Compensation for Victims of Violent Crimes: An Analysis

Robert E. Scott
COMPENSATION FOR VICTIMS OF VIOLENT CRIMES:
AN ANALYSIS

Spurred by the implementation of plans in Great Britain,¹ New Zealand,² and California;³ and by various other federal⁴ and state⁵ proposals, the concept of state compensation to victims of violent crimes has recently become the subject of wide public interest and intensive legal debate.⁶ In essence, the concept envisions some scheme by which the victims of crimes of violence can be compensated for any losses resulting from their criminally inflicted injuries.⁷

Before any proposals based on this conception are adopted they should be shown to have a valid theoretical framework, supported by sound legal principles, with an effective and efficient system of administration. The purpose of this note is to examine existing plans and proposals to determine whether they possess these essential characteristics. On this basis a discussion of compensation embraces three central areas of concern: (1) the various rationales proposed as a basis for a compensation scheme; (2) legal analogies and precedents to which such a

1. The British non-statutory scheme was announced in Home Office, Compensation for Victims of Violence, CMND. No. 2323 (1964) (hereinafter cited as CMND. No. 2323).
4. Various federal proposals have been introduced. All of the proposals except that of Rep. Green, H.R. 11818, 89th Congress, 1st Sess. (1965), are based on the bill introduced by Sen. Yarborough, S. 2155 89th Cong. 1st Sess. (1965) (hereinafter cited as S. 2155), which proposes a compensation scheme which encompasses only the limited areas of general federal police power and responsibility. Specifically, the "special maritime and territorial jurisdiction of the United States," (18 U.S.C. Sect. 7 (1964)), and the District of Columbia. This plan is sought to serve as a model for state compensation schemes. The bill introduced by Rep. Green, however, proposes a plan for national compensation of the federal level.
5. States in which compensation proposals have been introduced are: Oregon (H. 1822, 1965), Wisconsin (S. 450, 1965) and Maryland (S. 151, 1966.)
6. The concept of compensation is not a new one; it can be traced from the Code of Hamurabi, up through modern legal systems. See generally, Harper, The Code of Hamurabi 19 (1904) Sections 23 & 24; and the proposals of the Italian criminologists Garfolo and Ferri, Garfolo, Criminology 413 (1914); Ferri, Criminal Sociology, 1152 (1927). See also the suggestions of British social philosopher Jeremy Bentham, 1 Bentham, Works 372 (Browning ed. 1947). Compensation was first given serious thought in England by the leading social reformer and magistrate Margery Fry. See Fry, Justice for Victims, The Observer (London) July 7, 1957.
7. See generally, Compensation for Victims of Criminal Violence: A Round Table. 8 J. PUB. L. 191; and Compensation to Victims of Crimes of Personal Violence: An Examination of the Scope of the Problem, 50 MINN. L. REV. 212 (1965).
plan can be related; and (3) the practical difficulties involved in implement- ing a compensation plan. Although certain aspects of compensation have been discussed in depth elsewhere, it is hoped that a more complete discussion which centers on this three-part analysis will provide a new direction to subsequent analysis.  

**THEORETICAL RATIONALES FOR COMPENSATION**

The basis for all the compensation proposals rests on the clear distinction that our modern legal system has created between civil and criminal remedies. Almost all serious crimes are simultaneously torts, and no civil act or omission is suspended because such act amounts similarly to a criminal offense. However, the law has left it to the victim to take appropriate action against the offender to recover what he can. The central problem here is that the offender, assuming that he can be identified and discovered, is rarely worth suing because he is likely to be financially irresponsible.

Based on the premise that the present civil remedy is wholly inadequate, compensation proposals have relied on various rationales with which to support their scheme. Primary among these are those advocating reparation by the offender through a system of penal reform, state compensation based on social fault theory, and state compensation on the basis of controlling social policy.

The inadequacy of present tort law to protect the victim of crime

---

8. Several outstanding articles have been published in recent months dealing with various aspects of compensation. Among these are: Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 St. Louis L. Rev. 247 (1965); *Compensation To Victims of Crimes of Personal Violence: An Examination of the Scope of the Problem*, 50 Minn. L. Rev. 212 (1965); Children, *Compensation for Criminally Inflicted Personal Injuries*, 39 N.Y.U. L. Rev. 444 (1964); Note, *Compensation for Victims of Crime*, 31 U. Chi. L. Rev. 531 (1966); Note, *Compensation for Victims of Violent Crimes*, 61 Nw. U. L. Rev. 72 (1966). All of these, however, by the very nature of their intensive analysis of specific aspects of the problem have failed to present the concept of compensation in its entirety. It would seem appropriate, therefore, to present a more encompassing analysis in order to make subsequent judgments more accurate.


10. See generally, Note, *Compensation for Victims of Crime*, 33 U. Chi. L. Rev. 531 (1966) for a more extensive discussion of these various alternatives.


COMPENSATION FOR VICTIMS

has led to the suggestion that penal systems should be oriented not on a policy of deterrence and retribution to the offender; but rather on enforcing the victim's claim for restitution by integrating compensation as a part of the offender's punishment.\textsuperscript{14} Instituting such a plan under the present penal system, however, would seem to be an evasion rather than a solution to the problem, and one would still be confronted with the financial irresponsibility of the criminal class.\textsuperscript{15} Therefore, most of the proposals go beyond simply advocating state intervention to require restitution by the offender, and suggest establishing a fund from the proceeds of prison labor which could be used to compensate the victims of violent crimes.\textsuperscript{16}

In the majority of cases, however, any such scheme would not provide adequate compensation for the injured victim.\textsuperscript{17} Furthermore, any plan which proposed incarceration of offenders until restitution from their prison labor had been achieved could be justly criticized on several significant grounds. Under such a system, criminal responsibility would attach, at least in some measure, to the amount of damage done which might not coincide with the \textit{mens rea}.\textsuperscript{18} Secondly, these solutions, in a final analysis, would amount to imprisonment for debt.\textsuperscript{19}

Therefore, although restitution proposals, placing as they do primary responsibility on the offender (who ought in terms of justice to be charged with it), deserve close and careful scrutiny. Any logically sound rationale for victim compensation must, by default, be based on some form of state compensation.

Having failed to justify compensation to victims from the efforts of the criminal class who bear the primary responsibility, various proposals have been presented which stress the duty of the state to protect its citizens and its collateral obligation to indemnify those citizens when it fails in this duty.\textsuperscript{20} This argument centers on the premise that the state, which forbids its citizens to arm themselves in self-defense, cannot

\textsuperscript{15} \textit{Supra} note 10, at 535.
\textsuperscript{18} Silving, \textit{supra} note 10, at 245.
\textsuperscript{19} \textit{Ibid}.
disown all responsibility for its failure to protect them. In addition, advocates of state liability rely on the lack of response from society to the causes of crime. If society continues to tolerate recognized sources of criminal emergence, it is argued that certainly it has some minimum responsibility to the victims of such criminal violence.

This rationale, however, is plagued with fundamental difficulties and has not, therefore, been accorded general recognition. The principal difficulty stems from the dubious premise which places liability on one for the wrongful conduct of another. Furthermore, it is doubtful whether the state does in fact guarantee absolute protection to its citizens. Many crimes are outside the state's powers of prevention. Consequently, although our traditional doctrines of vicarious liability have been extended to encompass broader and broader areas, liability has not yet been extended to such a degree as to permit justification for placing primary responsibility for compensation to victims of violent crime upon the state. Thus, the majority of proposals advocating compensation, have chosen rather to base their discussion on an expansion of social welfare on behalf of the victim as a logical extension of existing welfare programs.

Although the arguments based on society's failure to protect the individual, and its toleration of acknowledged sources of crime are not sufficient to support a finding that society has a duty to compensate the victim of crime, nonetheless, they are persuasive in support of a rationale based on social welfare.

21. Fry, supra note 12 at 192. See also comments by Senator Yarborough upon introducing his bill in Congress: "Having encouraged our people to go out into the streets unprotected, we cannot deny that this puts a special obligation upon us to see that these people are, in fact, protected from the consequences of crime." 111 Cong. Rec. 13533 (daily ed. June 17, 1965).


23. Ibid.

24. Supra note 10, at 537.

25. See British White Paper, CMND. No. 1406, at p. 7. "There is a distinction between compensation for the consequences of civil riot, which the forces of law and order may be expected to prevent, and compensation for individual acts of personal violence which can never be entirely prevented . . . it does not follow that the state has assured the duty of (protection) . . . everywhere . . . the most it has done is to create an assumption that it will provide a general condition of civil peace."); supra note 10, at 537.

26. Supra note 10, at 537.

27. Particularly in the area of workmen's compensation and products liability. See Generally Miller, supra note 16.
At a time when society has admitted its responsibility for the costs of industrial accidents, old age illness, and injured veterans, there is a persuasive argument that compensation costs should be distributed among the potential victims, society at large. The concept of risk-sharing in order to spread the cost throughout the entire group becomes even more compelling when, as it has been noted, many victims cannot afford private insurance. This type of argument, to be sure, is subject to the criticism that such a program leads to abandonment of individual responsibility and to dependence on governmental paternalism. Further, it must be noted that under such a risk-spreading scheme, not all of the group run the same risk of criminal violence as do others and, therefore, compensation would amount in some degree to a redistribution of the costs of criminal violence from groups which now bear a proportionately larger amount to those with a lighter load.

In spite of such criticism, social legislation appears to be the strongest rationale supporting compensation to victims of violent crime. In fact, the majority of the proposals go so far as to provide for the compensation not as a matter of right but “ex gratia”. This, of course, makes the compensation award discretionary, and forecloses any question of judicial review.

Existing Legal Institutions and Historical Analogies

Following a discussion of the theoretical rationale behind compensation lies the issue of whether the sincere impulse to compensate the unfortunate crime victim which is reflected in the proposals for social legislation can find adequate legal support through historical relationships and analogous legal precedents. What criteria can be employed to justify the compensation of victims of crime through social legisla-

29. Childres, supra note 22, at 457.
31. This result obtains because crime rates vary greatly between various cultural, racial and economic groups. Supra note 10, at 539.
33. CMND. No. 2323 at 4; Yarborough, supra note 31, at 256; supra note 10, at 542.
tion rather than any other group of equally innocent victims of misfortune.  

There are several analogies to which the concept of compensation can be effectively related. First among these is the historical position of the victim of violent crime which placed emphasis on reparation by the offender and his social unit to the victim instead of society in the aggregate. The next analogy deals with that variety of situations in which our system has moved away from the concept of common law fault and has placed liability on certain classes regardless of fault; or on classes who caused the harm, but were not necessarily at fault in so doing. Primary among these are legislation establishing workmen's compensation and the expanding field of products liability and extra-hazardous activities.

The basis of primitive criminal law was the personal reparation by the offender to the victim. In primitive legal systems, private conduct which would be criminal today would probably have been constituted a tort and have been compensable by payment of damages to the victim. Only those acts which threatened the stability of the entire society were considered of sufficient seriousness to entail public prosecution. Private disputes remained outside the concern of public censure and were not for the most part considered public crimes. This is not to say, however, that the private disputes were ignored. Rather primitive society provided for an organized system of victim revenge, generally consisting of compensation to the victim. In this regard, only the victim gained and the state acquired nothing except order and control by insisting on compensation of the victim. Here compensation was generally guaranteed by the offender's family unit and the only problems were those involving indigent offenders not connected with any house-

35. Miller, supra note 16, at 204.
36. See generally, supra note 34, at 76 et seq.
37. Id. at 84 et seq.
38. Miller, supra note 16, at 205.
41. Ibid.; See also 1 Pollock and Maitland, History of English Law, 48 (2nd ed. 1885); Flucknett, A Concise History of the Common Law, 426 (5th ed. 1956).
42. Mueller, supra note 40, at 313.
43. Mueller, supra note 40, at 225.
There were set schedules of damages for specific offenses and most of the punitive damages were pecuniary.

Similarly, to the primitive societies, the legal institutions of early western culture were based on an indemnification from the offender's family to the victim. The Anglo-Saxon legal system evolved from the blood feud between family groups to a stable system by which money payments were set at commutations for injury. During the feudal period, an elaborate system of compensation was also established.

Thus the primary emphasis of the retribution for personal offenses involving violence was centered upon the individual victim. The advent of modern legal systems, however, saw the subordination of the individual's claim. The state's right to punish was substituted for the right of the injured victim to recover damages for his loss. This change has had a dual effect. First, "punishment has been separated from indemnification" with criminal law emerging as a separate field; secondly, the state has assumed total control over the enforcement of legal sanctions administered at the family level. Thus, the interests of the state or sovereign in punishing private offenses gained superiority over the individual victim, with his only private redress being a civil tort action.

Therefore, the victim, who historically enjoyed the position of primary concern in retribution of criminal violence, has been required to assume the role of the sovereign or state. The transformation whereby the individual was replaced by the sovereign in redressing private wrongs occurred in England through a dual process: (1) The king arbitrarily assumed jurisdiction over a greater number of offenses, by extending protection to various persons and places and during various times; (2) The original concept of "felony" which was restricted in feudal times to a breach of the feudal relationship was expanded to include numerous other serious non-public offenses. Felony thus came to encompass, murder, mayhem, rape, arson, robbery, larceny and burglary.
a secondary role in the process of restitution of wrongs in the interests of peace, stability, and social growth. Because it has been the state which has pre-empted this historic position, logically, the state should on the basis of social legislation support the interest of the injured victim. To be sure the victim's interest is recognized in a private civil recovery. However, where such redress is demonstrated to be inadequate in order to return the victim to his historic position, the state should provide compensation for his losses.

In addition to reliance on a historical relationship to justify placing compensation in the area of social legislation, advocates have relied on supporting legal analogies; the primary one being Workmen's Compensation which represents the outstanding departure from the individualistic concept of personal fault to a system of non-fault liability. The moving purpose behind the workmen's compensation legislation was to distribute the risk of accidental injury from the worker who could least afford to support it, and to re-distribute this risk throughout the entire industry as a cost of production, with the ultimate expense running in increased prices to the consumer. The basic justification for the workmen's compensation plans is that since the employer benefits economically through increased profits in the labor of the employee, the employee should not be forced to bear the cost of an injury sustained in the course of contributing said labor. Behind even this, however, rests the central premise of risk-spreading; that is, the optimum method of bearing a loss in a group is to assess it on those members of the group best able to distribute it. There are certain identifiable characteristics peculiar to workmen's compensation: (1) the potential victims are a large but assessable group, (2) there is a nexus between the potential victims as a group and the industrial employees who would have to bear the loss, and (3) workmen's compensation legislation abrogated the concept of fault and placed the basis of the legislation rather on the relation or nexus between the two groups.

There is a sufficient parallel between the group of potential victims of industrial accidents and the group of potential victims of crime both large and identifiable. Further, as it has been noted above, the concept

54. Miller, supra note 16, at 205; supra note 34, at 84.
55. 1 Schneider, Workmen's Compensation 2 (3rd ed. 1941).
56. Id. at 3-4.
57. Feezer, Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases, 78 U. PA. L. Rev. 805 (1930); supra note 34, at 85.
58. Miller, supra note 16, at 205.
59. Ibid.
of risk-spreading which formed the basic premise for workmen's compensation can readily be related to compensation of victims of crime. The analogy, however, finds its weakest point when an attempt is made to parallel the relation between the group who suffers the loss and the group to whom the risk must be distributed. Presumably since the loss cannot be shifted on the victim himself, proposals envisage shifting it to the public as a whole. No comparable relation exists, however, between the public as a whole and the victim of crime. It cannot be said that the state profits from the efforts of the victim in any significant sense. Since workmen's compensation finds its basis on this relation between employee and employer, it is here that the analogy to compensation finds its weakest support. Instead, victim compensation must rely on the general proposition that crime losses are endemic to the entire society and that endemic losses should be spread throughout the entire group.

The second major area in which absolute liability has replaced the laissez-faire system of personal fault is in the field of products liability. Here again the evolution can be traced from the early decisions denying recovery to a remote purchaser against the manufacturer even when the manufacturer was at fault. This situation was of course substantially altered in the United States in the case of *McPherson v. Buick Motor Co.* which extended the liability of the manufacturer to the consumer, resting not upon the contract, but on the relation arising from the purchase and the foreseeability of harm if proper care were not used. From this point society has moved even farther, by permitting recovery in warranty without privity, toward imposing liability without fault upon the manufacturer, basing such liability on the relation that exists between manufacturer and consumer. Here again we find the same
nexus between the group of potential victims, the consumer, and the group of loss-bearers who stand to profit from the system, the manufacturers. Once more there is a supporting analogy between the large and identifiable group of victims of products defects, and the large and identifiable group of victims of violent crime. However, as in the case of workmen's compensation the analogy fails in finding an adequate relationship between the victims of crime and the loss bearers, i.e. the general public.

A similar analogy can be traced in the area of absolute tort liability for extra-hazardous activities. The rule established in *Rylands v. Fletcher* held that one who undertakes an activity which is likely to result in risk of harm, even if done with the utmost care, is strictly liable without fault for the harm that it causes. The basis for these and other areas of liability without fault is that the party who ultimately causes the injury can most easily bear the risk of paying for it.

Obviously, these analogies cannot be stretched too far because of the lack of a satisfactory relationship between the state and the victim. They are, however, valuable in demonstrating the concept of risk distribution, and in emphasizing the expansion of the concept of strict liability as a replacement for the laissez-faire concept of individual fault. This indicates a prevailing climate for the further extension of such plans into other areas where the innocent victims of misfortune are inadequately recompensed by the present system for their losses.

**Problems Involved in Effectively Establishing an Efficient and Fair Program of Compensation**

The greatest amount of criticism of proposals to compensate victims of violent crime has centered around the practical difficulties in establishing such a program and effectively integrating it in the existing system of criminal administration. Of particular concern has been the danger of fraudulent or unjustified claims, the practical cost of any such scheme, the problem of determining which crimes should be com-

---

69. Other areas in which strict liability has been extended are: The Federal Safety Appliance Act (45 USCA Section 1 and ff.); Child Labor Statutes; and Pure Food Acts, Prosser, *supra* note 66 at 337.
pensated and by how much, and finally the difficulty in integrating any such proposal with the present administration of criminal justice.

Of primary concern in any scheme of victim compensation is protecting the public from fraudulent claims. Most of the proposals have attempted to surmount this difficulty by arbitrarily excluding all but crimes of violence against the person from consideration. Crimes against property it is felt would prove highly susceptible to fraud; whereas "few people would voluntarily wound themselves to obtain a modest compensation and (therefore) the risk of successful deception is negligible." Granting this premise in the majority of cases, there still exists the problem of the culpable victim. The victim who is either partially or wholly responsible for his injury because of previous provoking conduct presents a serious problem. The two areas in which there is the highest incidence of victim precipitation in violent crimes are sex offenses, and family or domestic arguments followed by physical violence. In these types of cases the line between victim and offender is impossible to draw, and the solution to these difficulties does not seem readily apparent.

In the case of fraudulent claims, if compensation is based solely on a criminal conviction, then many bona fide victims will be denied compensation as well as causing an unreasonable delay at the time when the financial remuneration is most needed. Lowering the burden of proof would seem to be the best solution, and most of the plans have adopted the civil "preponderance of the evidence," in place of the criminal "beyond a reasonable doubt." In fact, only the California plan in-

70. Fry, supra note 12 at 193.
71. Ibid.
72. It should be noted that particularly in the area of sex offenses, deception would be a relatively simple matter, and detection would prove practically impossible. See generally, Weihofen, Compensation for Victims of Criminal Violence: A Round Table, 8 J. PUB. L. 209 at 210 et seq. (1959).
73. Studies have indicated that 25% of all violent crime is victim precipitated, Wolfgang, Victim Precipitated Criminal Homicides, 48 J. CRIM. L. C. & P.S. 1 (1957).
74. "Psychological investigations demonstrate that with victims of rape or seduction a significant number actually consented, and another appreciable number engaged in reckless or flagrantly provocative conduct," Weihofen, supra note 72 at 212.
75. A high percentage of all murders arise out of family quarrels. "A study of 1,000 murders committed in New Jersey revealed that 67% of them arose out of unpremeditated quarrels—wives, mistresses, sex rivals, or acquaintances."
76. Ibid. In 1957 of the 3 million violent criminal offenses committed, only one-third resulted in charges of which only 69% resulted in convictions.
77. NEW ZEALAND STAT. No. 134 at Section 17(5) (recovery based "on a balance of probabilities."); S. 2155 at Section 301(o) (Claim supported by substantial evidence").
corporated a criminal conviction as a requirement for compensation.\textsuperscript{78} However some substitute would seem necessary.\textsuperscript{79} The British plan provides that the reported offense must be related immediately to the police in order to be eligible for compensation, unless it was the subject of some criminal proceeding; however the New Zealand statute and the federal proposal omit any such requirement.\textsuperscript{80}

Most of the plans have attempted to solve the problem of victim participation at least in part by either wholly excluding or limiting recovery by the offender’s relatives or household members.\textsuperscript{81} The British plan provides further that compensation should be paid only for “unprovoked assaults upon innocent persons.”\textsuperscript{82} The federal proposal and the New Zealand statute have adopted the exclusionary standard, excluding from contribution all victims who contributed directly or indirectly to their injuries.\textsuperscript{83} This has been criticized as being unnecessarily limited and the broader British proposal which excludes all those “responsible” for their injuries may be preferable on that basis.\textsuperscript{84}

Whether these measures will prove sufficient to reduce compensation awards based on fraudulent or victim-precipitated claims to an acceptable minimum remains to be seen. In reality even though all the plans attempt in some measure to exclude the culpable victim, they all place the majority of responsibility for determining the validity of claims on an administrative commission established for that purpose. This would seem to be a dubious solution at best, and further plans should focus more specific attention on fraudulent claims by making eligibility for com-

\textsuperscript{78} CAL. STAT. CH. 1549 (1965).
\textsuperscript{79} CAL. STAT. CH. 1549 (1965). The Yarborough bill accepts proof of final conviction of a crime as conclusive that the offense was committed. S. 2155 section 205(i).
\textsuperscript{80} CMND. No. 2323 1944 at Paragraph 5d.; see generally N.Z. STAT. No. 134; and S. 2155.
\textsuperscript{81} The British and Federal proposals deny compensation altogether to this class. See CMND. No. 2323 at Paragraph 7, and S. 2155 Section 304(c). “No compensation shall be awarded if the victim—
(1) is a relation of the offender; or
(2) was at the time of the personal injury or death of the victim living with the offender as his wife or her husband or as a member of the offender’s household.

The New Zealand proposal, on the other hand, only prevents victims related to or living with the offender from receiving compensation for pain and suffering, but allows them to recover for their actual losses sustained. NEW ZEALAND STAT. No. 134 at Section 18(2).
\textsuperscript{82} CMND. No. 1406 at 11.
\textsuperscript{83} N.Z. STAT. No. 134 Section 17(3); S. 2155 Section 301(d).
\textsuperscript{84} Childres, Compensation for Criminally Inflicted Personal Injuries, 50 MINN. L. REV. 271 at 274 (1965).
Compensation depend on a report by the victim to the police within a short period after the injury, followed by the submission of a medical report.\textsuperscript{85} Concern has been voiced by critics of the compensation schemes as to the projected cost of such proposals. It has been argued in this regard that any equitable compensation plan would have to cover the total amount of the loss through crime in addition to the cost of administering the compensation scheme. Since the annual cost of crime is about 7% of the national income (over $20,000,000 in 1957),\textsuperscript{86} this would obviously prove to be prohibitive. This estimate, however, seems significantly inflated. In the first place, the cost of law enforcement and judicial administration is already being borne by society; therefore, the only addition would be the cost of the total amount of harm caused by crime, and the expense of the administrative framework.\textsuperscript{87} Further, the examples of the expenditures of existing plans to date demonstrate that the cost of such proposals should be much more reasonable. In its first eleven months of operation, the British plan gave grants totalling $232,234.80,\textsuperscript{88} whereas New Zealand only paid out $4,888 in eighteen months.\textsuperscript{89} These experiences should be ample evidence that the cost of such proposals will not prove to be prohibitive.

As it has been noted above, all the compensation proposals limit the scheme to compensation of victims of crimes of personal injury. Such arbitrary exclusion of crimes of property can be justified on the grounds that: (1) fraudulent claims of property loss would be practically impossible to detect, (2) property is more likely to be covered by private insurance,\textsuperscript{90} (3) property loss is never quite as disastrous as serious injury to the person, and (4) a program for compensation which included property damage would greatly increase the expense.\textsuperscript{91} The basic reason for the distinction, however, probably lies in the fact that public sympathy runs much greater toward a victim of violent crime than to one who has suffered property loss, and the drafters of the proposals are intent on securing wide public support.

Granting, therefore, that the reasons for the distinction are well

\textsuperscript{85} Id. at 282.
\textsuperscript{86} 12 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, THE COST OF CRIME (1931); Mueller, supra note 40 at 219.
\textsuperscript{87} Mueller, supra note 40 at 219.
\textsuperscript{88} Worrall, Compensation for Victims of Crime, 11 Editorial Research Reports 685 at 691 (1965).
\textsuperscript{89} Id. at 689.
\textsuperscript{91} See generally on the exclusion of property loss, Childress, supra note 84 at 272.
founded, nonetheless, the arbitrary separation can be criticized on practical grounds. The primary difficulty is that such a distinction is not very often possible to draw.\(^92\) The British plan has attempted to solve this problem by requiring that the injury be attributable to a criminal offense involving the use of force.\(^93\) The New Zealand statute and the federal bill, on the other hand, provide for an elaborate schedule of enumerated offenses. In order for a victim to be eligible for compensation, his injury must have been caused by a crime falling within this schedule.\(^94\) This latter procedure would seem to compound rather than alleviate the difficulty of distinguishing crimes of violence against the person from crimes of property. Even if, and it is doubtful, one is able to enumerate specifically all the crimes from which injury may result, in those instances where the distinction is difficult to draw, any plan, such as the British proposal, which leaves considerable discretion to the administrative agency would be preferable.

All the plans allow recovery by the victim whether or not it has been judicially determined that a crime has, in fact, been committed. Consequently, compensation does not depend upon whether the criminal has been apprehended. Nor does a lack of capacity to form criminal intent bar recovery.\(^95\)

The amount of compensation to the victim is another area of potential difficulty. Strong arguments have been advanced against compensation on the level of common law damages.\(^96\) The most preferable solution would be a compensation pattern resembling workmen's compensation or social welfare programs. Existing plans, however, have generally incorporated the common law pattern. The federal bill allows recovery for expenses actually incurred as a result of the injury, loss of earning power and pain and suffering, but with a ceiling of $25,000.\(^97\) The British and New Zealand plans also adopt the common law elements of damage but place ceilings on recovery for loss of earnings.\(^98\)

92. "What about armed robbery, burglary or arson? They may involve threatened or even actual violence yet are open to the same difficulties as other crimes of property." Weihofen, supra note 72 at 210.
93. CMND. No. 2323 at 5.
95. N.Z. Stat. No. 134 Section 17(b); S. 2155 Section 301(f); CMND. No. 2323 at 5.
96. Childres, supra note 22, at 462. Childres' argument against common law damages is based on the following points: (1) common law damages would not be limited to compensation; (2) common law damages would have no ceiling; (3) delay is unsatisfactory; (4) common law damages would add needless expense.
97. S. 2155 Section 303 and 304(b).
98. CMND. No. 2323 at 6; N.Z. Stat. No. 134 Section 19(3).
A final area to which attention must be focused is the prevention of multiple recovery. The concept of compensation is, of course, compensatory. The victim should be placed as near as possible in the same position as he was prior to the injury. For this reason the amount of compensation which the victim receives from other sources, whether private insurance or workmen's compensation, etc., should be deducted from his award. Under most of the existing proposals, provision had been made for the deduction of these additional public payments.99

Most of the proposals for compensation envisage the creation of an independent administrative agency,100 or the attachment of the program with an existing agency.101 The central advantage in such a concept is that claims can be speedily processed and awards made without undue delay. The federal bill requires a hearing at which the compensation claim will be litigated. Both victim and agency would be represented by counsel, introduce evidence, and cross-examine witnesses.102 The British and New Zealand plans perhaps provide for a speedier decision by having the victim submit an application for compensation to one member of the compensation commission. The commission then investigates the claim and either makes an award or rejects the application. If the victim is dissatisfied with the decision, he can appeal for a hearing before the entire commission at which time he can present his case.103 Without doubt, the commission would be required to employ investigators to process these claims. Such investigation could be maintained at a moderate level if, as suggested above, the plans provided for a timely police report and medical examination. Administration of a compensation plan, therefore, would not seem to present any significant difficulty and the cost of such an agency could probably be kept within reasonable bounds.

The problem of greatest concern which has been raised in establishing a viable scheme for victim compensation is that of integration with the existing administration of criminal justice.104 As has been noted above,

99. N.Z. Stat. No. 134 Section 17(b), (c), (d); S. 2155 Section 305(b); Cmnd. No. 2323 at 7.
100. A three member board has been considered optimum by the proposed Federal commission and the New Zealand Tribunal, S. 2155 Sect. 201(a); N.Z. Stat. No. 134 Sect. 4. The British plan, on the other hand, has established a five man board. Cmnd. No. 2323 at 4.
102. S. 2155 Section 205.
103. Cmnd. No. 2323 at 7; New Zealand follows the British procedure.
104. Supra note 34, at 101.
the majority of the proposals specifically omit any requirement that compensation be based on conviction in a criminal trial. As a consequence, the situation may well arise where an issue of significant importance to the accused at his trial is decided previously at the compensation hearing. Since the compensation proceedings are administrative, and since they do not employ the same rules of evidence or burden of proof; it is conceivable that such decision could prove unjustifiably prejudicial to the defendant’s case. If, for example, the accused bases his case on the fact that the victim was a culpable actor in the crime, what are his chances of success if the jury is made aware that the victim has received a compensation award? On the other hand, the denial of an award to the victim would conceivably prejudice the state’s case. A further consideration would be the reluctance of the compensated victim to testify at the criminal trial, especially in those instances where the offender might have assisted in his recovery.

The New Zealand statute and the federal proposals have attempted to solve the problem in part by providing for a postponement of the compensation hearing if a criminal proceeding is pending. This would not seem to be an adequate solution, however, because in that case the victim could hardly be expected to give objective testimony in those instances where award would be contingent upon conviction.

The sole solution would seem to be that the proceedings at the compensation hearing should be made inadmissible in court and knowledge of such outcome by any juror should be sufficient to dismiss him for cause. To insure adequate protection of the accused, such a safeguard should be a mandatory section of all compensation proposals.

**Conclusion**

The foregoing analysis has been designed to point out the separate considerations which are involved in a discussion of compensation. Although other legal articles have discussed the various aspects of compensation in greater depth than has been analyzed here, they have all failed to make this essential distinction between the theoretical and legal supportive principles and the practical problems involved in any com-

---

105. Only California has such a stipulation. *Cal. Stat. ch. 1549.*
110. *N.Z. Stat.* No. 134 at Section 17(b); S. 2155 Section 301(f).
Compensation plan. By separating the analysis into three separate and independent considerations it has been possible to indicate that while the theoretical bases for the proposals are strong, the practical problems remain largely unsolved. It is thus feasible to support the general concept of compensation while rejecting any further implementation of compensation proposals at this time. As has been indicated, existing plans have not, for the most part found adequate solutions to the difficult task of operating a compensation plan effectively and fairly. A scheme of this importance and with a controversial basis should not, regardless of its persuasive supporting principles, be attempted until better solutions to these problems are produced. Unfortunately those who have criticized compensation proposals have indiscriminately included in their criticisms disapproval of the theoretical basis with doubt over practical feasibility. On the other hand, advocates of compensation have tended to ignore practical difficulties and to rationalize these problems on the basis of the theoretical soundness of their position. Both these positions are unsatisfactory. By separating the analysis one can settle conclusively the issue of whether or not the plans are theoretically desirable. Thus resolved, discussion in the future can center on the practical problems and their solutions.

Because compensation plans evoke widespread sympathy for the victim, and do not infringe on established pressure groups, they will probably receive substantial support in many states in the future. The danger of such proposals as has been demonstrated lies in the fact that that this moral persuasiveness and substantial legal analogies will override the difficulties which remain with practical implementation. Granting that a legitimate rationale and a substantial legal basis are strong evidence for the theoretical advisability of a compensation plan, Nonetheless, before any further schemes are given effect, some adequate alternatives should be advanced which will permit the plan to operate effectively within the framework of our present judicial system.

Robert E. Scott