

# COMPENSATING CRIME VICTIMS: A LEGISLATIVE AND PROGRAM ANALYSIS

*Michael Gahan*\* and  
*Rose T. Lennon*\*\*

## INTRODUCTION

In a decade marked both by a steady increase in the crime rate and an increase in dependence on governmental subsidies, there comes to the political forefront a hybrid: compensation for victims of crime. The concept envisions that a state with such a program will reimburse an individual for medical costs and lost wages sustained as a result of being an innocent victim of crime. Twenty-one states and one territory have operative programs as of April 15, 1977.<sup>1</sup> These jurisdictions are as follows:

Alaska	Maryland	Oklahoma
California	Massachusetts	Pennsylvania
Colorado	Minnesota	Tennessee
Delaware	Nevada	Texas
Hawaii	New Jersey	Washington
Illinois	New York	Wisconsin
Kentucky	North Dakota	Virgin Islands
	Ohio	

Other states have statutes, but implementation has not been effected because of financial or constitutional problems.<sup>2</sup> Federal legislation has been

\* B.A., Lewis University, 1975; J.D. Candidate, University of Notre Dame Law School, 1978.

\*\* A.B., University of Notre Dame, 1974; J.D. Candidate, University of Notre Dame Law School, 1977.

This note results from a project on crime victims compensation by the Legislative Research Service, Notre Dame Law School, Michael Gahan, Project Director. The authors wish to express appreciation for research assistance to Lawrence A. Goya, and also to James G. Wiehl and Raymond B. Biagini, of Notre Dame Law School's Class of 1979.

1. Alaska Stat. Secs. 18.67.010 to 180 (Michie 1976); Cal. Gov't Code Secs. 13959 to 13974 (West Cum. Supp. 1977); Colo. Rev. Stat. Secs. 17-1-201 and 27-28-101-102 (Supp. 1976); Del. Code Ann. tit. 11, Secs. 9001 to 9017 (Michie Cum. Supp. 1976); Haw. Rev. Stat. Secs. 351-1 to 70 (1968); Ill. Ann. Stat. ch. 70, Secs. 71 to 84 (Smith-Hurd Cum. Supp. 1977); Ky. Rev. Stat. Secs. 346.010 to 180 (1976); Md. Ann. Code Art. 26A, Secs. 1 to 17 (1973); Mass. Ann. Laws ch. 258A, Secs. 1 to 7 (Michie/Law Co-op 1968); Minn. Stat. Ann. Secs. 299B.01 to 16 (West Cum. Supp. 1977); Nev. Rev. Stat. Secs. 217.010 to 260 (1973); N.J. Stat. Ann. Secs. 52:4B 1 to 21 (West Cum. Supp. 1976-1977); N.Y. Exec. Law Secs. 620 to 635 (McKinney 1972); N.D. Cent. Code Secs. 65-13-01 to 20 (Smith Supp. 1975); Ohio Rev. Code Ann. Secs. 2743.01 to .72 (Page Supp. 1975-1976 as amended by Substitute House Bill No. 82, 1976); Okla. Stat. Ann. tit. 22, Secs. 991 a to d (West Cum. Supp. 1976-1977); 1976 Pa. Laws amending sec. 202 of "The Administrative Code of 1929," and adding Secs. 477 to 477.15 (Official Advance Copy of Statute Enacted at 1976 Session); Tenn. Code Ann. Secs. 23-3501 to 3517 (Supp. 1976); Tex. Civil Code Ann. tit. 71, Art. 4447m (1976); V.I. Code Ann. tit. 34, Secs. 151-177 (Supp. 1976); Wash. Rev. Code Ann. Secs. 7.68.010 to 910 (Supp. 1975); Wis. Stat. Ann. Secs. 949.01 to 18 (West Supp. 1976-1977).

2. Ga. Code Ann. Secs. 47-518 to 526 (1974); R.I. Gen. Laws Secs. 12-25-1 to 12 (Supp. 1976); Va. Code Secs. 368.1 to .18 (Supp. 1976) [Hereinafter statutes will be cited only to the jurisdiction and the particular section of the applicable statute].

proposed, but, as will be discussed further below, has not yet been enacted.

A Uniform Crime Victims Reparations Act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1973. The uniform act proposes that any victim who suffers financial hardship is eligible to make a claim to a three-member board which hears evidence as to the criminal activity and the injuries sustained. The board makes awards if a claim is supported by a preponderance of the evidence. This uniform act has been influential, however, in only two states. Many other states with no law on the books are awaiting implementation of a federal program of supplementary funding to help absorb the tremendous costs that the program will entail.

This note will examine the statutes now in effect, reviewing their coverage and eligibility requirements, methods of administration, and financial resources. Proposals will be made as to what the ideal piece of legislation should include in order to extend benefits as far as economically feasible. Further comment on the Uniform Crime Victims Reparations Act and on federal schemes now pending is also offered.

### Philosophical Considerations

The modern movement towards providing compensation to crime victims is not an exclusive product of the welfare state. The concept has been traced back to the Babylonian Code of Hammurabi which provided,

If the robber is not caught, the man who has been robbed shall formally declare whatever he has lost before a god, and the city and the mayor in whose territory or district the robbery has been committed shall replace whatever he has lost for him.

If (it is) the life (of the owner that is lost), the city or the mayor shall pay one maneh of silver to his kinsfolk.<sup>3</sup>

The idea also appears in Biblical texts:

If men quarrel, and the one strike his neighbor with a stone or with his fist, and he die not, but keepeth his bed; if he rise again, and walk abroad upon his staff, he that struck him shall be quit, yet so that he make restitution for his work, and for his expenses upon the physicians.<sup>4</sup>

Contemporary advocates of compensation have adopted and expanded the traditional rationale. Five reasons for compensation may be effectively advanced. First is the concern for parity of treatment by the state for both the offender and his victim. After being accused, the offender is provided with legal counsel, rehabilitation and maintenance at public expense. The victim, on the other hand, must pay his own expenses, which possibly include large medical bills and lost wages not reimbursed by private insurance.<sup>5</sup>

3. Code of Hammurabi Secs. 23 and 24 as translated by G.R. Driver and J.C. Miles in *II The Babylonian Laws* 21 (1955).

4. *Exodus* 21:18-19.

5. *Victims of Crime Compensation Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 1st & 2nd Sess. 58 (1975-1976) (statement of Paul Rothstein, Reporter for the Uniform Act) [Hereinafter referred to as *House Hearings*].

The second reason for state compensation recognizes the government's failure to achieve "the good society." Social and economic conditions that breed crime continue to exist in every community. The nation's police departments, which are the chief agencies intended to prevent crime and maintain order, have achieved only limited success in reaching their goals.<sup>6</sup>

The third reason is what Paul Rothstein, reporter for the Uniform Crime Victims Reparations Act, referred to as society's promise. This reasoning states that the citizen has been asked to forego his right to arm in self-defense or to hire a private police force, in reliance upon state protection. According to this line of thought, society makes good on its promise either by prevention of crime or by reparation to the victim afterwards.<sup>7</sup>

Fourth, public compensation is the only effective way to completely assist victims. Insurance, public welfare, charity and restitution have proved inadequate. The only remaining method is publicly-funded victim compensation.<sup>8</sup>

Finally, compensation serves to encourage citizen cooperation with law enforcement. The most common method of achieving this is the requirement in most legislation that the crime for which compensation is claimed be reported to the police.<sup>9</sup> Furthermore, the desire for this cooperation is expressly stated as the policy for the legislation in Wisconsin and other states.<sup>10</sup>

## COVERAGE AND ELIGIBILITY

### A. Coverage

Two basic questions regarding crime victim compensation concern what should be compensated and who should be eligible. No two states answer these questions exactly alike. Texas provides the least coverage, allowing only the examination costs for rape victims.<sup>11</sup> States like Nevada utilize Good Samaritan type statutes. These laws compensate individuals injured while attempting to prevent a crime, apprehend a suspected criminal, help another victim, or aid a police officer in his efforts to do the same.<sup>12</sup> Yet the broadest coverage compensates both victims of violent crimes and the victim's dependents.

Most states enumerate compensable crimes, typically including a lengthy list. However, specific listing limits flexibility by predetermining all compensable crimes. Some states, instead, use more expansive terminology, e.g., "any crime" or "any violent crime." All of the broadest coverage states compensate dependents of deceased victims, except that certain jurisdictions bar compensation if the victim and the alleged criminal are members of the same family. In addition, most states award compensation for crimes involving automobiles, planes, or boats if

6. *House Hearings, supra* note 5, at 58-59 (statement of Paul Rothstein).

7. *House Hearings, supra* note 5, at 59 (statement of Paul Rothstein).

8. *House Hearings, supra* note 5, at 515-16 (Council of Europe, "Compensation for the Victims of Crime"). See also *House Hearings, supra* note 5, at 3-4 (statement of Rep. Peter W. Rodino, Jr. (D., New Jersey)).

9. See discussion *infra* in section on Eligibility.

10. "The policy of this state is to encourage the cooperation of the public in law enforcement and to promote the public welfare. The legislature finds that this policy will be furthered by the payment of awards to the victims or their dependents of certain serious crimes or to persons injured in attempting to prevent the commission of crimes or to apprehend suspected criminals." 1975 Wis. Laws ch. 344 Sec. 1.

11. Tex. Art. 4447m.

12. Nev. Sec. .070.

the vehicle itself was used to inflict the injury or used in another crime.<sup>13</sup>

### 1. *Minimum Loss Provisions*

Of the 22 jurisdictions with operative compensation programs, 13 require the victim to sustain a minimum out-of-pocket loss before his claim for compensation will be granted. A survey of the range of these limits shows a floor of \$25 in one state,<sup>14</sup> \$100 in ten states,<sup>15</sup> and \$200 in the other two.<sup>16</sup> Six of these limits are alternatively expressed in terms of two weeks' lost earnings.<sup>17</sup> Generally, this figure is merely a bottom limit to the amount of the award, but four states also deduct it from the final amount granted.<sup>18</sup>

The purpose for such limitations is a desire to avoid a situation where administrative costs of investigation exceed the amount of compensation paid. However, crime statistics continually show that the poor, not the middle and upper classes, are more often victimized by crime.<sup>19</sup> To these victims, a relatively small out-of-pocket loss may represent a large percentage of their monthly income.<sup>20</sup> Though this potential effect on the low-income victim may be alleviated by the alternative wage-loss provisions, such alleviation is unlikely.

As of January 1, 1977, the New York legislature eliminated the requirement of a minimum out-of-pocket loss of \$100 in medical bills or two weeks lost earnings.<sup>21</sup> This action suggests that New York has reduced administrative costs to a point where the problem of inordinate expenditures is substantially decreased, has reaffirmed its commitment to aid all innocent victims of crime, or has done both. Other reforms were also introduced to expedite the processing of claims.<sup>22</sup> For the period from April 1, 1974 through March 31, 1975, the New York Crime Victims Compensation Board expended 19% of its budget on administration. This put the program in the middle range of operative programs in terms of administrative expenditures.<sup>23</sup> If the new procedures serve to reduce that proportionate expense, New York's lead should be followed by other states.

Closely analogous to the minimum loss requirement is the stipulation in five states that the victim must suffer serious financial hardship before compensation may be granted.<sup>24</sup> These provisions have been roundly criticized as likely to plunge the victim compensation programs into the same morass as existing

621(3). 13. Alaska Sec. 130(b) (4); Cal. Sec. 13960(b); Haw. Sec. 32(b); Ky. Sec. 020(3); N.Y. Sec.

14. Del. Sec. 9007(b) (May be waived in extreme cases).

15. Cal. Sec. 13960(d); Ky. Sec. 070; Md. Sec. 7; Mass. Sec. 5; Minn. Sec. 04; N.J. Sec. 18; N.D. Sec. 06(7); Pa. Sec. 477.5; Tenn. Sec. 3506(d); Va. Sec. 11.

16. Ill. Sec. 73(b); Wis. Sec. 06(3).

17. Ky. Sec. 070; Md. Sec. 7; Mass. Sec. 5; N.J. Sec. 18; Pa. Sec. 477.5; Tenn. Sec. 3506(d). (May be waived in interests of justice). Cal. Sec. 13960(d) expresses this alternative as 20% of the victim's net monthly income.

18. Ill. Sec. 73(b); Ky. Sec. 130(3); Md. Sec. 7; Mass. Sec. 5.

19. Lamborn, *The Scope of Programs for Government Compensation of Victims of Crime*, 1973 U. Ill. L.F. 21, 54 [Hereinafter referred to as Lamborn].

20. Yarborough, *S. 2155 of the Eighty-Ninth Congress-The Criminal Injuries Compensation Act*, 50 Minn. L. Rev. 255, 264-65 (1965).

21. N.Y. Sec. 631 (McKinney Supp. 1976).

22. New York Crime Victims Compensation Board, *Ninth Report* 8, 9 (1975).

23. Wisconsin Legislative Research Bureau, Information Bulletin 76-IB-3, *Compensation for Victims of Crime: A Current Status Report* 7 (May, 1976) [Hereinafter referred to as *Wisconsin Bulletin*].

24. Cal. Sec. 13964(d); Ky. Sec. 140(3); Md. Sec. 12(f); N.Y. Sec. 631(6); Wis. Sec. 06(6).

welfare programs.<sup>25</sup> While administrators and proponents may disagree, if the desire to reduce administrative costs is to be attained, as expressed above, elimination of such a test may serve to reduce staff investigation.<sup>26</sup>

The Marquette University Center for Criminal Justice and Social Policy, in conjunction with the Victim/Witness Project of the U.S. Department of Justice's Law Enforcement Assistance Administration, made extensive surveys of crime victimization between December, 1974 and August, 1975. The numerical base for their findings was 1,231 victim respondents questioned at the Milwaukee County Courthouse and District Attorney's Office. Results of the survey were included in the testimony of Dr. Richard Knudten, director of the center, before the Subcommittee on Criminal Justice of the House Judiciary Committee.

Response to the survey indicates that 30.5% of the victims suffered physical injury. Using one hundred dollars as a cutoff point because that figure is the most common minimum loss amount, 63.5% suffered a loss below minimum. Another 9.8% suffered a loss between \$101 and \$200. The sample was further refined by calculating the amount of insurance recovery. When these figures were taken into consideration, the \$100-and-below-percentage rose to 79.3%. Another 3.6% were included in the \$101-\$200 range. Taking into account the fact that 56% suffered no loss after insurance, a full 23.3% of all injured persons would be ineligible for compensation under a program requiring a one hundred dollar minimum loss.<sup>27</sup>

Unfortunately, the report of this survey fails to correlate time lost from employment with the resulting income loss. It is, therefore, impossible to analyze the impact of the second filtering device of two weeks earnings in many minimum loss requirements.

A final problem associated with the inclusion of a minimum loss requirement is inflated or fictitious amounts claimed on application forms. One possible, though somewhat unlikely, result would be higher charges by medical practitioners to accomplish the same end.<sup>28</sup> If such fraud is not discovered until significant investigative time passes, the desire to avoid such costs is defeated.

A minimum loss requirement should be deleted from all present and future compensation laws. The financial hardship requirements should also be eliminated as merely another addition to the welfare problem. Also, these two provisions should be deleted from the uniform act where they are presently proposed as optional provisions based on state policy considerations.<sup>29</sup>

The statement of Calvin Winslow, assistant director for crime victims compensation of the Washington State Department of Labor and Industries on February 13, 1976, is instructive on the minimum loss issue :

25. Uniform Crime Victims Reparations Act Sec. 5(g) (See Commissioners' Comment to this section in 11 Uniform Laws Ann. 42-43 (1974)); *House Hearings*, *supra* note 5, at 61 (testimony of Paul Rothstein).

26. As of May, 1976, Maryland and California showed the lowest administrative expenses as a percentage of total program costs (10% and 13% respectively). New York showed a 19% cost. *Wisconsin Bulletin*, *supra* note 23, at 7. This apparent inconsistency may be partially explained by the fact that of all the programs reporting such figures, these are among the oldest programs, and thus the states have had an opportunity to streamline their procedures.

27. *House Hearings*, *supra* note 5, at 199, 202-204 (Testimony of Dr. Richard D. Knudten, Director of the Center. Permission to use this copyrighted material granted in letter of February 22, 1977, a copy of which is on file in the *Journal of Legislation* offices).

28. Edelhertz and Geis, *California's New Crime Victim Compensation Statute*, 11 San Diego L. Rev. 880, 885 (1974).

29. Uniform Crime Victims Reparations Act Sec. 5(h).

I submit that a \$25 reimbursement to a 70 year old widow purse snatch victim for that portion of her medical costs not paid by medicare may be tremendously more important to her than a payment of \$100 to another victim. Also, a \$100 minimum out-of-pocket loss would eliminate most of the help we are now providing to rape victims. Examination and treatment for most rape victims costs us less than \$100 per claim. The dollars saved by such a provision are minimal. Further, at the time a claim is first filed with us, a victim can't make an accurate determination, nor can we, as to whether or not out-of-pocket costs will or will not exceed \$100. We must obtain law enforcement records, medical bills, information as to income and loss of time from work. After spending our administrative time, we may as well pay the \$25 or \$50 award.<sup>30</sup>

## 2. *Maximum Award*

All of the jurisdictions except Washington, where the program is funded through the Workmen's Compensation scheme,<sup>31</sup> and New York, which sets a maximum only on compensation for lost earnings up to \$20,000 (leaving the entire medical bill to the Compensation Board),<sup>32</sup> provide a maximum dollar amount over which no compensation will be paid. These figures range from \$5,000 to \$50,000.<sup>33</sup> Depending on circumstances, this award may be paid in either a lump-sum or a series of periodic payments.

In most cases, this maximum award is more than sufficient to meet the victim's needs. For instance, in 1975, New Jersey paid the maximum award in 63 of 304 (or slightly more than 20%) of the favorable decisions. This was an increase from less than 13% in calendar year 1974.<sup>34</sup> During fiscal year 1975, Alaska made no maximum awards.<sup>35</sup>

The problem with setting a ceiling arises in the rare situation where a victim sustains lost earnings or medical expenses far in excess of the maximum, with no insurance coverage to provide the collateral source necessary to sufficiently reduce the impact. William Hyland, Attorney General of New Jersey, stated that, at the time the funding of that state's program was severely cut, he was in the process of formulating legislation to increase the maximum from \$10,000 to \$50,000. He believed that \$10,000 was simply not enough.<sup>36</sup> There is an ever present-risk that medical expenses alone will exceed the maximum award. The New York arrangement eliminates this possibility.<sup>37</sup>

30. *House Hearings, supra* note 5, at 411.

31. Wash. Sec. 010.

32. N.Y. Sec. 626, 631(3).

33. \$5,000: Ga. Sec. 524(c); Nev. Sec. 220(2); \$10,000: Del. Sec. 9007(d); Haw. Sec. 62(b); Ill. Sec. 77(e); Mass. Sec. 5; Minn. Sec. 04(3); N.J. Sec. 18; Tenn. Sec. 3506(e); Va. Sec. 11(b); V.I. Sec. 163 (in addition a maximum of \$1,000 is awarded for each dependent other than spouse, in death cases); Wis. Sec. 06(3); \$15,000: Ky. Sec. 130(5); \$23,000: Cal. Sec. 13965 (a) (1) [\$10,000 for pecuniary loss], (2) [\$10,000 for lost wages], (3) [\$3,000 for rehabilitative services]; \$25,000: Alaska Sec. 130(c); N.D. Sec. 06(9); Pa. Sec. 477.9(b); \$40,000: Alaska Sec. 130(c) (if the victim had more than one dependent); \$45,000: Md. Sec. 36 (payments may continue above \$45,000 if the victim is still alive); \$50,000: Ohio Sec. 60(e).

34. New Jersey Violent Crimes Compensation Board, *Annual Report 2* (1975) [Hereinafter referred to as *1975 New Jersey Report*].

35. Alaska Violent Crimes Compensation Board, *Second Annual Report* 16-19 (1975) [Hereinafter referred to as *1975 Alaska Report*]. The maximum award has since been increased to \$25,000. Alaska Sec. 130 (Michie Supp. 1976).

36. *House Hearings, supra* note 5, at 278. Mr. Hyland mentioned pending cases where medical expenses ran as high as \$30,000 to \$40,000.

37. N.Y. Sec. 626, 631(3).

The Victims of Crime Acts of 1976<sup>38</sup> and 1977,<sup>39</sup> and the Ohio statute, compensate up to \$50,000.<sup>40</sup> In comparing the proposed federal act to the Washington state program, Calvin Winslow spoke to this fact:

... the Washington Act does not have a (sic) upper limit on the amount paid to a claimant. The \$50,000 limit, if incorporated into the Washington Act, would result in termination of monthly benefits of \$602 to a totally and permanently disabled crime victim after just less than seven years. If that same victim had incurred \$30,000 in medical costs, all of which were paid by the program, his monthly compensation would terminate in 33 months. In terms of long-term disability, \$50,000 is just not realistic. Admittedly, long-term claims are costly, but represent only a small portion of total claims. If the innocent victim of a criminal assault incurs overwhelming losses as the proximate result of the assault, why shouldn't that victim receive full reparation? *The ceiling of \$50,000 would result in victims with less than \$50,000 losses receiving full reparation and those with over \$50,000 receiving only partial reparation.* (Emphasis added)<sup>41</sup>

The Marquette survey showed no respondents claiming a medical loss before insurance in excess of \$10,000. After consideration of insurance proceeds, only three respondents (1.5%) reported losses exceeding \$2,000. The highest claim fell in the \$6,001 to \$10,000 category.<sup>42</sup> This survey also reports the amount of income lost due to crime victimization, but regrettably fails to compute a combined medical and employment loss figure. However, the lost income report shows only one respondent losing over \$6,000 (.3%). Only four persons (1.3%) reported lost earnings in the \$4,001 to \$6,000 category.<sup>43</sup> The New Jersey and Alaska experiences, reported above, show that maximum awards are paid, but by no means are they the norm.<sup>44</sup>

It could be argued that if the compensation program were to provide a low statutory maximum, as many do, compensation would eventually be picked up in the form of welfare payments to the victim or his dependents. However, as was stated above, these programs hopefully provide an alternative to welfare,<sup>45</sup> which will not be applied only to those fortunate enough to have claims that fall under the state maximum. This problem, and the philosophical desire to avoid entanglement of compensation programs with welfare, would be resolved by the pending Victims of Crime Act of 1977. Section 4(6) of that act states that an otherwise qualifying state program will not receive federal assistance unless: "The program does not require claimants to seek or accept any welfare benefits, unless such claimants were receiving such benefits prior to the occurrence of the qualifying crime giving rise to the claim."<sup>46</sup>

The welfare question has also arisen in relation to the maximum lost

38. *House Hearings, supra* note 5, at 1195.

39. S. 551, 95th Cong., 1st Sess., 123 Cong. Rec. S1900 (daily ed. Feb. 1, 1977).

40. Ohio Sec. 60(e).

41. *House Hearings, supra* note 5, at 410.

42. *House Hearings, supra* note 5, at 204.

43. *House Hearings, supra* note 5, at 206.

44. *Supra* notes 34 and 35.

45. See discussion *supra* in section on Minimum Loss.

46. Cong. Rec., *supra* note 39.

earnings that may be paid to a victim. An early article on the subject proposed that any such payments be limited to two-thirds of the victim's prior earnings. Comment on this provision suggested that such a restriction would provide an incentive for the victim to return to work as soon as possible.<sup>47</sup> A similar suggestion received much criticism,<sup>48</sup> and is presently the law only in the Virgin Islands.<sup>49</sup>

A final question is the relation of collateral source recovery to maximum payments. Specifically, if a claimant suffers compensable damage in an amount greater than the statutory maximum and then receives insurance or other coverage, is his award reduction to be based on the statutory maximum or the actual amount of his loss? Massachusetts faced this question in 1973 in the case of *Gurley v. Commonwealth*.<sup>50</sup> The court ruled that any deductions must come from the actual loss sustained rather than the maximum allowable recovery.

The Alaska board, however, refused to allow payments for lost earnings to a severely injured shooting victim. The claim was denied because all of the victim's medical expenses had been paid by the Veterans Administration, and the amount of this collateral payment exceeded the maximum statutory award.<sup>51</sup> The Massachusetts approach is the better approach in light of the fact that the programs are designed to compensate unreimbursed losses -- a purpose frustrated in this Alaska claim.

Maximum benefit figures should be eliminated. The relative paucity of such awards, coupled with the potential catastrophic effects when a victim's losses exceed the maximum, militate against restrictions. This would necessitate elimination of section 5(j) of the uniform act, which imposes a \$50,000 maximum, and a change of any future federal act substantially similar to the pending legislation.<sup>52</sup>

### 3. Excluded Coverage: Pain and Suffering

Presently, Hawaii is the only state that expressly allows significant compensation for pain and suffering.<sup>53</sup> Since the inception of the program in 1968, these payments have constituted a large portion of the awards, ranging as high as 46.1% during fiscal 1973.<sup>54</sup> In 1975, the most recent year for which an annual report is available, pain and suffering constituted 35.2% of all awards.<sup>55</sup> Based on a total program outlay of \$265,810.79, this represents a \$93,565.00 expenditure for pain and suffering.<sup>56</sup>

47. Note, *A State Statute to Provide Compensation for Innocent Victims of Violent Crimes*, 4 Harv. J. Legis. 127, 138 (1966).

48. Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U. L. Rev. 444, 462 (1964).

49. V.I. Sec. 163(b) (3) (a).

50. *Gurley v. Commonwealth*, 363 Mass. 595, 597-99, 296 N.E.2d 477, 479-80 (1973).

51. 1975 *Alaska Report*, *supra* note 35, at 33.

52. Cong. Rec., *supra* note 39.

53. Haw. Sec. 33(4). V.I. Sec. 163(b) (3) (B) provides for a pain and suffering award not to exceed \$500. Ohio Sec. 52, effective September 29, 1976, defines economic loss to include pain and suffering. Tenn. Sec. 3506 specifically allows such recovery in cases of rape or crimes of sexual deviancy. No detailed information was available on the latter three programs.

54. Hawaii Criminal Injuries Compensation Commission, *Eighth Annual Report* (Statistical Data Sheet) 4 (1975) [Hereinafter referred to as 1975 *Hawaii Report*]. In 1968, the Commission made three awards totalling only \$1,000, 85% of which was attributable to pain and suffering.

55. 1975 *Hawaii Report*, *supra* note 54, at Appendix A.

56. 1975 *Hawaii Report*, *supra* note 54, at Appendix A.



The two largest awards made in 1975 for pain and suffering were \$8,000 and \$6,000. In the former case, the victim suffered an open gunshot wound to the face in 1972 for which he still received treatment when the award was made more than three years later. The \$8,000 award was designed to cover both pain and suffering and disfigurement.<sup>57</sup> The second victim also sustained severe facial injuries, including a broken nose, fractured cheekbone, and loss of his left eye.<sup>58</sup>

Hawaii's law mandates reduction of the final award based on recovery from a collateral source.<sup>59</sup> Both of the above victims were fortunate enough to be compensated for their medical bills in an amount totalling close to \$23,000. Had they not lived in Hawaii, the total potential compensation for these two victims would have been \$92.50 to reimburse the unpaid medical expense of the victim who lost his eye.<sup>60</sup>

Other states provide pain and suffering awards, although they are classified as payment for mental, emotional or traumatic shock.<sup>61</sup> For instance, in 1976, the Delaware board awarded an assault victim \$2,762.73. This payment represented a \$2.00 out-of-pocket expense and \$260.73 of lost earnings. The remaining \$2,500.00 covered what the board termed "disfigurement and emotional stress."<sup>62</sup> While the law may be worded so as to allow such an interpretation, the policy of the administering body may preclude any such awards.<sup>63</sup>

Very often, especially in rape cases, there is little or no compensable physical injury. The traumatic mental and emotional shock may, however, be tremendous.<sup>64</sup> " . . . [I]t would appear to mock the victim and play havoc with consistency to urge the compensation of a forcible rape victim, and, in the next breath, to reject her claim for pain and suffering."<sup>65</sup>

What will be the economic impact of adding pain and suffering to all crime victims compensation programs? If the Hawaii experience is an adequate indication, states could expect to add thirty-five to forty percent to their present budget.<sup>66</sup> At this point, the question changes from one of whether such awards should be made to whether their payment is fiscally possible.

Although the Victims of Crime Act of 1976, which would have provided a 50% matching federal grant to the states which set up programs conforming to federal guidelines, did not pass, the cost estimate that accompanied the bill is instructive at this point. Pain and suffering were expressly eliminated from the proposed federal compensation.<sup>67</sup> The Congressional Budget Office prepared

57. 1975 Hawaii Report, *supra* note 54, at Appendix A.

58. 1975 Hawaii Report, *supra* note 54, at Appendix A.

59. Haw. Sec. 63(a).

60. 1975 Hawaii Report, *supra* note 54, at Appendix A.

61. N.Y. Sec. 623(10); N.J. Sec. 2.

62. Delaware Violent Crimes Compensation Board, *Supplemental Report 25* (1976) [Hereinafter referred to as *1976 Delaware Report*].

63. New Jersey Violent Crimes Compensation Board, *Rules and Regulations*, Rule 7, at 3 (no date) [Hereinafter referred to as *New Jersey Rules and Regs.*]. "The Board will consider only those losses for which the claimant can produce evidence. There will be no compensation awarded by the Board for disability unless it results in a verified economic loss to the claimant. No allowance shall be made for pain and suffering."

64. Lamborn, *supra* note 19, at 37. Statement of Edward A. Morrison, chairman of the New York Crime Victims Compensation Board, on file at the *Notre Dame Journal of Legislation*.

65. Starrs, *A Modest Proposal to Insure Justice for Victims of Crime*, 50 Minn. L. Rev. 285, 306 (1965).

66. 1975 Hawaii Report, *supra* note 54, at 3.

67. Cong. Rec., *supra* note 39.

a cost estimate, dated September 14, 1976, to accompany the report of that bill from the Committee on the Judiciary. For fiscal year 1978, the cost estimated by the Congressional Budget Office was \$22 million, rising to \$29 million by fiscal 1979.<sup>68</sup> An addition of 40% for pain and suffering would increase the outlay to \$30.8 million in fiscal year 1978 and \$40.6 million in 1979.

The above figures represent estimates based on estimates. Possibly, the impact on the states will not be so great if they are already compensating for pain and suffering. However, if the federal government provided pain and suffering coverage, these states will bear the same increase in outlay based on 50% federal funding. Perhaps this is too much to ask of the already financially strapped states. A potential alternative would be to allow pain and suffering, but limit its amount at some figure higher than provided in the Virgin Islands law.

As of January 1, 1977, the New York Crime Victims Compensation Board was allowed to contract directly for counseling services to aid traumatized claimants.<sup>69</sup> While this provision aims primarily at the rape victim, its potential use extends further. For instance, a surviving claimant who witnessed his spouse's death might also be able to obtain such services. This new provision is commendable, and deserves serious consideration in other states.

A surprising finding that came out of the Marquette University study, mentioned above, shows that the impetus needed for the necessary increases in revenue will not be as hard to find as imagined. A survey of 1,604 Milwaukee County crime victims showed that of those persons favoring some form of compensation (83.9% of the total), 60% continued to favor such payments even if it required a tax increase. Less than 23% rejected a tax increase entirely.<sup>70</sup> The key point is that the perennial fear of tax increases may not be as great as expected when victim compensation is the reason for the increases.

#### 4. *Excluded Coverage: Property Loss*

Perhaps the most widely rejected concept for potential or existent compensation programs is coverage of property loss. Three of the existent programs expressly deny funds to the victim to recover damaged property, concomitant with the funds for his personal injuries.<sup>71</sup> The reasons surrounding this exclusion are understandable in light of the present financial crunch among state governments. One cannot fault a legislature, trying to balance its budget with the numerous requests for assistance, for holding down the costs of a victim compensation program.

The President's Commission on Law Enforcement and Administration of Justice estimated the monetary loss to Americans in 1967 due to property damage to be upwards of \$4 billion annually, and noted that this figure will surely rise with a rising crime rate.<sup>72</sup> This figure will also increase due to the growing impact

68. H.R. Rep. No. 94-1550, 94th Cong., 2d Sess. 14 (1976) [Hereinafter referred to as H.R. Rep.].

69. N.Y. Sec. 623(10).

70. *House Hearings, supra* note 5, at 220.

71. Del. Sec. 9002(8); Ill. Sec. 74: "Pecuniary loss does not include property damage"; Pa. Sec. 477: "In no case shall property damages be included"; Tenn. Sec. 3506(B): "In no case will any compensation be awarded for any damage to real or personal property." Other states cover this exclusion by defining compensable losses in such a way that property loss could not be included.

72. Lamborn, *supra* note 19, at 26-27.

of inflation.

Professor LeRoy L. Lamborn noted that the states would not likely be able to support a program to provide comprehensive recovery for property damage without a federal subsidy.<sup>73</sup> However, the Victims of Crime Act of 1977 expressly provides that no federal monies are to be used to reimburse property loss.<sup>74</sup> This section however, will not preclude a state from spending its own money to cover such loss.<sup>75</sup> The Act also makes clear that the term "property loss" does "not include expenses incurred for medical, dental, surgical or prosthetic services and devices."<sup>76</sup> The Judiciary Committee, in 1976, noted that this provision would allow recovery for replacing or repairing broken eyeglasses, dentures, artificial limbs, hearing aids, or wheelchairs.<sup>77</sup>

California and Hawaii allow compensation for property loss in the limited circumstances that apply to the Good Samaritan.<sup>78</sup> California has justified such an exception to the general rule of denial on the basis that such action by a private citizen benefits the entire public.<sup>79</sup>

In addition to the financial burden on the states, the wide availability of insurance to cover property damage is cited for denying such recoveries. The error in this reasoning is that such insurance is not universally affordable.<sup>80</sup> Perhaps the greatest anomaly occurs in those states that require the victim to prove financial hardship as a condition of recovery, and then preclude that same victim from recouping his property losses, even though it may have been that very financial hardship which prevented him from obtaining insurance in the first place.

The Marquette study showed that less than half (45.2%) of the sample lost property due to crime victimization.<sup>81</sup> When insurance recovery was taken into consideration, over half (56.4%) of these victims suffered losses of less than one hundred dollars.<sup>82</sup> The result of this sample shows that only 216 individuals, out of 1,231 interviewed, suffered adjusted property loss of greater than one hundred dollars.<sup>83</sup>

The aforementioned financial problems and the Marquette survey point to a possible solution to the problem of property loss. Perhaps the states could afford this venture if they deducted the first one hundred dollars from any such recovery. Another cost-saving device would limit such recovery only to those cases where the victim also has a valid compensable claim for personal injury

73. Lamborn, *supra* note 19, at 27.

74. Cong. Rec., *supra* note 39.

75. H.R. Rep., *supra* note 68, at 10.

76. Cong. Rec., *supra* note 39.

77. H.R. Rep., *supra* note 68, at 10.

78. Cal. Sec. 13972: "In the event a private citizen incurs personal injury or death or damage to his property in preventing the commission of a crime. . . the private citizen, his widow, his surviving children. . . may file a claim with the State Board of Control; for indemnification to the extent that the claimant is not compensated from any other source." Ga. Sec. 518: "The Claims Advisory Board shall have authority to consider and make recommendations to the General Assembly concerning payment of compensation to innocent persons who sustain injury or property damage or both. . . in attempting to prevent the commission of crime. . ." (inoperative) Haw. Sec. 51: "In the event a private citizen incurs injury or property damage in preventing the commission of a crime. . . the Criminal Injuries Compensation Commission may, in its discretion. . . order the payment of compensation."

79. Lamborn, *supra* note 19, at 25-26.

80. Lamborn, *supra* note 19, at 28.

81. House Hearings, *supra* note 5, at 209.

82. House Hearings, *supra* note 5, at 211.

83. House Hearings, *supra* note 5, at 209-211.

or lost wages. In order to continue to make insurance policies attractive so that the government does not become an alternative to insurance, a relatively low maximum property recovery amount is advisable. By implementing this program, those people now unable to afford adequate insurance would be compensated. By setting a low limit of recovery, people with potential losses higher than the maximum would not be encouraged to drop their present coverage in favor of governmental compensation.

### B. Eligibility

Usually, only state residents are eligible to be compensated for crimes occurring within the state of their residence. Seven states, however, also compensate non-residents for crimes within their boundaries.<sup>84</sup> California even covers state residents victimized while out of state.<sup>85</sup>

The majority of states require that crimes be reported to the police within a specified period of time.<sup>86</sup> Failure to so report may prevent recovery unless the victim shows good cause why the offense was not reported. Two states, however, do not require a police report. Several others only stipulate that the victim cooperate with the police in apprehending the criminal,<sup>87</sup> the most recently proposed federal legislation contains such a provision.<sup>88</sup> It seems likely, therefore, that future state legislation will follow the federal lead.

Once a claim is filed, the claimant has the burden of proof to show that the crime was actually committed and proximately caused his injuries. In many states, the conviction of the defendant for the crime charged is *prima facie* evidence for the victim's claim; this lightens the claimant's burden of proof.<sup>89</sup> However, most states do not require that a perpetrator be in custody before a victim receives compensation.

A major deficiency in many programs is the absence of a requirement that police inform victims of their compensation rights. Only three states mandate police to make such an announcement. Minnesota, for example, requires police to carry cards to be given to victims which list their rights.<sup>90</sup> New York's statute, amended as of January 1, 1977, similarly requires that victims be briefed on their compensation rights.<sup>91</sup> In Alaska, the Violent Crimes Compensation Board, concerned about the small number of applications, instituted a unique policy of contacting victims. Names and addresses of victims are received from a review of newspaper articles by the Board's staff and by contact with law enforcement agencies, hospitals, and District Attorneys' offices.<sup>92</sup>

84. Haw. Sec. 51; Ill. Sec. 72(d); N.Y. Sec. 621(3). Maryland's policy of compensating non-resident victims is explained in *House Hearings*, *supra* note 5, at 22 (Statement of Martin I. Moylan, Executive Director, Maryland Criminal Injuries Compensation Board). The policy in Alaska, Minnesota, and New Jersey has not been incorporated into their statutes. However, in *Wisconsin Bulletin*, *supra* note 23, at 6, these states responded that non-residents were eligible.

85. Cal. Sec. 13961(a).

86. Alaska Sec. 130(a) (within 5 days); Ky. Sec. 130(1) (c) (within 48 hours); Md. Sec. 12(a) (3); Mass. Sec. 5 (within 48 hours); Minn. Sec. 03 (within 5 days); N.J. Sec. 18 (within 3 months); N.Y. Sec. 631(1) (within 1 week); Pa. Sec. 477.9(3) (within 72 hours).

87. Cal. Sec. 13964(b); Ill. Sec. 73(d); Ky. Sec. 130(2).

88. H.R. 1183, 95th Cong., 1st Sess., 123 Cong. Rec. H448; Sec. 4(3) (daily ed. Jan. 19, 1977).

89. Alaska Sec. 040(E); Haw. Sec. 14; Nev. Sec. 120; N.J. Sec. 7; N.D. Sec. 12(1); Wis. Sec. 09.

90. Minn. Sec. 15.

91. N.Y. Sec. 625(a) (1).

92. 1975 *Alaska Report*, *supra* note 35, at 22-23.

As coverage and eligibility expand, new problems arise. If, for example, the accused is brought to trial after the compensation hearing, and the record is public, will he gain an unfair advantage by knowing the prosecutor's thoughts concerning his case?<sup>93</sup> If the compensation board determines that there was a crime, is that determination admissible at the criminal defendant's trial?<sup>94</sup> Or if, as in some states, the criminal must repay the state whatever compensation was awarded the victim, should the ability to make such payments influence decisions regarding parole? A negative answer to this last question could possibly encourage criminal behavior by those who cannot honestly earn sufficient income to repay the state.

### 1. *Personal Exclusions From Eligibility: The Family Relationship*

All programs except California and Delaware limit or exclude compensation to members of the perpetrator's family. This exclusion includes spouses, children, and paramours.<sup>95</sup> North Dakota, Minnesota and Ohio provide a fair amount of discretion in this field.

The basic arguments for the disqualification of family members are as follows: (1) As in all other areas, legislative bodies are concerned with cost. A high number of otherwise compensable crimes are domestic incidents, elimination of which greatly lowers program costs; (2) There is a legitimate desire to avoid the anomaly of a perpetrator benefitting indirectly from his own wrongful conduct;<sup>96</sup> (3) The fear of potential fraud, i.e. turning an otherwise innocent domestic incident into a compensable injury. As explained below, this should be no more of a concern in this area than it is in any other.<sup>97</sup>

Unjust denial of compensation is at least as serious a concern in the family situation as the fear of unjust enrichment to the perpetrator. One example is a husband who kills his wife, leaves dependent children, and is later incarcerated. Certainly, the children are innocent victims but their support benefits will be denied.<sup>98</sup>

An illustration from a New Jersey annual report shows the potential hardship. The victim, an eleven year old child, was injured when he came to the assistance of his mother during a fight between his parents. The father stabbed the mother, then threw the minor down a flight of stairs, resulting in head and hip injuries. Because the child lived with his father at the time of the incident, the

93. Pennsylvania, for example, provides that records of all proceedings shall be public, except where confidentiality is protected by law or regulation. Pa. Sec. 477. 11. New York has a similar provision (N.Y. Sec. 633).

94. Minnesota provides that neither record of a claim, decision of the Board, nor award made or denied is admissible as evidence in any criminal or civil action against the offender. Minn. Sec. 14.

95. Alaska Sec. 130(b) (1 & 2); Ga. Sec. 524(b) (1 & 2); Haw. Sec. 34 (except for expenses actually and reasonably incurred due to injury or death of victim Sec. 33(1)); Ill. Sec. 73(e); Ky. Sec. 050(2); Md. Sec. 5(b); Mass. Sec. 3; Minn. Sec. 03(2) (c) (unless justice requires otherwise); Nev. Sec. 220(1) (a & b); N. J. Sec. 18 (a & b); N.Y. Sec. 624(2); N.D. Sec. 06(3); Ohio Sec. 60(B) ("Unless a determination is made that the interests of justice require that an award be made in a particular case"); Pa. Sec. 477.3(b); R.I. Sec. 6(c); Tenn. Sec. 3505(c) ("if the court, at its discretion, determines that any benefit would accrue, either directly or indirectly, to the offender"); Va. Sec. 4(B); V.I. Sec. 164(b) (4 & 5); Wash. Sec. 070(3) (b & c); Wis. Sec. 8(2) (a & b).

96. H. Edelhertz and G. Geis, *Public Compensation to Victims of Crime* 269 (1974) [Hereinafter referred to as Edelhertz and Geis].

97. Rothstein, *How the Uniform Crime Victims Reparations Act Works*, 60 A.B.A.J. 1531, 1532 (1974).

98. Edelhertz and Geis, *supra* note 96, at 269.

board was required to dismiss the claim. Perhaps other factors entered into the determination, such as whether the mother or father filed the claim, but when following the strict letter of the statute, the claim had to be denied.<sup>99</sup>

However, Section 5(c) of the uniform act does not preclude such familial recovery:

Reparations may not be awarded to a claimant who is the offender or an accomplice of the offender, nor to any claimant if the award would unjustly benefit the offender or accomplice. [Unless the Board determines that the interests of justice otherwise require in a particular case, reparations may not be awarded to the spouse of, or a person living in the same household with, the offender or his accomplice or to the parent, child, brother, or sister of the offender or his accomplice].<sup>100</sup>

The Commissioners' comment to this section suggests that the unjust enrichment language at the end of the first sentence may be sufficient. However, if the policy of the state legislature dictates otherwise, the bracketed language should be included.<sup>101</sup> This section, by not eliminating recovery of relatives, is a step forward.

To date, North Dakota is the only state to have adopted an act substantially similar to the Uniform Act, and in deciding this issue, chose to include the second, somewhat more limiting sentence.<sup>102</sup> Minnesota and Ohio have also written discretionary latitude into their statutes.<sup>103</sup> In its first year of operation, the North Dakota board denied no claims because of the family relationship.<sup>104</sup> From July 1, 1974 to June 30, 1976, the Minnesota board denied 228 claims, only four of which were based on family or household exclusions.<sup>105</sup>

Paul F. Rothstein, reporter for the uniform act, spoke of the problems and inequities involved in family situations which give rise to claims for compensation:

It seems to me we should look at the particular case and not exclude a person just because he is a family member. It seems to me we should look at what the circumstances are. Are they an estranged family? Are they trapped beyond their willingness or against their will into the family relationship? Are they themselves totally innocent and just victimized by this family member who is the offender; for example, the horrendous husband whom they cannot shake free of? It seems to me that is a better approach . . . It is the approach of the model act.<sup>106</sup>

Fraud will never be eliminated in compensation programs. The problem then is how to cope with fraud. Careful scrutiny of all claims ferrets out most

99. New Jersey Violent Crime Compensation Board, *1974 Annual Report* 8.

100. Uniform Crime Victims Reparations Act Sec. 5(c).

101. Uniform Crime Victims Reparations Act Sec. 5(c) (Commissioners' Comment).

102. N.D. Sec. 06(3).

103. Minn. Sec. 03(2) (c); Ohio Sec. 60(B).

104. North Dakota Crime Victims Reparations Act, *First Annual Report* 7 (1976).

105. Minnesota Crime Victim Reparations Board, *First Biennial Report* (Statistical Summary) 2 (1974-1976).

106. *House Hearings*, *supra* note 5, at 65.

instances of fraud. In fact, fraud occurs infrequently. Wilfred S. Pang, executive secretary of the Hawaii Criminal Injuries Compensation Commission, recently stated that he had investigated no claims where he found or had strong suspicion of connivance to obtain false compensation.<sup>107</sup> The uniform act, in section 5(c), takes a healthy step forward in providing case by case analysis when the family relation is in question. This approach should be followed in all jurisdictions presently denying claims on this basis, and should be written into any pending or forthcoming legislation.

## 2. *Personal Exclusion From Eligibility: Victim Misconduct*

Many statutes contain a provision denying recovery to a victim, or a claimant for a victim, when the victim has been responsible in one way or another for the injuries sustained.<sup>108</sup> Other states and the uniform act allow discretion to either reduce or deny the award altogether, depending on the extent of the victim's contributory misconduct.<sup>109</sup>

The reason for such a limitation is the desire not to compensate a wrongdoer. When the Commissioners for the uniform act met, three positions were taken on this question. They may be termed as strict, lenient, and moralistic; the final product is a compromise.

Under the strict view, a victim would not be compensated when he is the "architect of his own misfortune."<sup>110</sup> An example of this view is denial of a claim based on the fact that the victim deliberately walked his dog at night while in a high crime area.

The lenient view would compensate anyone injured by a criminal act, despite the surrounding circumstances. For instance, if A starts a barroom fistfight, but is injured by B who resorts to the use of a knife, club, or gun, A would still be fully compensated for his injuries.<sup>111</sup> Professor LeRoy L. Lamborn testified on this subject before the Judiciary Subcommittee, and pointed out that self-reporting studies have shown that 99% of adults questioned have committed acts for which they could have been incarcerated. He concluded: "Perhaps we are being a bit holier than thou when we look at it from this point of view--here is an entirely innocent person and here is an entirely bad person."<sup>112</sup>

The moralists among the commissioners felt that a victim injured while engaged in immoral conduct, such as patronizing a topless bar or traveling to an illicit love affair, should be denied compensation. This denial would result whether or not the crime of which he was a victim was related to his immoral conduct.<sup>113</sup>

Compromising on the above three views, the uniform act provides that

107. *House Hearings, supra* note 5, at 426. See also Edelhertz and Geis, *supra* note 96, at 280.

108. Cal. Sec. 13964(a & c); Ga. Sec. 524 (b) (3); Minn. Sec. 3(2) (d) (if such compensation will unjustly benefit the offender); Nev. Sec. 220(1) (c); V.I. Sec. 164(b) (6); Wash. Sec. 070(3) (a&d).

109. Alaska Sec. 80(c) and 130(b) (3); Del. Sec. 9006 (a&c); Ill. Sec. 77(c); Ky. Sec. 140(2); Md. Sec. 12(e); Mass. Sec. 6; Minn. Sec. 04(2) (in such cases the Board also deducts \$100 from the award); N.J. Sec. 18; N.Y. Sec. 631(5); N. D. Sec. 06(6) (b); Ohio Sec. 60(d); Pa. Sec. 477.9(f); R. I. Sec. 6(c); Tenn. Sec. 3509(g); Va. Sec. 12(d); Wis. Sec. 6(5). Haw. Sec. 31(c) provides only for reduction of an award, not denial. However, 1975 *Hawaii Report, supra* note 54, at Appendix B reflects two cases in which victim responsibility resulted in complete denial.

110. *House Hearings, supra* note 5, at 62 (Testimony of Paul Rothstein).

111. *House Hearings, supra* note 5, at 62.

112. *House Hearings, supra* note 5, at 139.

113. *House Hearings, supra* note 5, at 62.

recovery may "be reduced or denied to the extent the Board deems reasonable because of the contributory misconduct of either the claimant or a victim through whom he claims."<sup>114</sup>

Approaches similar to that of the uniform act may be found in the annual reports from Alaska, Delaware, and Hawaii.<sup>115</sup> Such discretion is probably exercised in other states, but not explicitly reported. It is certainly a more equitable approach than one that results in complete denial because of the slightest amount of contributory misconduct.

## ADMINISTRATION

Crime victim compensation programs are administered in three forms: independent boards established exclusively to determine claims, pre-existing boards for which crime compensation is only one of several functions, and the courts.

### A. The Independent Board

The most popular administrative forum has been the independent crime victim compensation board.<sup>116</sup> The board typically consists of between three and five members, appointed by the state's governor with no more than two-thirds of the board of the same political party.<sup>117</sup> Terms of office run from three to seven years with reappointment usually allowed.<sup>118</sup> New York requires Senate approval of the members.<sup>119</sup>

To initiate the claims procedure, the victim must file a claim form with the board. The states are divided as to whom is responsible for obtaining the information to support a claim. Those that require the claimants to submit the form together with medical reports, hospital receipts, and other material include: Alaska, Hawaii, Maryland, Kentucky, Pennsylvania and New York.<sup>120</sup> In Delaware, the board has responsibility for obtaining any information to support a claim, but reserves the right to require the claimant to submit relevant documents.<sup>121</sup> In all states, the board conducts investigations to determine the validity of the claim; it reviews police reports and witnesses' statements. In Maryland, the board routinely looks into the criminal background of any claimant if there is a suspicion that the victim was involved in the illegal acts. The burden of proof is on the claimant to prove that he was the innocent victim of such crime.<sup>122</sup>

The investigation is actually handled by the board's staff, which meets with the individual claimant and then forwards its recommendations to the board. Typically, after investigation the board may: 1) render a decision in writing or

114. Uniform Crime Victims Reparations Act Sec. 5(f) (2).

115. 1975 *Alaska Report*, *supra* note 35, at 46; 1976 *Delaware Report*, *supra* note 62, at 16-17; 1975 *Hawaii Report*, *supra* note 54, at Appendix A.

116. States which have independent boards: Alaska, Delaware, Hawaii, Kentucky, Maryland, Minnesota, New Jersey, New York, and Pennsylvania.

117. Three members: Alaska Sec. 020(A); Cal. Sec. 13962; Haw. Sec. 11; Md. Sec. 3(a); Minn. Sec. 05(1); N.J. Sec. 3; Pa. Sec. 477.1(a). Five members: Del. Sec. 9003; Ky. Sec. 030(1); N.Y. Sec. 622(1).

118. 3 years: Alaska Sec. 020(B); Del. Sec. 9003. 4 years: Haw. Sec. 12; Ky. Sec. 030(2). 5 years: Md. Sec. 3(b); N.J. Sec. 4. 6 years: Minn. Sec. 05(2); Pa. Sec. 477.1(b). 7 years: N.Y. Sec. 622(2).

119. N.Y. Sec. 622(1).

120. Alaska Sec. 030(B); Haw. Sec. 14; State of Maryland, Criminal Injuries Compensation Board, 7th *Annual Report* 3 (1976); Ky. Sec. 080(2); Pa. Sec. 477.6(b); N.Y. Sec. 627.

121. Del. Sec. 9005.

122. *House Hearings*, *supra* note 5, at 20 (Statement of Martin I. Moylan).



2) order a hearing. If no hearing is granted and the claim is denied, the claimant has the right to request a hearing by giving written notice to the board within 20 days of receipt of the board's denial.<sup>123</sup> New York makes its decision either to grant or to deny the claim solely on the basis of the staff investigation; hearings are ordered when a board member has doubts about the case.<sup>124</sup>

A hearing is usually held before just one of the board members. In Delaware, if the claim is for more than \$500, three members hear the case.<sup>125</sup> When a hearing is ordered, the claimant, his attorney, and all material and necessary parties are notified in writing of the time and place of the hearing.<sup>126</sup> Hearings conform to rights granted under a state's version of the Administrative Procedure Act. Hearings are open to the public, except where: 1) sex crimes are involved; 2) prosecution against the alleged perpetrator of the crime is pending and no trial has been held; or 3) prosecution has resulted in an acquittal or dismissal on technical grounds.<sup>127</sup>

Claimants have the right to be represented at the hearing by an attorney.<sup>128</sup> Since attorneys are hired on a contingent fee basis, the statutes usually provide for payment of attorney's fees. Most states, including Alaska, Delaware, New Jersey and Pennsylvania, say that the attorney fee is supplemental to the claimant's award; the fee is usually computed on a percentage basis of that amount awarded to the claimant.<sup>129</sup> In Alaska, for instance, the attorney is allowed up to 25% of the first \$1,000 awarded, 15% on the next \$9,000, and 7.5% of the amount awarded over \$10,000.<sup>130</sup> The statutes provide that it is unlawful for the attorney to contract with the client for a larger sum than that allowed by the board. In Hawaii and Minnesota, the attorney's fees are deducted from the total amount awarded and the board sets a reasonable amount of compensation.<sup>131</sup> In Kentucky, Maryland and New York, the statutes do not address this question.

At the hearing, all witnesses testify under oath or affirmation and a record of the proceedings is made. The board is usually not bound by statutory or common law rules of evidence or by formal rules of procedure; any pertinent statement or document is received.<sup>132</sup> The New Jersey board retains a panel of impartial medical experts who examine the claimant if the board requests.<sup>133</sup> Their findings and/or any other medical reports or hospital records may be accepted by the board as proof of the injuries sustained without compelling the presence of the attending physician at the hearing.<sup>134</sup>

The appeal process, if available, varies greatly from state to state. In New York, Kentucky, Minnesota and Maryland, when a claimant is dissatisfied with the decision of a single commissioner, he can request a reconsideration by the full

123. *New Jersey Rules & Regs.*, *supra* note 63, Rules 8-10.

124. N.Y. Sec. 628(4).

125. Del. Sec. 9003.

126. For representative regulations, refer to: 1975 *Alaska Report* 12; *New Jersey Rules & Regs.*, *supra* note 63, at Rule 10.

127. Haw. Sec. 14 (all hearings public unless offense is sexual); *New Jersey Rules & Regs.*, *supra* note 63, at Rule 10(j).

128. *New Jersey Rules & Regs.*, *supra* note 63, at Rule 11. (It seems that most states presume this right and do not specifically provide for it by statute. Most statutes do discuss the attorney's right to fees).

129. Alaska Sec. 050; Del. Sec. 9009; N.J. Sec. 8; Pa. Sec. 477.22(c).

130. Alaska Sec. 050.

131. Haw. Sec. 16; Minn. Sec. 071.

132. Alaska Secs. 020(f) and 060; Haw. Sec. 14; Ky. Sec. 080(6); N.J. Sec. 7(e); N.Y. Sec. 628.

133. N.J. Sec. 13.

134. *New Jersey Rules and Regs.*, *supra* note 63, at Rule 10(k).

board.<sup>135</sup> Kentucky also provides that if the claimant or attorney general is still not satisfied with the full board's decision, then either can petition the Franklin Circuit Court in the state capitol; the case will take precedence over all other civil cases on the court's docket.<sup>136</sup>

In New Jersey, a case may be reopened for further investigation prior to decision by the board. A motion to reopen is not a matter of right, but rather a matter for the board's discretion.<sup>137</sup> In Alaska, no appeal or even judicial review is allowed; all board hearings are final.<sup>138</sup> In Delaware, appeal from a board decision goes directly to the Superior Court for review.<sup>139</sup> In Hawaii, judicial review is available only if the board's decision exceeds its authority of jurisdiction; otherwise the board's decisions are final.<sup>140</sup> All statutes, especially those in states where hearings are conducted by only one board member, should have some minimal appeal mechanism.

## B. Existing Board Systems

Some states find it more expedient to combine crime compensation functions with those of a pre-existing state agency. The state of Washington, for example, has a crime victim compensation program based on workmen's compensation benefit schedules, administered by the Department of Labor and Industries.<sup>141</sup> The state accepts the responsibility to compensate and assist crime victims and their survivors just as it compensates and assists industrially injured workers and their dependents.<sup>142</sup>

Wisconsin's program is similarly administered by the Department of Industry, Labor and Human Relations.<sup>143</sup> Virginia's program is conducted by the Industrial Commission, but no funds have been appropriated for payment of awards.<sup>144</sup> North Dakota's law is a function of its Workmen Compensation Bureau.<sup>145</sup> Nevada's program is run by its state Board of Examiners.<sup>146</sup>

California, the first state to adopt a crime compensation program, initially delegated administration of the program to the Department of Social Welfare.<sup>147</sup> The department was given the task of establishing criteria which "shall be substantially the same as those provided for aid to families with dependent children, provided, however, that aid shall be paid regardless of whether or not the applicant meets the property qualifications prescribed for that program."<sup>148</sup> The result of such ambiguous legislative drafting was disastrous for both victims and administrators. In 1967, new legislation made the Assistant Attorney General responsible for preparing cases which would be heard by the State Board of

135. N.Y. Sec. 628; Ky. Sec. 090; Minn. Sec. 08; Md. Sec. 9.

136. Ky. Sec. 110.

137. *New Jersey Rules & Regs.*, *supra* note 63, at Rule 10(k).

138. Alaska Sec. 040.

139. Del. Sec. 9005(c).

140. Haw. Sec. 17(b).

141. Wash. Sec. 010.

142. *House Hearings*, *supra* note 5, at 402 (Statement of Calvin Winslow, Assistant Director, Washington Crime Victims Compensation Board).

143. Wis. Sec. 02.

144. Va. Sec. 1.

145. N.D. Sec. 03.

146. Nev. Sec. 080.

147. 1965 Cal. Stats., ch. 1549 (Repealed 1967).

148. 1965 Cal. Stats., ch. 1549 (Repealed 1967).

Control.<sup>149</sup> The present law, passed in 1973, continued to authorize the State Board of Control to review crime compensation cases.<sup>150</sup> The State Board of Control consists of three members: the Director of General Services, the State Controller, and one member appointed by the Governor; it is responsible for handling all claims against the state.<sup>151</sup>

The procedures as to conduct of the hearings in states where authority is vested in a pre-existing agency are substantially the same as in states with independent boards. The disadvantage of this system is, however, that pre-existing agencies often have a backlog of those cases that they were originally designed to handle.

### C. The Court-Based Systems

The third system of administration is the filing of claims through the court system. This method is employed by Illinois, Massachusetts, Tennessee and Ohio.

The Illinois program relies on cooperation between the Illinois Attorney General's Office and the Clerk of the Court of Claims. This cooperation is not statutorily mandated, although the role of the Attorney General's office may be recognized in a pending amendment.<sup>152</sup> First, the claimant must file a notice of claim with the Illinois Attorney General's Office within six months of the injury. Within two years, he must submit an application for compensation with the Clerk of the Court of Claims.<sup>153</sup> The applicant must submit hospital records, doctors' reports and insurance data with the application. The Attorney General employs investigators who interview the claimant and all witnesses and send a report to the legal staff of the Attorney General's Office. As a cost saver, much of the administrative work is done by law students and college criminal justice majors as part of their academic programs.<sup>154</sup>

The Attorney General's office then prepares two documents for the Court of Claims: a recommendation as to the final disposition of the claim and an opinion based on the recommendation. The court is not legally bound by the Attorney General's recommendations. The claimant also has the right to request a hearing before the court if he is dissatisfied with the recommendations. The whole tone of the statute, however, stresses settlement at the administrative level. Note that the statute provides: "no hearing need be held, however, unless the written requests state facts which were not known to or by the exercise of reasonable diligence could not have been ascertained by the applicant or other person."<sup>155</sup>

If a hearing is held, the rules of evidence apply. This is one major difference from the systems that rely on informal board hearings. Because police reports, which might comprise the substance of a claimant's evidence, are inadmissible as hearsay, the state must go to the expense of bringing police officers and

149. 1967 Cal. Stats., ch. 1546, Sec. 1 (Repealed 1973).

150. Cal. Sec. 13962.

151. Cal. Sec. 13900.

152. Interview with James F. Bell, Chief, Crime Victims Division, Office of the Illinois Attorney General, Joliet, Ill. (Feb. 19, 1977).

153. Ill. Secs. 72(b) & 73(g).

154. *House Hearings, supra* note 5, at 145 (Statement of Peter Bensinger, Former Director, Crime Victims Division, Office of the Illinois Attorney General).

155. Ill. Sec. 79.

other relevant witnesses to the Court of Claims in Springfield, Illinois.<sup>156</sup>

In Massachusetts, the individual files his claim together with all medical reports directly to the office of the Clerk of the District Court. The clerk notifies the Attorney General and requests that his office conduct an investigation of the claim. The Attorney General may come into the case either to oppose or support the individual's claim.<sup>157</sup> Claims are heard in the District Court where the claimant lives.<sup>158</sup> There is no provision in the statute which allows priority to a compensation claim on the civil docket. No provision is made for appeal to a higher court.

In Tennessee, a claim is filed with the Clerk of the Court. The clerk then notifies the district attorney and the alleged offender, if named in the report. The district attorney shall investigate the claim and can either support or oppose the claim. The burden of proof is on the claimant that the criminal act both occurred and proximately caused the injury. All orders and decisions of the court are final. This system has not yet been tested, since actual victim compensation will not begin until July 1, 1977.<sup>159</sup>

The Ohio system also relies on cooperation between the Clerk of the Court and the Attorney General. After investigation, a hearing is held by a panel of Court of Claims Commissioners. Appeal may be had to the Court of Claims in Franklin County.<sup>160</sup>

The use of the court system is an inefficient method of procedure. Illinois, from date of passage (October 1, 1973) to December 1, 1975, has only closed one-third of the claims pending.<sup>161</sup> The additional caseload which such an awards program promotes inevitably causes additional delays in all civil litigation. Generally the informal administrative process is more appropriate to the underlying philosophy of crime victims compensation.

## FINANCE AND FUNDING

### A. Restitution and Subrogation

The Oklahoma statute on this subject provides that the sentencing court shall have power to suspend the sentence of persons convicted of their first or second felony. The justification for this suspension is the concurrent imposition of an order to make restitution to the victim through the Department of Corrections.<sup>162</sup> Failure to pay is grounds to revoke a suspended sentence. No separate fund exists to pay crime victims.

The same situation exists in Colorado, where restitution programs are handled by the State Board of Parole and the Department of Institutions. A critical shortcoming of the Colorado program is the apparent allowing of direct contact between the offender and his victim.<sup>163</sup>

156. Note, *Illinois Crime Victims Compensation Act*, 7 Loy. U. L. J. 357 (1976).

157. Mass. Sec. 4.

158. Mass. Sec. 2.

159. Tenn. Sec. 3507.

160. Ohio Sec. 55(A)-(C).

161. Ill. Crime Victims Compensation Act, Statistical Study (Oct. 1, 1973-Dec. 31, 1975) (Study on file with the *Notre Dame Journal of Legislation*).

162. Okla. Sec. 991a.

163. Colo. Sec. 101. The statute states only that restitution may be ordered from offenders to victims. The office of the Governor did not provide any information concerning the operation of the program.

The pending amendment to the Illinois act allows the Pardon and Parole Board to examine the ability of the offender to make restitution to the program, in addition to all other appropriate parole considerations. The board has the power to determine the conditions of the payment. Any sums collected shall be paid to the Secretary of State for reimbursement of state funds.<sup>164</sup> This ability would also lie in the sentencing court in the same manner as the Oklahoma provisions.<sup>165</sup>

These programs are commendable for two significant reasons. First, it is a reasonable hope that such restitution would provide the convicted offender with a sense of responsibility for his actions above and beyond that which comes from serving a prison sentence. If this is effective, the overall "crime problem" may be lessened.

The potential problem of an offender, faced with an order of restitution, resorting to other illegal methods to obtain the money is dealt with in the Oklahoma statute. If the offender is faced with a change in the financial condition which substantially affects his ability to make restitution, he may petition the court for a reduction in the payment order or for total suspension of the order.<sup>166</sup>

The second advantage of restitution is the potential ability of the state to recoup the payments made to victims. Whether or not the state anticipates a self-sufficient compensation fund, all restitutionary payments to the state increase the amount of money available to victims. Thus, the restitution plan should be vigorously pursued in all jurisdictions.

Closely related to the restitution concept is the provision of subrogation found in most statutes.<sup>167</sup> The subrogation clause allows the state to pursue the claimant's right of action against the offender to the extent of awards made.

There are two problems with subrogation clauses. First, they are rarely used. The executive secretary of the Delaware board stated that no such claims have been pursued.<sup>168</sup> This is the common situation.

Second, the offender is, more often than not, judgment proof, rendering the claim fruitless from the beginning.

This source of compensation is generally regarded as insignificant by all Boards throughout the country. Our own experience has been that approximately 60% of our claims have no identified offender, 25% are juveniles, 5% are family relationship situations (see N.J.S.A. 52:4B-18) and the remaining 10% are generally judgment proof. Further, the additional burden of pursuing civil action by the state is generally thrown upon an already understaffed Attorney General's department. Restitution by the offender, while theoretically the ideal solution, is as a practical matter unproductive.<sup>169</sup>

164. Bill to amend ch. 70, paras. 72, 73, 74 & 77 and to add paras. 73.1, 73.2, and 73.3, Ill. Crime Victims Compensation Act (Bill on file with the *Notre Dame Journal of Legislation*).

165. Bill to amend ch. 70, paras. 72, 73, 74, & 77 and to add paras. 73.1, 73.2, & 73.3, Ill. Crime Victims Compensation Act (Bill on file with the *Notre Dame Journal of Legislation*).

166. Okla. Sec. 991b.

167. Alaska Sec. 140; Cal. Sec. 13966; Del. Sec. 9010; Ga. Sec. 526; Haw. Sec. 35; Ky. Secs. 170 & 180; Md. Sec. 15; Mass. Sec. 7; N.J. Sec. 20; N.Y. Sec. 634; N.D. Sec. 14; Pa. Sec. 477.13.

168. Letter from Oakley M. Banning, Jr. to the authors, on file in the *Notre Dame Journal of Legislation* (Nov. 30, 1976).

169. Letter from Carl J. Jahnke, Esq., Chairman, Violent Crimes Compensation Board, State of New Jersey, to the authors, on file in the *Notre Dame Journal of Legislation* (Nov. 19, 1976).

Restitution and subrogation are vital for a program to have the ability to meet fiscal needs. Since subrogation has been generally ineffective, the concept of discretionary restitution should be fully explored in states without such authority. States having the authority now, should make an effort to determine the effectiveness in terms of both rehabilitation and repayment to the state of expended funds. This information would be valuable to other states considering such a move.

### B. State Funding Procedures

No matter how theoretically sound a crime victims compensation program, it must have a source of funds. The program has been described as "something like a casualty insurance company."<sup>170</sup> Unlike private insurance, however, the states often do not have the cash inflow to afford the benefits awarded. Illinois data gives an example of the funding problem. H.B. 836 appropriated \$250,000 for fiscal year 1976 awards (7/1/75 - 6/30/76). After five months a balance of \$2,463.19 remained from that appropriation, and \$429,764.95 was the outstanding unpaid balance of installment payments.<sup>171</sup>

New Jersey reported a \$4 million need for funds in fiscal year 1976. The legislature appropriated \$985,000.<sup>172</sup> While the Attorney General of New Jersey noted that the Board receives approximately five claims for every 100 violent crimes reported, he figures that no more than 20% of all crimes are reported. "So the potential for claims greatly exceeds the ability of the Board to make awards"<sup>173</sup>

How do the states finance their programs? Most are funded through general appropriations. Delaware provides that in addition to fines assessed on any criminal defendant, an additional 10% penalty will be assessed on all criminal fines and forfeitures collected; this amount will be paid into the compensation fund.<sup>174</sup> In Maryland, an additional \$5 fine is placed on all persons convicted of crime, excluding vehicular, natural resource, or health and sanitation violations.<sup>175</sup>

Tennessee is attempting to establish a self-sustaining fund by assessing a \$21 fee from each person convicted of a crime "against person or property."<sup>176</sup> Twenty dollars goes to the compensation fund; one dollar to administrative costs. Funds are coming in slowly, however, seemingly due to lack of awareness among trial judges regarding the bill. Also, the Corrections Department has problems collecting from inmates.<sup>177</sup>

California's penal code contains a discretionary provision allowing the court to order a convicted criminal defendant to pay "a fine commensurate with [the] offense committed and with probable economic impact upon the victim but [it] cannot be greater than \$10,000."<sup>178</sup> The court must first determine that

170. *House Hearings, supra* note 5, at 155 (Statement of Robert O'Shea, Clerk of Illinois Court of Claims).

171. *House Hearings, supra* note 5, at 155.

172. *House Hearings, supra* note 5, at 278 (Statement of William Hyland, Attorney General of the State of New Jersey).

173. *House Hearings, supra* note 5, at 278.

174. Del. Sec. 9012.

175. Md. Sec. 17.

176. Tenn. Code Ann. Sec. 40-3207(a) (Supp. 1976).

177. Letter from Rep. Steve Cobb, House of Representatives, Nashville, Tennessee, to the authors, on file in the *Notre Dame Journal of Legislation* (Feb. 8, 1977).

178. Cal. Sec. 13967.

exacting such a penalty will not cause the defendant's dependents to go on public welfare. This restitutionary remedy is intended to supplement California's appropriation for crime victim compensation, which in fiscal year 1976 amounted to \$5,963,000.<sup>179</sup>

It appears, therefore, that realistic state budgets are essential to the effective working of a crime victims compensation program. Moreover, it is highly important that those who are convicted for a crime be mandated, by state statute, to contribute financially to the crime victims compensation budget, but that such budgets should not rely on these contributions. The importance of the contributions, based on experiences in states which now have such programs, lies in their deterrence value rather than in their financial utility.

### UNSUCCESSFUL PROGRAMS

Theoretically, crime compensation may be a politically sound idea, but because of the tremendous cost factors involved, many states encounter difficulties. Louisiana passed a crime compensation act, but later repealed it.<sup>180</sup> Rhode Island has a statute on the books, but is awaiting federal funding.<sup>181</sup> The Virginia legislature failed to appropriate any funds for its program in fiscal year 1977; thus even if awards are announced, no money is available to pay them.<sup>182</sup>

Maine's legislature patterned its program after the uniform act.<sup>183</sup> But the governor, who claims to agree with the legislation in principle, vetoed the bill, citing an unreasonably small part of the program appropriation allocated for awards [\$31,600] and the establishment of what was termed "an unwieldy enforcement mechanism."<sup>184</sup> Instead, he appointed a Task Force on Corrections which reported that the Department of Corrections should "encourage restitution in all cases in which the victim can be compensated" through a probation-work program for criminals.<sup>185</sup> This suggestion is hardly satisfactory, however, for it provides direct contact between the criminal and his victim. As of February 1, 1977, no new legislation was introduced.<sup>186</sup>

Georgia passed a Good Samaritan statute to be administered by an independent board. All award recommendations must be approved by the General Assembly before payment. This law has run into constitutional problems, however, for the state constitution prohibits any donation or gratuity in favor of any person, corporation, or association. Whether crime victim compensation awards are "donations" or "gratuities" within the meaning of the Georgia constitution is unclear.<sup>187</sup> In any case, awards have been held back on this ground.

179. *House Hearings*, *supra* note 5, at 389. (Statement of Eugene Veglia, Executive Secretary of the California State Board of Control).

180. Letter from Louisiana Board of Review to the authors, on file in the *Notre Dame Journal of Legislation* (November 11, 1976).

181. 1972 R.I. Pub. Laws ch. 245 Sec. 3.

182. Va. Code Sec. 19.2-368.1 to .18 (Supp. 1976). Letter from Industrial Commission of Virginia to the authors, on file in the *Notre Dame Journal of Legislation* (November 10, 1976).

183. 1975 Me. Legis. Serv., B2403 (July 2, 1975).

184. "An Act Relating to Public Compensation to Victims of Crime." L.D. 1787, State of Maine (1975).

185. Report of the Task Force on Corrections, State of Maine, to Commissioner David Smith (September 30, 1976).

186. Letter from Law and Legislative Reference Library, Augusta, Maine, to the authors, on file in the *Notre Dame Journal of Legislation* (January 15, 1977).

187. Ga. Sec. 518; Ga. Const. Art. III, Sec. VIII, Par. XII (1).

## THE FEDERAL LEGISLATION

States which have not yet passed crime compensation legislation have several alternatives. (1) They may look to the examples of their sister states and pattern legislation on the best provisions therein. (2) They may adopt the Uniform Crime Victim Reparations Act (which Minnesota and North Dakota have basically done). (3) They may await passage of federal legislation and see what provisions are required by the federal government to be included in state legislation in order to qualify for the federal funding.

It seems inevitable that the federal government will become involved in the crime compensation program. This inevitability arises from both financial and philosophical considerations. Rep. Peter W. Rodino, Jr., Chairman of the Committee on the Judiciary, stated that since federal crime prevention legislation has failed to reduce the crime rate "there is a concomitant responsibility to provide for those who have been injured or damaged innocently as a result of a failure to adequately protect against crime."<sup>188</sup> As to the realities of what federal funding would entail, a comment by Rep. Henry J. Hyde (R., Illinois) regarding the Maryland Criminal Injuries Compensation Board seems to be representative of one school of thought:

I think the existence and operation of your [Maryland's] program underscores graphically the futility of the Federal Government sticking its nose into States with money, which we don't have, to fund programs that are already ongoing and meeting the needs of their communities. . . . To go around funding 50 states' programs with the deficit situation we are now in is highly inappropriate.<sup>189</sup>

The opposite side contends that federal money is, indeed, available if there is a change in appropriation priorities to the benefit of social welfare interests.

Assuming that federal legislation is passed, the question arises as to what form it will take. Congressman Rodino has identified three possible approaches: (1) a federal program solely to aid victims of federal crimes; (2) a federal program to help states fund their own compensation programs; or (3) a combination of the first two approaches.<sup>190</sup> In 1973, the United States Senate passed S. 300, covering federally-governed locales, and providing for 75% federal financing of state programs complying with federal standards.<sup>191</sup> To date, the bill has not yet passed the House of Representatives.

A more recent bill considered by the House Committee on the Judiciary, the committee to which bills regarding crime victims compensation are referred, is the Victims of Crime Act. On September 9, 1976, the Committee recommended by a vote of 16-15 that the bill pass, as amended.<sup>192</sup> The House was unable to

188. *House Hearings, supra* note 5, at 7.

189. *House Hearings, supra* note 5, at 26.

190. *House Hearings, supra* note 5, at 4.

191. "The Victims of Crime Act of 1973," S. 300, 93rd Cong., 1st Sess (1973), 119 Cong. Rec. 6256-6264 (March 29, 1973).

192. Letter from Rep. Peter W. Rodino, Jr. (D., New Jersey), Chairman, Committee on the Judiciary, U.S. House of Representatives, to the authors, on file in the *Notre Dame Journal of Legislation* (November 9, 1976).



take it up prior to the *sine die* adjournment of the 94th Congress.<sup>193</sup>

The Victims of Crime Act gives responsibility to the U.S. Attorney General and an Advisory Committee on Victims of Crime. This Advisory Committee is to be composed of nine members appointed by the Attorney General, seven of whom must be officials of federally-qualified state programs. The committee will be appointed for a year and will receive a per diem allowance. The flaw of this one year appointment provision is that in one year's time the board will build up barely enough expertise on the federal dimensions of the program to be of any real service to the Attorney General. The Attorney General has the power to delegate authority, but it seems that a new division of his office is needed to take ultimate responsibility for coordinating the federal program with those of the states.

The bill provides that the responsibility for administering each state program rests solely with the state involved. The Attorney General is prevented from intervening in any individual claim by a claimant against his state board. State programs, however, must meet certain federal standards in order to receive funding. The reimbursement that is awarded is 100% of the state cost for compensation for crimes that fall within the exclusive federal jurisdiction and 50% of state costs made to state qualifying crimes.

The calculation of state costs excludes certain items: (1) administrative costs; (2) pain and suffering awards, property loss awards, or awards in excess of \$50,000; (3) awards to an individual who has received compensation from collateral sources covering the same injuries; (4) awards for claims filed more than one year after occurrence of the crime; and (5) awards by the state to individuals who failed to report the crime to the police within 72 hours, unless the state found that there was good cause for the individual's failure to report. If a state pays any of the above items to the individual, the state cannot claim reimbursement from the federal government.

The Victims of Crime Act also puts affirmative duties on the state: (1) the individual must be given the right to a hearing with administrative or judicial review; (2) the state must require that the claimants cooperate with police; (3) the state must require that police take reasonable care to inform victims of qualifying crimes about the existence of the compensation programs; (4) the state must be subrogated to claims the individuals would have against the one who commits the crime; and (5) the state cannot require the individual to accept welfare benefits in lieu of the compensation award.

An examination of federal legislation begins with the question of whether the government should exercise its discretion as to which individuals it will aid. Proponents of the bill imply that because of cost considerations, the government can subsidize only certain individuals. The opponents of the Victims of Crime Act argue that "such a program is selective largesse and not the result of any government liability to its citizens."<sup>194</sup> The opponents feel that the federal government's main concern should be with crime prevention; it should not arbitrarily decide to compensate one class of citizens, although the states are within their discretion to make the decision as to whom to compensate.<sup>195</sup>

193. H.R. 13157, 94th Cong., 2d Sess., 122 Cong. Rec. H3216 (daily ed. Apr. 9, 1976).

194. H.R. Rep. No. 1550, 94th Cong., 2d Sess. 19 (1976).

195. H.R. Rep., *supra* note 194, at 19.

One reason that the federal government must be careful as to reimbursement exclusions is that many states will pass or amend their statutes so that they will not have to pay for anything for which they will not be reimbursed. An exclusion of reimbursement for property loss awards or for pain and suffering awards will eliminate the inclusion of those provisions into state statutes, even though the aforementioned Marquette study found that such payments would equal only a small percentage of total awards.<sup>196</sup>

It seems a wise choice to exclude administrative costs from the reimbursement formula. Federal taxpayers should not have to fund inefficient state agencies. In 1975, Alaska reported that program administration is 33.3% of its total budget,<sup>197</sup> whereas in Maryland such costs are only 10% of the budget. Hawaii reported a 19% cost factor and in Washington, it was 33%.<sup>198</sup> There is no apparent correlation between high administrative costs and the type of board system employed. No costs versus total award figures are available from the states that use the court systems.

On January 4, 1977, Rep. Rodino re-introduced the Victims of Crime Act in the House.<sup>199</sup> One month later Senators Hubert H. Humphrey, Edward M. Kennedy, Spark M. Matsunaga, and James Abourezk submitted the companion measure in the Senate.<sup>200</sup>

## CONCLUSION

Assistance to innocent victims of violent crimes — our wage-earning, tax-paying, law-abiding citizens — is the finest of uses of public funds. Unfortunately, it is at the bottom of all priority lists. All state legislation of which I am aware contains the limitation that such assistance is subject to funds appropriated. Unfortunately, the same limitation does not appear in legislation providing assistance to the perpetrators (defense, rehabilitation, etc.). A reordering of priorities is desperately needed.<sup>201</sup>

This note has pointed out many of the strong and weak facets of operative state compensation programs. The possible infusion of federal funds, on a matching basis, may provide a springboard for more extensive compensation. The conclusions to be drawn from this study are clear:

1. The requirement of a minimum out-of-pocket loss as a prerequisite to compensation should be eliminated. In addition, the practice of deducting this minimum loss from the final award should be dropped in order to provide the most equitable coverage.

2. Maximum limits on awards should be replaced by measures which provide complete compensation to those who suffer the most from the crime. At the very least, the New York plan of total reimbursement of medical expenses should be adopted.

196. *House Hearings*, *supra* note 5, at 208-211.

197. *1975 Alaska Report*, *supra* note 35, at 15.

198. *Wisconsin Bulletin*, *supra* note 23, at 7.

199. *Cong. Rec.*, *supra* note 88.

200. *Cong. Rec.*, *supra* note 39.

201. Letter from Carl J. Jahnke, Esq., Chairman, New Jersey Violent Crimes Compensation Board, to the authors, on file in the *Notre Dame Journal of Legislation* (November 19, 1976).

3. Compensation for pain and suffering, especially in rape cases, should be statutorily mandated, with the option of setting a ceiling on any such recovery.

4. A workable system of compensating for property loss should be developed within the suggested limitation of a maximum recovery and restricted to those cases involving compensable personal injury.

5. Exclusion of the offender's family members should be accomplished on a case-by-case basis, not by an across-the-board exclusion.

6. The comparative misconduct of the victim should also be a case-by-case determination, with the administering body taking all factors into account.

7. Compensation programs must be administered by an independent state board. States operating through the court system should immediately change to the use of a board to expedite their process.

8. Restitution by the offender, and pursuit of the offender under state subrogation clauses, must vigorously be enforced to alleviate fiscal difficulties.

9. New sources of funding, such as additional fines, must be found and implemented to make the programs self-sufficient.

10. Federal legislation is sorely needed to assist states with operative programs, and to prod those states without programs, so that victim compensation becomes a nationwide effort.

It is hoped that the various legislatures carefully consider each of these suggestions, implementing all of them when such action becomes feasible. By making several suggestions, piecemeal expansion is anticipated. A final, comprehensive expansion will give crime victim compensation legislation and, more importantly, the victim himself, the enhanced standing which both deserve.