of the elements relevant in determining the award. If recovery is allowed for medical expense, loss of wages, loss of earning capacity, pain and suffering, then these should be considered in setting a maximum. There are many possible methods which can be adopted. Among these are: (a) set no maximum at all; (b) set an absolute maximum; (c) set absolute maxima on certain elements of recovery and none on others — or perhaps various maxima on the various elements. The maximum could also be set up on a sliding scale. It is suggested that an absolute maximum could be set on pain and suffering with no maximum on hospital and medical expenses. Further, a sliding scale on loss of earning capacity and loss of wages, dependent upon such items as number of dependents, percentage of disability and other similar items could be established.

The objections to a method such as suggested in (c) above are its complexity and difficulty in administration. It is submitted, however, that there are many factors relevant in determining the loss the victim has sustained and these factors

should not be ignored. Overriding the issue, of course, is the state interest in keeping the cost of the system within certain bounds. This will certainly have to be taken into account in establishing a maximum recovery scheme.

The New Zealand plan limits recovery for pain and suffering to 500 New Zealand pounds and sets a limit of 1000 New Zealand pounds for general damages and pecuniary losses other than through loss of wages. The awards are also closely tied to loss of earnings and a maximum recovery was established at ten pounds and 17.6 shillings weekly with an addition of one pound per week for a dependent wife and 10 shillings per dependent child per week for a period of six years.⁹²

Under the British plan there is no upper limit. Compensation is assessed on the same basis as common law damages.⁹³ There is an exception to this in that the rate of loss of earnings to be taken into account cannot exceed twice the average, according to the age and sex of the victim, of industrial earnings at the time the injury was sustained, and no punitive damages or damages for loss of expectation of happiness can be awarded.⁹⁴

The California act provides that: "In no event shall a claim be approved pursuant to this section in excess of five thousand dollars (\$5,000.00)."⁹⁵

New York's act provides that the award may not exceed out-of-pocket expenses incurred for medical and other services necessary as a result of the injury, together with loss of earnings or support resulting from the injury.⁹⁶ The Act provides further that in any event, the award for loss of earn-

⁹² NEW ZEALAND ACT, note 7 *supra*.

⁹³ BRITISH COMMAND PAPER Para. 22.

⁹⁴ *Id.*

⁹⁵ CAL. GOV'T CODE §13963 (West Supp. 1968).

⁹⁶ N.Y. EXEC. LAW §631(2) (McKinney Supp. 1969).

ings or support may not exceed \$100.00 per week or an aggregate of \$15,000.00.⁹⁷ Massachusetts limits total dollar recovery to \$10,000.00.⁹⁸ Senator Yarborough's plan for the federal government would be more generous and sets a limit of \$25,000.00.⁹⁹

The Model Act calls for compensation without limit for medical, burial and other expenses actually incurred subject to a \$25.00 deduction.¹⁰⁰ It provides additional compensation for loss of wages, limited to \$500.00 per month.¹⁰¹ It also places a limit of \$500.00 on any recovery for pain and suffering.¹⁰²

3. *Factors to consider in establishing the amount of the award.* A rational scheme of compensation dictates that some victims should receive more compensation than others. This is clearly the case resulting from the fact that different victims will receive different injuries and the impact of the injuries will be varied. In determining the relevant factors one cannot divorce himself from the widespread common law elements of recovery. The list includes pain and suffering, loss of earnings, loss of earning capacity, mental injury, and loss of enjoyment of life, among others. Our job then is to sort out those factors upon which the amount of the award should be dependent and to devise a system by which these factors can be efficiently and effectively considered by the agency setting the amount. A survey of the seven plans to which our attention has been directed earlier again seems in order.

In New Zealand compensation may be awarded for any of the following types of loss or injury: expenses actually and reasonably incurred as a result of the victim's injury or

⁹⁷ *Id.* §631 (3).

⁹⁸ MASS. GEN. LAWS ch. 258A, §5 (Supp. 1969).

⁹⁹ YARBOROUGH PROPOSAL §§303(b), 304(b).

¹⁰⁰ HARVARD MODEL ACT §301.

¹⁰¹ HARVARD MODEL ACT §302 (1).

¹⁰² HARVARD MODEL ACT §302 (2).

death; pecuniary loss to the victim as a result of total or partial incapacity for work, or to dependents as a result of the victim's death; other pecuniary loss resulting from the victim's injury, and any expenses reasonably incurred; and the pain and suffering of the victim.¹⁰³ It should be noted that certain restrictions are placed on the amount of the award, but we shall be concerned at this time only with the elements of recovery and not restrictions on the total amount.

The British plan merely calls for compensation to be based on the common law method of assessment, with some restrictions on amount.¹⁰⁴ Also, neither punitive damages nor damages for loss of happiness are allowed.¹⁰⁵

The California act explicitly states:

The maximum amount for which the board may approve a claim pursuant to this section shall not exceed the amount necessary to indemnify or reimburse the claimant for necessary expenses incurred for hospitalization or medical treatment, loss of wages, loss of support, or other necessary expenses directly related to the injury. If continued hospitalization or medical treatment is necessary, a partial award may be made and the claim subsequently reconsidered for the purpose of recommending an additional award.¹⁰⁶

In New York¹⁰⁷ and Massachusetts¹⁰⁸ compensation is based on out-of-pocket expenses, including reasonable medical expenses and loss of earnings or support resulting from the injury. No provision is made for compensation for pain and suffering. Senator Yarborough's bill differs only in that under it pain and suffering are compensable items.¹⁰⁹

¹⁰³ NEW ZEALAND ACT, note 7 *supra*.

¹⁰⁴ BRITISH COMMAND PAPER Para. 22.

¹⁰⁵ *Id.*

¹⁰⁶ CAL. GOV'T. CODE §13963 (West Supp. 1969).

¹⁰⁷ N. Y. EXEC. LAW §631(2) (McKinney Supp. 1969).

¹⁰⁸ MASS. GEN. LAWS ch. 258A, §5 (Supp. 1969).

¹⁰⁹ YARBOROUGH PROPOSAL §303(d).

The Model Act provides not only for compensation for medical expenses, burial expenses, and other reasonable expenses resulting from the injury or death,¹¹⁰ but for loss of earning capacity and for pain and suffering up to \$500.00 as well.¹¹¹ There is also a separate provision for a flat payment of \$10,000.00 to the surviving dependent spouse and \$1,000.00 to each surviving dependent child in case of death of the victim.¹¹²

The criteria for establishing the amount of the award should be clearly stated. The elements of recovery should be designated both for cases involving only injury and those involving the death of the victim. Provisions should specify the compensation available to the dependents in the event of the victim's death. There should be a payment for the expenses incurred in the event either of death or only injury. The payment to surviving dependents should not supplant the payments for medical and burial expenses, but should supplement them. It is further submitted that recovery should be available to the victim for the following elements: (1) loss of earnings, (2) loss of earning capacity, (3) pain and suffering (both physical and mental), (4) medical expenses actually incurred, (5) other reasonable expenses incurred such as ambulance fees and traveling expenses for treatment. Surviving dependents should be able to recover for the medical and burial expenses actually incurred as well as for the loss of their decedent's support.

In case of death, pain and suffering should not be a compensable element, and in no event should punitive damages be awarded. The rationale supporting punitive damages does not apply because the perpetrator is not paying the award. Such a "punishment," therefore, should not and cannot logi-

¹¹⁰ HARVARD MODEL ACT §301.

¹¹¹ *Id.* at §302.

¹¹² *Id.* at §303.

cally be fixed upon the taxpayers who will be financing the plan.

The economic factors within each jurisdiction will have to dictate the limits of recovery for any of these items. The pain and suffering element could be, least damagingly, limited to a relatively small amount or even eliminated altogether. A benefit gained from eliminating pain and suffering as an element of recovery would be the saving of administrative time that would be required to determine how much "pain and suffering" was involved.

4. *Avoiding double recovery.* Some provision should be made to preclude the victim from recovering from more than one public source, but he should not be penalized for carrying private insurance, and in that instance should be allowed double recovery. The recovery should be reduced by any amount he received in a civil suit against the offender, and perhaps the state should be subrogated to all claims that the victim would have against the offender up to the amount of compensation. It is also submitted that the victim should be allowed to elect whether to proceed against the offender in a civil action or seek compensation through the state scheme.

The recovery of the victim should be reduced by any amount he receives from such programs as workmen's compensation or public welfare. The recovery should also be reduced by any amount the victim receives in a successful suit against a governmental body on the basis of its liability. A provision of this sort should take into consideration the various means in the jurisdiction by which the victim could have a recovery. The award should be reduced accordingly where such other payments are in consequence of the criminal injury.

5. *Emergency Awards.* In some instances it may be that the victim or his dependents are clearly in need of financial aid during the pendency of the claim. Provision should be made for such an award and for its repayment in case of an

unsuccessful claim. In the event of a successful claim, the final award could be reduced by the amount of the temporary payment. The New York plan contains such a provision.¹¹³

D. Payment of the Award.

Under the common law, awards in civil actions for damages are generally paid in a lump sum. On the other hand, payments under such programs as public welfare and workmen's compensation are generally made periodically. A scheme such as we are discussing could incorporate some of the desirable elements of each approach. Such items as the loss of past earnings, pain and suffering, medical expenses and other out-of-pocket expenses, could be reimbursed as a lump sum payment. For items such as loss of earning capacity or loss of support, periodic payments should be made.

Provision could also be made for a review of the periodic payments in the event of changed circumstances. This would be desirable in case of worsening condition of the victim or his subsequent death. It might also be desirable to consider subsequent changes in the needs of dependents. Periodic payments of the loss of support award would make such reevaluation possible.

The New Zealand¹¹⁴ and New York¹¹⁵ plans provide for periodic payments of at least part of the award. California,¹¹⁶ Great Britain,¹¹⁷ Massachusetts,¹¹⁸ the Yarborough bill¹¹⁹ and the Model Act¹²⁰ provide for lump sum payments. Some ex-

¹¹³ N.Y. EXEC. LAW §630 (McKinney Supp. 1969).

¹¹⁴ NEW ZEALAND ACT, note 7 *supra*.

¹¹⁵ N.Y. EXEC. LAW §632 (McKinney Supp. 1969).

¹¹⁶ CAL. GOV'T. CODE §13963 (West Supp. 1968).

¹¹⁷ BRITISH COMMAND PAPER Para. 22.

¹¹⁸ MASS. GEN. LAWS ch. 258A §6 (Supp. 1969).

¹¹⁹ YARBOROUGH PROPOSAL §304(b).

¹²⁰ HARVARD MODEL ACT §§301-303.

ceptions to the lump sum practice are made in Britain.¹²¹

E. Period Within Which A Claim Must Be Filed.

The investigation by the administrative board should begin as early as possible after the injuries have been inflicted. This necessity supports a requirement that claims be filed as soon as possible after the injuries have been suffered. A late filing might also tend to indicate that, perhaps, some collusion is involved; although a delayed filing could as likely be the result of some justifiable circumstance.

One possible by-product of a compensation scheme is better cooperation between victim and law enforcement officials in apprehending the offenders. Police can be aided by an early report of the offense. Thus it may be desirable to require the victim to make a report to the proper law enforcement authorities within a minimum time after the offense as a condition to his ultimate recovery under the scheme.

Requiring these two efforts by the victim is not unreasonable and could help the state reap a benefit from the plan other than that derived ultimately from the relief of victims. Existing plans have established such requirements. New Zealand requires that the claim be filed within one year after the injury or death unless the tribunal grants an extension.¹²²

¹²¹ See, e.g., Harrison, *Compensation for Criminal Injuries*, 110 SOL. J. 99 (1966), where Mr. D. H. Harrison, Secretary and Solicitor to the Criminal Injuries Compensation Board said: "Although compensation takes the form of a lump sum, the Board may make more than one payment. The example referred to in the scheme is where only a provisional medical assessment can be given. Interim payments have also been made where the applicant is likely to be unfit for work for an uncertain period and is losing wages, although full recovery is expected eventually. It may also be used in the case of an applicant injured at work to whom a provisional national insurance disablement gratuity or pension has been awarded." *Id.* at 100-1.

¹²² NEW ZEALAND ACT, note 7, *supra*.

The British act does not set a specific time, but does require that all victims must report crimes to the police without delay in order to qualify for compensation.¹²³ In California the statute requires that a claim must be filed within one year from the date of the death or injury.¹²⁴

In New York, "A claim must be filed by the claimant not later than ninety days after the occurrence of the crime upon which such claim is based, or not later than ninety days after the death of the victim, provided, however, that upon good cause shown, the board may extend the time for filing for a period not exceeding one year after such occurrence."¹²⁵ A report must be filed with the proper law enforcement authorities within forty-eight hours except under certain circumstances.¹²⁶

Under Senator Yarborough's plan the victim must submit his request within two years after the injury occurred.¹²⁷ The Senator, in commenting on his proposal, stated: "It is preferable to rely on the prudence of the commission to assess the meaning of delays rather than to fix a rigid statute of

¹²³ BRITISH COMMAND PAPER Para. 14. For a first hand report on how this flexible requirement has been applied, see Harrison, *Compensation for Criminal Injuries*, 110 SOLICITOR'S J. 99, (1966) in which Mr. Harrison says: "It is a condition of the scheme that the circumstances of the injury should have been reported to the police without delay or have been the subject of criminal proceedings in the courts. There is no fixed time within which a case should be reported to the police, and if a delay has occurred, the board consider [sic] its length and the reason for it before deciding if the application should be excluded. In cases of adult application, delays of twelve to fifteen days without reasonable explanation have been sufficient to exclude the application." *Id.* at 100.

¹²⁴ CAL. GOV'T CODE § 13962 (West Supp. 1968).

¹²⁵ N. Y. EXEC. LAW § 620 (McKinney Supp. 1969).

¹²⁶ *Id.* at §631 (1) (c).

¹²⁷ S. 2155, 89th Cong., 1st Sess. (1965).

limitations.”¹²⁸ Notwithstanding this comment, the plan he proposed does not allow the commission to waive the statute of limitations. The idea of relaxing the requirement seems a good one — there will undoubtedly be instances where the failure to file the claim within the period is justifiable. It is at these times that the commission should have some discretion in relaxing the requirement.

The Model Act places two duties on the applicant: (1) he must report the crime to appropriate police authorities within twenty-four hours after the crime, unless the delay was justified by extraordinary circumstances; and (2) make application to the commission within one year of the date of the compensable crime, unless the delay was justified by extraordinary circumstances.¹²⁹

The Model Act's dual requirement is a desirable feature. The “report to authorities” requirement should aid them in their investigation. The “filing requirement” will get the matter before the attention of the board at an early date and thus make their disposition more prompt. The twenty-four hour reporting requirement is workable, but the filing period should be shortened to something less than the one year period — perhaps following the example of New York and setting ninety days.

F. Proof Necessary to Support An Award.

What should be necessary to show that the injury was a result of a criminal act? Should it be necessary to show a conviction of the perpetrator? Upon whom should rest the burden of proof? What degree of proof should be required? And what evidence shall be admissible at the hearing on the application?

¹²⁸ Yarborough, S.2155 of the 89th Congress — *The Criminal Injuries Act*. 50 MINN. L. REV. 255, 262 (1965).

¹²⁹ HARVARD MODEL ACT §203 (1) (2).

The award should not be dependent upon the apprehension, prosecution or conviction of the offender. These contingencies should not preclude the award, because they are simply factors over which the victim has very little control. The victim should be encouraged to cooperate with the proper authorities and his failure to cooperate should serve as a bar to his receipt of compensation, but that should be the extent of his duty.

The victim should have only to convince the board that his injuries did result from a criminal act—without regard to the fact that the offender was not apprehended, prosecuted or convicted. The victim should have to bear this burden of proof; a burden which should be satisfied by a mere preponderance of the evidence and not a showing beyond a reasonable doubt.

In the event there are elements such as provocation or failure to cooperate with the authorities which the state raises as a bar to the award, then the burden of establishing these matters should rest on the state. Again, the degree of proof necessary should be merely one of showing that the probabilities favor the occurrence of the alleged provocation or lack of cooperation on the part of the victim.

The administrative board should not overly restrict the admission of evidence offered by the victim in establishing his claim. It is assumed that the initial application and hearing will be of an informal type and thus restrictive rules of evidence should not be applied. This should facilitate the handling of many claims without victims having to retain counsel to represent them. It will also relieve the board of getting involved in making many of the subtle distinctions that always seem to be necessary when ruling on the admissibility of evidence.

G. Discouraging and Detecting Fraudulent Claims.

One of the most predictable problems that will arise under a compensation scheme is the filing of fraudulent claims. These may be the result of collusion between various persons or

simply unilateral misrepresentations to the administrative board concerning the cause of certain injuries sustained by the claimant.

Most of the plans presently operating exclude from consideration all claims except those involving injury to the person. It is generally felt this will discourage such fraudulent claims. People seem to be less likely to submit themselves to physical injury than to incur damage to their property. Nevertheless, there will undoubtedly be fraudulent claims of personal injury. The scheme should be constructed so as to discourage such claims and to provide mechanisms for the detection of such claims, if filed. The requirement of reporting the alleged crime to police authorities within a certain period should help discourage some fraudulent claims. It should be required and insisted that the victim cooperate in the apprehension, prosecution, and conviction of the offender. An additional requirement directed at fraud should be to have the victim submit to a medical examination if deemed necessary.

One possible deterrent to fraudulent claims is the provision for criminal punishment of anyone filing fraudulent claims. In spite of safeguards enacted to discourage fraudulent claims, some will be filed. This reality should serve as a "red flag" to the board so that they can constantly be on guard for such claims. Detection of fraudulent claims will necessitate a complete and careful examination of the medical records, the police reports, testimony of the victim, testimony of other witnesses and other relevant evidence. This seems to justify giving the board power to subpoena evidence and witnesses in order to conduct a full investigation. The board should make use of any medical evidence that is available, especially the report of the medical examiner in the event that the claim is based on the death of the victim. The board should also determine the past and present relationship of the victim and the alleged offender. This may prove to be a key factor in establishing the validity of the claim.

At best, there will be abuses of a compensation plan, but

the abuse rate can be held to a minimum by setting clear standards, establishing penalties for the filing of fraudulent claims and providing for an efficient, yet thorough handling of the claims by the administrative board. A break in any portion of the dike could result in a deluge of false claims.

H. Administrative Machinery.

The administration of a compensation scheme will be one of the most important factors in the success or failure of the scheme. This dictates a careful examination of the possible solutions to the problems of establishing and organizing an administrative body. Thus far, the solutions have been varied. California has placed the administration of its plan in the hands of the State Board of Control.¹³⁰ Some of the other plans call for the creation of an independent administrative agency. The Yarborough bill provides for a three-member board,¹³¹ as does the New Zealand plan,¹³² the New York plan,¹³³ and the Model Act.¹³⁴ Great Britain uses a six-member board.¹³⁵ Under the Massachusetts plan, the program is administered by the district courts of the Commonwealth.¹³⁶

The members of New Zealand's administrative tribunal are appointed by the Governor-General for five-year terms. One of these members is designated by the Governor-General as the Chairman. He must have a minimum of seven years of legal experience. A victim injured as a result of the commission of a compensable crime applies to the tribunal for compensation. A hearing is then set and is held in the presence of the Chairman and at least one of the two other members of the commission. These hearings are normally held in public, except

¹³⁰ CAL. GOV'T. CODE §13962 (West Supp. 1968).

¹³¹ YARBOROUGH PROPOSAL §201.

¹³² NEW ZEALAND ACT §4.

¹³³ N. Y. EXEC. LAW §622(1) (McKinney Supp. 1969).

¹³⁴ HARVARD MODEL ACT §401.

¹³⁵ BRITISH ACT Para. 9.

¹³⁶ MASS. GEN. LAWS ch. 258A, §2 (Supp. 1969).

when sexual matters are involved or if the criminal case is in process or pending, in which case provisions are made for a private hearing. The tribunal may also hold a private hearing whenever it deems it in the "interests of public morality."¹³⁷ The alleged victim can appear alone or with counsel. The parties are also allowed to present evidence and cross-examine witnesses. Strict rules of evidence are not employed. Other persons who satisfy the tribunal that they have a substantial interest in the proceedings may appear and be heard. It is also important that under this plan the conviction of the offender is admitted as conclusive evidence of the commission of the crime—unless a new trial, rehearing, or appeal is pending. The tribunal then renders its decision as to whether compensation shall be made and if so, how much shall be paid.

There are provisions for raising jurisdictional questions on appeal from the tribunal's decision. These are the only appealable questions with the exception of orders by the tribunal requiring the offender to make payments.

The tribunal can, however, vary its own order upon the application of the Attorney-General, the victim, or the offender. The grounds for a variation of the order are: (1) fresh evidence, (2) any change in the circumstances of the party since the making of the order, (3) payments made to the victim or a dependent by some other agency, or (4) any other matter the tribunal feels is relevant.¹³⁸

The British plan is administered by the Victims of Crimes of Violence Compensation Board. The chairman and all board members must have legal experience.¹³⁹ The board is headquartered in London but has offices scattered throughout England for the convenience of claimants.

¹³⁷ NEW ZEALAND ACT §21.

¹³⁸ *Id.*

¹³⁹ BRITISH COMMAND PAPER Para. 9.

The claimant must fill out a standard form provided by the board. One member of the board then reviews the application by studying only that written submission. He decides the amount to be paid, if any, and notifies the claimant of his decision. In the event the claimant is dissatisfied with this decision he can appeal and have a hearing before a three-man board *excluding* that member who made the initial decision. This is a private hearing. At this hearing the claimant can bring in a friend or legal adviser to assist him in presenting his case. The claimant and his legal adviser, as well as a member of the board's staff, will be allowed to call, examine and cross-examine witnesses. The hearing is informal and strict rules of evidence are not followed. This board then makes the final determination of the matter.

The New York law is a very carefully drafted and comprehensive plan. Several legislative committees investigated the aspects of victim compensation, including the Commission on the Revision of the Penal Law and the Joint Legislative Committee on Crime and Control of Firearms. Two private organizations, the New York Republican Club and the Correctional Association of New York, also studied the problem. All of these study groups recommended the inauguration of a victim compensation plan.

The New York plan called for the establishment of a Crime Victims Compensation Board, consisting of three members, no more than two belonging to the same political party, appointed by the Governor with advice and consent of the New York Senate.¹⁴⁰ The members must have been admitted to practice law in New York for not less than ten years next preceding their appointment.¹⁴¹

The board is given very broad powers, among which are: power to request assistance from all state agencies, power to

¹⁴⁰ N. Y. EXEC. LAW §622 (McKinney Supp. 1969).

¹⁴¹ *Id.*

investigate completely all claims—with authority to reinvestigate or reopen cases, power to direct medical examinations of victims, power to hold hearings, and power to issue subpoenas to witnesses and for evidence.¹⁴²

The claimant files his claim with the board which then notifies the District Attorney of the county in which the crime is alleged to have occurred. If a prosecution related to the claim is pending, and the district attorney requests, the board defers proceeding until the prosecution is concluded.¹⁴³

The chairman then assigns the claim to himself or a member of the board who examines the claim and then investigates its validity. This includes, among other things, examination of police, court and official records and reports concerning the crime and an examination of medical and hospital reports relating to the injury. He can then render a decision or may call a hearing. At the hearing any relevant evidence not legally privileged is admissible. The board member then makes a decision and files it, together with his reasons, with the secretary of the board.¹⁴⁴

The claimant, or any member of the board, may request a review of the decision by the full board. The board then reviews it and can modify or affirm it. This is the final non-judicial review of the claim and the only review that can be requested and obtained by the victim.¹⁴⁵ The Attorney General and the Comptroller do have a right to institute a judicial proceeding to review the final determination of the full board.¹⁴⁶

There is no statutory provision concerning the private or public nature of the hearing although the board is given

¹⁴² *Id.* at §623.

¹⁴³ *Id.* at §625 (3) (4).

¹⁴⁴ *Id.* at §627.

¹⁴⁵ *Id.* at §628.

¹⁴⁶ *Id.* at §629.

the power to promulgate rules and regulations necessary to carrying out the provisions and purposes of the plan. This could, conceivably, include declaring certain hearings to be private. There is one provision for confidentiality of records which makes the record of the proceedings public but provides that any record or report obtained by the board, the confidentiality of which is protected by any other law or regulation, must remain confidential.¹⁴⁷

One of the most unusual features of the Massachusetts plan is the provision concerning its administration. The district courts of the Commonwealth are given jurisdiction to determine and award compensation.¹⁴⁸ The obvious disadvantages to such a scheme seem to be: (1) the substantial additional workload placed upon the courts, (2) the potential delay in adjudication seemingly inherent in the judicial process, and (3) the more rigid procedures which usually accompany judicial proceedings as compared to the more free-wheeling administrative proceedings. These are potential bottlenecks that may prove to be negligible.

V

CONCLUSION

The victim of a crime deserves the attention of society. As a primary societal institution, government should take an interest in the victim and his welfare. The state governments seem to be the most desirable units for ministering to the needs of victims. The responses that have been made are commendable. Certainly each operating program has its shortcomings, but they all seem to represent advancements over the traditional means of dealing with the problems of the victim. The conclusion seems warranted that the traditional approaches have all proved to be collective failures. They

¹⁴⁷ *Id.* at §633.

¹⁴⁸ See note 136 *supra*.

just do not meet the problem head-on. It seems that state compensation plans can.

It is, therefore, advocated that other states consider the adoption of such plans. It may be desirable to go slow in this area — perhaps watching other plans in operation for a period of time. On the other hand, many of the problems in adopting and administering such a plan have been faced and discussed and thus state legislatures will not be flying in a complete cloud when they consider such plans. By careful study, plans can be devised whereby the major objections can be met and major pitfalls avoided. It seems, therefore, that the lead taken by these pioneer states should be followed — with the ultimate aim of attempting to restore to as great a degree as possible a victim of a violent crime to his former status.