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A TRANSATLANTIC PERSPECTIVE ON THE COMPENSATION OF CRIME VICTIMS IN THE UNITED STATES

DESMOND S. GREER*

I. INTRODUCTION

Lawmakers in the United States have enacted legislation providing for financial assistance to victims of crime since 1965, when the California State Legislature enacted the first state program.¹ The first attempt to secure similar legislation on the federal level was also made in 1965. However, that bill, like many subsequent proposals, failed to secure the support of both Houses of Congress.² By 1982, just over two-thirds of the states had adopted compensation programs of one kind or another, but Congress had still failed to pass legislation on this matter.³ Eventually, the President's Task Force on Victims of Crime reviewed the developments in the states and reached the following conclusion:

[S]ubstantial progress has been made by many states in their attempts to compensate crime victims However, the states' inability to fully ad-

* Professor of Common Law, The Queen's University of Belfast. I wish to acknowledge my gratitude to Dean Russell Osgood for providing the opportunity to undertake the research for this Article while a Visiting Research Scholar at Cornell Law School in the Fall of 1992. I am also grateful to Mr. Jay Olson and Ms. Jackie McCann Cleland of the Office for Victims of Crime in the Department of Justice, and to Mr. Dan Eddy, Executive Director of the National Association of Crime Victim Compensation Boards, for their invaluable assistance. Thanks are also due to the National Victim Center and to the Law Library of George Mason University Law School. But the responsibility for what follows, which attempts to summarize the position in mid-1994, is mine alone.

¹ 1965 Cal. Stat. 1549. See also HERBERT EDELHERTZ & GILBERT GEIS, U.S. DEPARTMENT OF JUSTICE, PUBLIC COMPENSATION TO VICTIMS OF CRIME 76 (1974); DANIEL MCGILLIS & PATRICIA SMITH, COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS 6-7 (1983).

² For the early efforts to enact federal legislation, see EDELHERTZ & GEIS, *supra* note 1, at 191-206. The National Conference of Commissioners on Uniform State Laws approved a Uniform Crime Victims Reparations Act in 1973 [hereinafter 1973 UNIFORM ACT], which "was enacted in five states, with four others adopting a substantially similar [A]ct." UNIF. VICTIMS OF CRIME ACT 1992, Historical Notes, 11 U.L.A. 375 (Supp. 1994). This has now been superseded by the UNIF. VICTIMS OF CRIME ACT 1992, art. 3, 11 U.L.A. 396 (Supp. 1994) [hereinafter 1992 UNIFORM ACT].

³ See MCGILLIS & SMITH, *supra* note 1, at 8, 31-32.

dress the problems that persist suggest [sic] that there is an important role for the federal government to play in this area.⁴

Accordingly, the Task Force recommended that the United States Congress "should enact legislation to provide federal funding to assist state crime victim compensation programs" as part of a general strategy to develop "comprehensive assistance to all victims of crime."⁵ The prominence of the victims movement in the early 1980s secured a favorable reception for this recommendation, and in 1984 Congress enacted the Victims of Crime Acts (VOCA).⁶ VOCA established a federal office responsible for developing the rights of victims generally and in particular for providing supplementary federal funding for state victim assistance programs through a newly created Crime Victims Fund. VOCA support began in 1986 for compensation programs which satisfied certain statutory requirements.⁷ By 1992, as a result of this initiative and the continuing concern for victims at the state level, every state had enacted a compensation program.⁸

The early stages of these developments were influenced by the provisions of the Criminal Injuries Compensation Scheme introduced in Great Britain in 1964.⁹ That Scheme, too, has undergone a

⁴ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 42-43 (1982) [hereinafter TASK FORCE FINAL REPORT]. For a more detailed assessment, see generally MCGILLIS & SMITH, *supra* note 1.

⁵ TASK FORCE FINAL REPORT, *supra* note 4, at 37. The Task Force argued: "[T]he federal government has made substantial sums of money available to states . . . for the education and rehabilitation of state prisoners. . . . [I]t seems only just that the same federal government not shrink from aiding the innocent taxpaying citizens victimized by those very prisoners . . ." *Id.* at 43-44. A federal compensation program was undesirable: "The duplication of state and federal effort would not only be inefficient but also would be confusing to the victims both entities seek to serve." *Id.* at 43. Much of the report was concerned with the rights of victims in the criminal justice process.

⁶ Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 42 U.S.C. §§ 10601-10604 (1988 & Supp. 1993)).

⁷ 42 U.S.C. § 10602(b) (1988).

⁸ The last states to enact programs were South Dakota in 1991, S.D. CODIFIED LAWS ANN. §§ 23A to 28B-10 (1991) (current version at S.D. CODIFIED LAWS ANN. §§ 23A-28B-1 to 44 (1994)) and Maine in 1992, ME. REV. STAT. ANN. tit. 5, § 316-A (West 1992) (as amended by ME. REV. STAT. ANN. tit. 5, § 3360-3360(K) (West 1994)). Programs have been in force for some time in the District of Columbia, D.C. CODE ANN. §§ 3-401 to 446 (1994), and the Virgin Islands, V.I. CODE ANN. tit. 34, §§ 151-179 (1994), leaving Puerto Rico as the sole exception. Except for Nevada's program, NEV. REV. STAT. ANN. § 217.220(1)(d) (Michie 1992), all of the programs comply with the VOCA requirements. OFFICE FOR VICTIMS OF CRIME, VICTIMS OF CRIME ACT OF 1984 AS AMENDED: A REPORT TO THE PRESIDENT AND THE CONGRESS at 3 (1994) [hereinafter 1994 VOCA REPORT].

⁹ The Scheme was promulgated under the royal prerogative, and not enacted as a statute on account of its "experimental" nature. Note that it is a *British* Scheme, in that it applies to England, Wales, and Scotland. Northern Ireland has had a separate *statutory scheme* since 1968. For a commentary on the original British Scheme, see P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 335-59 (3d ed. 1980) and DAVID R. MIERS, RESPONSES TO VICTIMISATION: A COMPARATIVE STUDY OF COMPENSATION FOR CRIMINAL VIOLENCE IN

number of changes over the years—and indeed is currently facing its most rigorous re-examination.¹⁰ In both countries, therefore, the original ideas and philosophies underlying the initial “experiment” have been refined and developed in the light of almost thirty years of experience.

The purpose of this article is to review the current compensation programs in both the United States and Britain with reference to such questions as: the extent of a victim’s “right” to compensation; how the concept of a victim has changed over the years; when victims become disentitled to compensation or liable to have their compensation reduced; what is meant by “compensation,” where the money comes from, and the extent to which there is an “unmet need” for compensation. The expectation is that such an analysis will produce findings of relevance for the future development of criminal injuries compensation in both jurisdictions.

II. THE “RIGHT” TO COMPENSATION

The British Scheme introduced in 1964 was—and still remains—a constitutional and legal oddity. It is not embodied in legislation,¹¹ and it states only that the Criminal Injuries Compensation Board “will

GREAT BRITAIN AND ONTARIO *passim* (1978).

¹⁰ The current version of the scheme is the Criminal Injuries Compensation Scheme 1990 [hereinafter BRITISH SCHEME]. Developments up to 1991 are summarized in D.S. GREER, CRIMINAL INJURIES COMPENSATION, 1-10 (1991) and DAVID R. MERS, COMPENSATION FOR CRIMINAL INJURIES 1-11 (1990). The Scheme was put into statutory form by the Criminal Justice Act, 1988, ch. 33, §§ 108-117 (G.B.), but those provisions were not brought into force. In December 1993, the Government announced that a radically amended (and significantly less generous) extra-statutory “Tariff” Scheme would come into force in April 1994, and that the provisions of the 1988 Act “will accordingly be repealed when a suitable legislative opportunity occurs.” COMPENSATING VICTIMS OF VIOLENT CRIME: CHANGES TO THE CRIM. INJURIES COMP. SCHEME, 1993, Cmnd. 2434, ¶ 38. This decision provoked widespread opposition, leading (inter alia) to defeat of the Government in the House of Lords, *see* 555 PARL. DEB., H.L. (5th ser.) 1828-51 (16 June 1994), and to court proceedings designed to have the decision quashed. In October 1994, the House of Commons, by a narrow majority, “reversed” the House of Lords, *see* 248 PARL. DEB., H.C. (5th ser.) 445-77 (1994); but the next month the Court of Appeal held (by a majority of 2-1) that by introducing the “tariff scheme,” the Home Secretary had acted unlawfully and in abuse of the prerogative power. *See* Regina v. Sec’y of State for the Home Dep’t, *ex parte* Fire Brigades Union, 2 W.L.R. 1 (1995). The Home Secretary has been given leave to appeal to the House of Lords. *See* Editorial, *Fundamental Flaws in Compensation*, 144 NEW L. J. 1577 (1994). Given this uncertainty over the new “Tariff” Scheme, reference hereafter will be to the 1990 Scheme, unless otherwise indicated.

¹¹ A major reason for the controversy over the new (non-statutory) “Tariff Scheme” referred to in the previous paragraph is that it represents an attempt by the executive to flout the will of Parliament as recorded in the Criminal Justice Act 1988. The majority of the Court of Appeal in the *Fire Brigades Union* case held that the Home Secretary could not lawfully exercise the prerogative power to establish a scheme radically different from the provisions of the 1988 Act.

entertain applications for *ex gratia* payments of compensation."¹² In theory, the state accepts no legal liability for criminal injuries suffered by its citizens,¹³ and the courts have described the Board as "a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown."¹⁴ In reality, the Board members "are instructed and compelled to make payments to all who come within the ambit of the Scheme."¹⁵ Any failure to do so may be challenged in the courts.¹⁶ Thus, for all practical purposes, a crime victim in Britain has a legally enforceable right to compensation.

The position in the United States does not appear to be so clear-cut. Although compensation programs are invariably statutory, state legislatures tend to accept that they have, at most, a "moral responsibility" to assist crime victims.¹⁷ The Florida program provides a typical example:

The Legislature recognizes that many innocent persons suffer personal injury or death as a direct result of adult and juvenile criminal acts or in their efforts to prevent crime or apprehend persons committing or attempting to commit adult and juvenile crimes. Such persons or their dependents may thereby suffer disabilities, incur financial hardships or become dependent upon public assistance. The Legislature finds and determines that there is a need for government financial assistance for such victims of adult and juvenile crime. Accordingly, it is the intent of the Legislature that aid, care, and support be provided by the state, as a matter of moral responsibility, for such victims of adult and juvenile crime.¹⁸

¹² BRITISH SCHEME, *supra* note 10, ¶ 4. For criticism of this "sophistry," see PETER CANE, *ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW* 255 (5th ed. 1993). *Cf.* Criminal Justice Act, 1988, ch. 33, § 111(1) (G.B.) (providing only that an award "may be made" to persons who qualify for compensation).

¹³ COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, 1964, Cmnd. 2323, ¶ 8.

¹⁴ *Regina v. Criminal Injuries Comp. Bd. ex parte Lain*, [1967] 2 Q.B. 864, 882 (*per* Lord Parker C.J.).

¹⁵ CRIMINAL INJURIES COMP. BD., *FIRST ANNUAL REPORT*, 1965, Cmnd 2782, ¶ 5.

¹⁶ *Lain*, [1967] 2 Q.B. at 881-82. *But cf.*, *Regina v. Criminal Injuries Comp. Bd., ex parte P*, [1994] 1 All E.R. 80, 84 (claim for compensation "not a right but a privilege").

¹⁷ "Very few states have adopted the rights theory as the basis of their compensation scheme." Charlene L. Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 *RUTGERS L.J.* 51, 63 (1985). New Jersey is said to be an exception. *But cf.*, *White v. Violent Crimes Comp. Bd.*, 388 A.2d 206 (N.J. 1978) (victim has no right to compensation). It does not appear that the adoption of constitutional amendments declaring the "rights" of crime victims has altered the position; the New Jersey Crime Victim's Bill of Rights is typical in stating only that a victim has a right to compensation "wherever possible." N.J. STAT. ANN. § 52:4B-36 (West 1994). However, the victim may be given a right to be informed of the existence of the compensation program as in Rhode Island, R.I. GEN. LAWS § 12-28-3(9) (1993), or a right to restitution from a convicted offender as in California under CAL. CONST. art. 1, § 28(b) (Deering 1993) ("Restitution shall be ordered from the convicted persons in every case . . . unless compelling and extraordinary reasons exist to the contrary."), or both.

¹⁸ FLA. STAT. ANN. § 960.02 (West 1994). *See also* MD. CODE ANN., MISC. GOV'T § 1

Alternatively, legislation may declare that state assistance is "in the public interest" or necessary "to promote the public welfare," or "a stronger criminal justice system" or that it simply recognizes the need of victims for indemnification.¹⁹ However, legislators rarely, if ever, argue that compensation legislation is necessary to meet the *legal* obligation of the state or the *legal* entitlement of the victim. Generally, compensation provisions give the Board discretion to compensate victims of crime. They state that a Board *may* pay compensation in accordance with the terms of the program²⁰ or explain that "the Board is not compelled to provide compensation in any case."²¹ The courts, too, tend to come to the same conclusion,²² though a different view is occasionally expressed: "once a claimant . . . [has] met the statutory qualifications set forth in [the Act] for an award[,] he possess[es] a sufficient 'personal right' and eligibility to the benefits . . . and as an aggrieved party [is] entitled to . . . judicial examination of the action of the Board"²³ Further, no case has been found in which a

(1993); W. VA. CODE § 14-2A-2 (1994); WIS. STAT. ANN. § 949.001 (West 1993). See also KY. REV. STAT. ANN. § 346.010 (Baldwin 1993) (compensation is payable "as a matter of grace") and N.Y. EXEC. LAW § 620 (McKinney 1994) (same).

¹⁹ See, e.g., CAL. GOV'T CODE § 13959 (Deering 1994); DEL. CODE ANN. tit. 11, § 9001 (1992); N.M. STAT. ANN. § 31-22-2 (1994). For an interesting analysis of the nature of state programs generally, see Susan K. Sarnoff, A National Survey of State Crime Victim Compensation Programs, Policies and Administrative Methods 126-31 (unpublished Doctor of Social Welfare thesis, Adelphi University).

²⁰ See, e.g., N.Y. EXEC. LAW § 620 (McKinney 1994). Compare TEX. CRIM. PROC. CODE ANN. § 56.34(a) (Vernon 1994) ("The attorney general shall award compensation . . . if . . . satisfied . . . that the requirements of this [Act] are met.") with CAL. GOV'T CODE § 13964(a) & § 13965(a) (Deering 1994) (where a victim comes within the terms of the program, the board "shall" approve the application, but "may" authorize the payment of compensation).

²¹ DEL. CODE ANN. tit. 11, § 9005(3) (1992) ("The Board is not compelled to provide compensation in any case"). See also HAW. REV. STAT. § 351-31(a) (1992) (The commission "in its discretion . . . may order the payment of compensation"); N.C. GEN. STAT. § 15B-25 (1993) ("[Act] shall not be construed to create a right to receive compensation"); UTAH CODE ANN. § 63-63-29 (1993) ("Failure to grant an award does not create a separate cause of action").

²² See, e.g., *Johnsen v. Nissman*, 39 A.D.2d 578 (N.Y. App. Div. 1972); *Lake v. State*, 507 A.2d 1349 (R.I. 1986); *In re Saylor*, 437 N.E.2d 321 (Ohio Ct. Cl. 1982); *White v. Violent Crimes Comp. Bd.*, 388 A.2d 206 (N.J. 1978). In Tennessee, compensation is "a matter of legislative largesse." *Williams v. State*, No. 01-A-01-9206-BC-00212, 1993 Tenn. App. LEXIS 148, at *5 (Tenn. Ct. App. Feb. 19, 1993). In Ohio, it is the product of "a legislatively created class gift." *In re Schroepfer*, 448 N.E.2d 528, 531 (Ohio Ct. Cl. 1983).

²³ *Criminal Injuries Comp. Bd. v. Gould*, 331 A.2d 55, 71 (Md. 1975). This is one of only two American cases the writer has found referencing the British Scheme. The other is *Hersh v. Kentfield Builders, Inc.*, 172 N.W.2d 56, 58 (Mich. Ct. App. 1969). But see *McComas v. Criminal Injuries Comp. Bd.*, 594 A.2d 583, 585 (Md. Ct. Spec. App. 1991) ("victims of crime do not have a substantive right to the benefits created but only an expectation of receiving those benefits"). Both views are said to be derived from the "welfare" nature of the compensation program. See also *Ellis v. N.C. Crime Victims Comp. Comm'n*, 432 S.E.2d 160, 165 (N.C. Ct. App. 1993) (Board not given "complete discretion" as to the making of an award).

Board—or a court—has held that a person who satisfies the terms of a program may properly be refused compensation. It would appear, therefore, that American victims have, in practice, just as strong a “right” to compensation as their British counterparts—with one exception: Many programs expressly provide that the payment of an award is subject to the availability of funds; if sufficient funds are not available, the Board is permitted—or indeed required—to make a reduced award, or no award at all.²⁴ Such statutory provisions operate, both in theory and in practice, as a significant derogation from what may otherwise be a substantial, even if *de facto*, “right” to compensation.

III. THE CONCEPT OF A VICTIM.

A. CITIZENSHIP AND RESIDENCE.

From the outset, the British Scheme has applied to any person, irrespective of nationality, domicile, or length of residence, who sustains a criminal injury in England, Wales, or Scotland or on board a British vessel or aircraft. Coverage is not, however, provided for any British citizen injured abroad.²⁵ Similarly, in the United States, many of the earlier state programs applied only to residents injured or killed within the state. Coverage was not available for non-residents or for residents injured or killed outside the state. One of the first requirements of VOCA was the removal of any bar on the award of compensation to non-residents injured or killed within the state,²⁶ and Nevada is now the only state which fails to comply with this provision.²⁷ Many programs, however, do not apply to prison inmates.²⁸ The citizenship of victims is generally irrelevant,²⁹ but some uncer-

²⁴ See, e.g., UTAH CODE ANN. § 63-63-31(2) (1993) (“This program is not an entitlement program. Awards may be limited or denied as determined appropriate by the board to insure the viability of the fund.”). See *infra* text accompanying notes 229 to 235.

²⁵ BRITISH SCHEME, *supra* note 10, ¶ 4; GREER, *supra* note 10, at 25-28.

²⁶ 42 U.S.C. § 10602(b)(4) (1988) (providing that a state program qualifies for VOCA support if “such program, as to compensable crimes occurring within the State, makes compensation awards to victims who are nonresidents of the State on the basis of the same criteria used to make awards to victims who are residents of such State”).

²⁷ NEV. REV. STAT. ANN. § 217.220(1)(d) (Michie 1992) (victim must be resident of Nevada). This provision makes Nevada the only program which fails to meet VOCA requirements. See *supra* note 8. However, many state programs, such as KY. REV. STAT. ANN. § 346.025(2) (Baldwin 1993), provide that non-residents are covered only while federal funding is available.

²⁸ See, e.g., GA. CODE ANN. § 17-15-7(c) (1994) (no compensation paid to a victim injured while confined in any federal, state, county or municipal jail, prison, or other correctional facility); MICH. COMP. LAWS § 18.360(d) (1994) (same); MO. REV. STAT. § 595.020(3) (Vernon Supp. 1994) (same).

²⁹ Non-U.S. residents are not eligible for compensation if injured in Arizona, ARIZ. COMP. ADMIN. R. & RECS. R10-4-103(3) (1990), Pennsylvania, PA. STAT. ANN. tit. 71, § 180-

tainty remains with respect to non-citizens who have entered or remain in the United States unlawfully.³⁰

In 1988, a further VOCA provision required states to compensate residents who were victims in another state which did not have a compensation program.³¹ With the enactment of programs in all states, however, this provision has now lost most of its significance. Some programs also provide coverage for residents injured outside the United States—at least if they are injured in a jurisdiction which does not have a compensation scheme.³²

7.3(c) (1990), or Texas, TEX. CRIM. PROC. CODE ANN. art. 56.32(10)(A)(iii) (Vernon 1994). Other programs have a reciprocity provision. Thus, a resident of a foreign country injured in Ohio is only entitled to compensation if “the laws of [that country permit residents of Ohio] to recover compensation as victims of offenses committed in that country.” OHIO REV. CODE ANN. § 2743.51(A)(1)(a)(ii) (Baldwin 1990).

³⁰ Occasionally, as in Arizona, the program expressly requires a claimant to be “a lawful resident of the United States.” ARIZ. COMP. ADMIN. R. & REGS. R10-4-103(3) (1990). But often it is enough if he or she is a “person,” and in *Hernandez v. Fahner*, 481 N.E.2d 1004 (Ill. App. Ct. 1985), the court held that “the word ‘person’ meant all persons regardless of immigration status or citizenship.” *Id.* at 1011. An administrative policy of requiring proof of immigration status was therefore held to be unauthorized. *Id.* at 1012. *See also* *Cabral v. State Bd. of Control*, 169 Cal. Rptr. 604 (Cal. Ct. App. 1980) (compensation payable to illegal immigrant injured in California).

³¹ 42 U.S.C. § 10602(b)(6) (1988) imposes two conditions, that “(A) the crimes would be compensable crimes had they occurred inside that State; and (B) the places the crimes occurred in are States not having eligible crime victim compensation programs.” Except for Nevada and Puerto Rico, every state has an eligible crime victim compensation program. Nevada has no “eligible” program, NEV. REV. STAT. ANN. § 217.220(1)(d) (Michie 1992), while Puerto Rico does not have any program. *See supra* note 8.

³² Coverage for residents injured abroad is included in the 1992 UNIFORM ACT, *supra* note 2, § 306(b), and a recent survey has established that some 24 programs have such a provision, at least in cases where the foreign jurisdiction is without a similar program: Research Notes, *Coverage in Foreign Countries*, CRIME VICTIM COMP. Q., No. 3, 1993, at 8. *See, e.g.*, UTAH CODE ANN. § 63-63-14(5) (1993); WIS. STAT. ANN. § 949.035(1) (West Supp. 1993); N.J. ADMIN. CODE tit. 13, § 13:75-1.6(f)(2) (1993). In New Jersey, where compensation is payable to a resident injured abroad if: (a) the foreign jurisdiction is without a victim compensation program, or (b) compensation is payable but does not “fully compensate” the victim for all expenses, compensation was awarded (under (b)) to the widow of a New Jersey resident killed when a terrorist bomb exploded on Pan Am Flight 103 over Lockerbie Scotland. N.J. VIOLENT CRIMES COMP. BD., ANNUAL REPORT 1989-1990, at 14-15 (1991). The British Board made its first “sizeable” payment of compensation to a widow in June 1994. *Pan Am Widow Wins £32,270*, DAILY TELEGRAPH, June 29, 1994, at 4. Many programs, however, still have a provision such as ALA. CODE § 15-23-3(2)(b) (Supp. 1994) and MINN. STAT. ANN. § 611A.53(1b) (West Supp. 1994) (out-of-state coverage applies only where the injury is sustained in any state, territory, or United States possession).

B. THE COMPENSATING EVENT.

1. *A Crime of Violence.*

(a) Generally.

From the outset, the British Scheme operated on the basis that the principle of public compensation could “justifiably” be restricted to victims of crimes of violence.³³ Similarly, compensation under VOCA is payable to victims of “criminal violence.”³⁴ Indeed, much of the justification for public compensation of crime victims in both countries derives from the concept of “violent” crime. That concept has a seemingly clear core meaning, but is one which, in practice, has led to some definitional difficulties. One obvious approach is to stipulate a list of “violent” crimes, as in New Jersey, where compensation is payable for injury or death resulting from the commission of or attempt to commit:

1. aggravated assault;
2. mayhem;
3. threats to do bodily harm;
4. lewd, indecent, or obscene acts;
5. indecent acts with children;
6. kidnapping;
7. murder;
8. manslaughter;
9. rape;
10. any other crime involving violence, including domestic violence.;
11. burglary;
12. tampering with a cosmetic, drug or food product.³⁵

Such stipulative definitions are designed to reduce problems of interpretation and application. But they are open to the objection that “[t]his practice could result in denial of benefits to some deserving victims simply because legislatures failed to amend victim compensation laws to reflect new or changing offense definitions in their criminal codes.”³⁶ The New Jersey program seeks to avoid this danger by including “any other crime involving violence.” But does that phrase mean “any other crime” which “*by its nature* involves violence” or “any other crime which *in the particular* case involves violence?” The New

³³ COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, 1961, Cmnd. 1406, at iv.

³⁴ 42 U.S.C. § 10602(b)(1) (1988). The statute also requires a victim of a federal crime to be compensated on the same basis as the victim of a state crime. 42 U.S.C. § 10602(b)(5) (1988).

³⁵ N.J. STAT. ANN. § 52:4B-11(b) (West Supp. 1994) (subsection (c) adds DUI offenses). See also ALASKA STAT. §18.67.101 (1991); D.C. CODE ANN. § 3-401(3)(A) (1994); 740 ILCS 45/2(c) (Supp. 1994); ME. REV. STAT. ANN. tit. 5, § 3360(3) (West Supp. 1993); WIS. STAT. ANN. § 949.03(1)(b) (West Supp. 1993).

³⁶ DALE G. PARENT ET AL., COMPENSATING CRIME VICTIMS: A SUMMARY OF POLICIES AND PRACTICES 20 (1992) [hereinafter NIJ SUMMARY].

Jersey Superior Court has adopted the first—and narrower—of these possible interpretations:

Is arson a crime of violence under the Criminal Injuries Compensation Act? We hold that because arson carries an inherent risk of causing bodily injury to occupants, rescuers, and persons seeking to extinguish a fire, it may be considered a crime of violence . . . where a claimant is in fact injured by reason of an arson-caused fire.³⁷

But many programs prefer a broader and more pragmatic approach.³⁸

In addition, a list system may tempt legislatures to add specific offenses in response to special pleading—as may have been the case in New Jersey with reference to “tampering with a . . . product.” In Great Britain, where railway suicides have led to train drivers suffering nervous shock, the Scheme was amended in 1990 to include injuries suffered as a result of “an offence of trespass on a railway.”³⁹

In general, however, while the British Scheme provides that compensation is payable for any injury directly attributable to “a crime of violence (including arson and poisoning),”⁴⁰ it does not list specific offenses. Many programs in the United States use similar language. However, a descriptive phrase such as “crime of violence” or “criminally injurious conduct” is open to different interpretations. Thus, compensation may be payable with respect to:

[C]onduct that; (1) occurs or is attempted in this State, (2) poses a substantial threat of personal injury or death, and (3) is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state.⁴¹

The Massachusetts Program offers a variation on this approach:

[A]n act . . . which . . . would constitute a crime; provided . . . that such act involves the application of force or violence or the threat of violence by the offender upon the victim.⁴²

³⁷ *Puntasecca v. Violent Crimes Comp. Bd.*, 519 A.2d 890, 892 (N.J. Super. Ct. 1986). Arson resulting in bodily injury is explicitly covered by some programs. See, e.g., N.M. STAT. ANN. § 31-22-8(A)(1) & (2) (Michie Supp. 1994).

³⁸ See *infra* text accompanying notes 45 to 48.

³⁹ BRITISH SCHEME, *supra* note 10, ¶ 4(c). For the background, see GREER, *supra* note 10, at 52 and *infra* text accompanying notes 43 to 44. Oregon provides another macabre example—“abuse of a corpse in any degree.” OR. REV. STAT. § 147.005(4) (1993).

⁴⁰ BRITISH SCHEME, *supra* note 10, ¶ 4(a). Cf. Criminal Justice Act 1988, ch. 33, § 109(1)(a) & (3) (Eng.) (Act would have substituted a combination of a general test and a list of specific offenses).

⁴¹ This formula, recommended in the 1973 UNIFORM ACT, *supra* note 2, § 1(e), was adopted in OHIO REV. CODE ANN. § 2743.51(C)(1) (Baldwin 1990). See also MINN. STAT. ANN. § 611A.52 (6) (West 1987 & Supp. 1994); TEX. CRIM. PROC. CODE ANN. art. 56.32(4) (West Supp. 1994). The 1992 UNIFORM ACT, *supra* note 2, § 304 refers simply to “a crime [of violence, including drunk driving and domestic abuse].” (brackets in original).

⁴² MASS. GEN. LAWS ANN. ch. 258A, § 1 (West 1990 & Supp. 1994); see, e.g., *Marshall v. Commonwealth*, 602 N.E.2d 204 (Mass. 1992) (in the absence of wanton or reckless con-

Such definitions suggest that compensation is restricted to inherently violent crimes; injury or death resulting from a crime does not *per se* suffice. As the English Court of Appeal held in relation to the British Scheme, “[W]hat matters is the nature of the crime, not its likely [or actual] consequences.”⁴³ As a result, neither a train driver who suffered nervous shock from witnessing a person commit suicide by throwing himself in front of a train, nor a police officer who was injured as a result of criminal damage to property, received compensation.⁴⁴

Such problems of interpretation tend to be avoided by a more pragmatic—and more generous—approach which focuses not on the nature of the crime, but on its consequence. Under this approach, compensation is payable where any crime⁴⁵ (as defined in the state’s Criminal Code or in federal legislation) *in fact* results in personal injury or death.⁴⁶ This was the method originally adopted in Great Britain, but it was rejected in 1969 because it gave the Scheme an application—or at least a potential application—which went beyond its intended scope.⁴⁷ State programs which have adopted this approach are open to similar interpretation, but, as yet, this issue has not arisen in practice or caused legislative concern.⁴⁸

duct by another, no crime of violence where V dies of self-inflicted drug overdose). The proviso ceases to apply in 1995. See MASS. GEN. LAWS ANN., ch. 258C, § 1 (West Supp. 1994). Missouri has a similar provision. MO. REV. STAT. § 595.010.1(1) (Vernon Supp. 1994).

⁴³ Regina v. Criminal Injuries Comp. Bd., *ex parte* Webb [1987] Q.B. 74, 79 (*per* Lawton L.J.).

⁴⁴ See *id.*; Regina v. Criminal Injuries Comp. Bd., *ex parte* Clowes [1977] 1 W.L.R. 1353.

⁴⁵ Compensation may be limited to the victims of felonies. See, e.g., N.H. REV. STAT. ANN. § 21-M:8-h(I) (West Supp. 1993) (adding DUI victims). Other apparently limiting formulae probably do not help to interpret when a crime is compensable. For example, the Colorado program offers compensation for an “intentional, knowing, reckless, or criminally negligent act.” COLO. REV. STAT. § 24.4.1-102(4) (1988). But what is one to make of the Delaware approach which provides compensation for “any specific offense . . . if the offense . . . contains the characteristics of murder, rape” DEL. CODE ANN. tit. 11, § 9002(3) (1987 & Supp. 1993). See also *Keddie v. Delaware Violent Crimes Comp. Bd.*, 1991 WL 215655 (Del. Super. Ct.) (holding that “promoting suicide” or assisting a person to commit suicide is a compensable crime).

⁴⁶ See, e.g., FLA. STAT. ANN. § 960.03(3) (West 1985 & Supp. 1994); GA. CODE ANN. § 17-15-2(3) (1990 & Supp. 1994) (referring to any crime which results in “physical injury, financial hardship or death to the victim”); WIS. STAT. ANN. § 949.01(1) (West 1982).

⁴⁷ “[A] breach of the Factory Acts is a criminal offence and the Scheme was plainly never intended to permit an application to the Board [in respect of an injury caused by such an offence]” CRIMINAL INJURIES COMP. BD., SIXTH ANNUAL REPORT, 1970, Cmnd. 4494, ¶ 7.

⁴⁸ But see *Ruppert v. Commonwealth Crime Victims Comp. Bd.*, 565 A.2d 221 (Pa. Commw. Ct. 1989), *appeal denied* 578 A.2d 932 (1990). In *Ruppert*, the victim, injured in an accident at work, claimed compensation on the basis that his employer’s failure to obtain workers’ compensation insurance was a crime. Even though the court acknowledged that failure to obtain workers’ compensation insurance is a crime, it refused compensation be-

However legislators define "crime of violence," most criminal injuries compensation in the United States and in Great Britain is paid to victims of crimes which are undeniably "violent."⁴⁹ Although precise comparison is impossible due to the use of different (and sometimes unclear) classifications, Table 1 gives some impression of the general pattern in six United States programs:

Table 1: INCIDENCE OF COMPENSATION CLAIMS RECEIVED BY CRIME CATEGORY (%)⁵⁰

	CALIF	MINN	NY	TEXAS	OTHER	ALL
Murder/Homicide	14.6	9.1	10.6	9.2	9	9.1
Robbery	6.3	2.2	n/a	7.0	n/a	n/a
Assault	24.1	53.9	84.1	49.0	50.0	39.9
Rape/Sexual assault	7.0	5.9		4.9	8	7.5
Child molest/abuse	31.8	17.6	3.7	14.7	23	21.0
Domestic violence	n/a	2.2		n/a	4	3.1
DUI	3.3	4.7	1.6	3.3	3	2.5
Hit-and-run	3.3	n/a		3.1	n/a	n/a
Other	9.5	4.4		8.83		16.9

Two specific offenses which, largely as a result of "grassroots" pressure, have given rise to special consideration in the United States are drunken driving and domestic violence.

(b) Drunken Driving.

An injury attributable to a "traffic offense" was never compensable under the British Scheme, unless it was due to "a deliberate attempt to run the victim down."⁵¹ Prior to 1988, most programs in the

cause the victim's injury was not a "direct" result of that crime. *Id.*

⁴⁹ Compensation is payable irrespective of whether the offender is apprehended, prosecuted, or convicted, provided that the victim proves by a preponderance of the evidence that the offense was committed. See, e.g., ME. REV. STAT. ANN. tit. 5, § 3360-F(3) (West Supp. 1993); UTAH CODE ANN. § 63-63-11 (1993); *Anne B. v. State Bd. of Control*, 165 Cal. App. 3d 279 (Cal. Ct. App. 1984). A criminal act is an offense for compensation purposes even if the offender lacked legal capacity to commit it by reason of insanity, intoxication, infancy, etc. Compensation proceedings may be suspended if a prosecution is pending or imminent. See, e.g., ALASKA STAT. § 18.67.080(d) (1992). A conviction may be conclusive proof of the commission of a crime. See, e.g., MINN. STAT. ANN. §611A.52 (6)(b) (West 1987 & Supp. 1994).

⁵⁰ See CAL. STATE BD. OF CONTROL, BIENNIAL REPORT 1990-1992, at 30 (1993); MINN. CRIME VICTIMS REPARATIONS BD., 1993 ANNUAL REPORT 6 (1994); N.Y. STATE CRIME VICTIMS BD., ANNUAL REPORT 1990-1991, at 22 (1992); OFFICE OF THE ATTORNEY GENERAL, TEX. CRIME VICTIMS COMP. ANNUAL REPORT 1993, at 16 (1994). "All" refers to a "nationwide analysis" of claims statistics for 1993 compiled by the Office for Victims of Crime (copy on file). "Other" refers to a survey of seven states in Note, *Percentage of Claims Received (or Paid) by Type of Crime*, CRIME VICTIM COMP. Q., No. 2, 1994, at 12. Note that it is not always clear whether "murder" includes other homicides, and whether "domestic violence" includes child abuse cases. The British Board does not give this information in its Annual Reports.

⁵¹ BRITISH SCHEME, *supra* note 10, ¶ 11. See GREER, *supra* note 10, at 46-48.

United States similarly excluded compensation for injuries "arising out of the ownership, maintenance, or use of a motor vehicle except when intended to cause personal injury or death."⁵² Two reasons were normally adduced: First, legislatures did not intend public compensation to cover "accidental" injuries, and second, the existence of motor vehicle insurance—and of uninsured motorist coverage schemes—meant that road accident victims would usually be compensated, regardless of impecunious defendants. Similar arguments prevailed in Great Britain. In 1988, however, Congress amended VOCA to provide that "compensable crime" includes "driving while intoxicated" (DUI).⁵³ As a result, and unlike the position in Great Britain, DUI injuries or deaths are now compensable in all programs. A typical provision is that found in Minnesota:

'Crime' does not include an act involving the operation of a motor vehicle, aircraft, or watercraft that results in injury or death, except that a crime includes any of the following:

- (1) injury or death intentionally inflicted through the use of a motor vehicle, aircraft, or watercraft;
- (2) injury or death caused by a driver in violation of [drunk driving laws] . . . ; and
- (3) injury or death caused by a driver of a motor vehicle in the immediate act of fleeing the scene of a crime in which the driver knowingly and willingly participated.⁵⁴

In addition, many programs have been extended to include injuries caused by "hit-and-run" drivers⁵⁵ and reckless driving.⁵⁶ But there have also been attempts to limit the effect of such provisions. Victims are reminded that they have the burden of proving, by a preponderance of the evidence, that the driver of the vehicle was intoxicated.⁵⁷

⁵² As recommended by the 1973 UNIFORM ACT, *supra* note 2, § 1(e). See, e.g., MCGILLIS & SMITH, *supra* note 1, ¶ 4.1.3 (1983); DEBORAH CARROW, CRIME VICTIM COMPENSATION PROGRAM MODEL 37-38 (1980).

⁵³ 42 U.S.C. § 10602(d)(3) (1988).

⁵⁴ MINN. STAT. ANN. § 611A.52(6)(c) (West 1987 & Supp. 1994); See, e.g., CAL. GOV'T. CODE § 13960(c) (West 1989 & Supp. 1994); OHIO REV. CODE. ANN. § 2743.51(C)(1) (Baldwin 1990).

⁵⁵ Note, *Coverage of Hit and Run as Compensable Crime*, CRIME VICTIMS COMP. Q., No. 3, 1993, at 8 (reporting that 25 of 44 responding states cover victims of hit and run violations with no specific indication of drunk driving). The 1992 UNIFORM ACT, *supra* note 2, § 304(1), however, is limited to DUI offenses.

⁵⁶ See NAT'L ASS'N OF CRIME VICTIM COMP. BDS., PROGRAM HANDBOOK II-1 (1992) [hereinafter CVCB HANDBOOK]. Missouri seems to be unusual in providing compensation for "vehicular manslaughter" even if the driver was not intoxicated. MO. REV. STAT. § 595.010.1(1) (Vernon Supp. 1994).

⁵⁷ See, e.g., N.J. ADMIN. CODE tit. 13, § 13:75-1.7(i)(1) (1993) (not necessary that offender be convicted of offense, but victim "must demonstrate by a preponderance of the credible evidence that the incident involved driving under the influence of alcohol or drugs").

Indiana sets out road traffic offenses that are *not* covered:

- (A) A crime . . . resulting from the operation of a vehicle other than a motor vehicle.
- (B) Involuntary manslaughter resulting from the operation of a motor vehicle by a person who was not intoxicated.
- (C) Reckless homicide resulting from the operation of a motor vehicle by a person who was not intoxicated.
- (D) Criminal recklessness involving the use of a motor vehicle, unless the offense was intentional or the person using the motor vehicle was intoxicated.⁵⁸

Other programs adopt exclusionary rules based loosely on the concept of "contributory misconduct." For example, some states refuse to compensate victims who were also drunk drivers, who were passengers in the offender's vehicle and either knew or ought to have known of the condition of the driver, or who were not wearing a seat-belt.⁵⁹

Such provisions reflect a concern that the inclusion of drunk driving and other automobile accident cases will lead to many new claims being made on budgets that are already overstretched. However, there is little evidence that this is happening. In 1989, a survey of five programs found that drunk driving accounted for only two to four percent of claims filed.⁶⁰

Table 1 suggests that the picture has not changed a great deal since 1989.⁶¹ Nonetheless, such cases tend to give rise to more serious injuries, so that "average awards in DUI cases are more than twice the average award for all other claims."⁶² In addition:

Program staff believe drunk driving cases take more time to process than

⁵⁸ IND. CODE ANN. § 5-2-6.1-3(1) (Burns 1994).

⁵⁹ See, e.g., LA. REV. STAT. ANN. § 46:1809(B)(4) (West 1982 & Supp. 1994); MD. ANN. CODE art. 26A, § 12(e)(2) (Supp. 1992); N.H. CODE ADMIN. R. 603.03(f) (1992); N.J. ADMIN. CODE tit. 13, § 13.75-1.7(i)(2) (1993); WIS. STAT. ANN. § 949.08(2)(e) (West Supp. 1993). See also *infra* text accompanying note 170.

⁶⁰ NIJ SUMMARY, *supra* note 36, at 4. See also CVCB Handbook, *supra* note 56, at XV-1 ("experience . . . would suggest that . . . relatively few claims . . . are filed [because of] the availability of collateral resources, such as . . . automobile insurance, uninsured motorists funds, medical insurance and life insurance.").

⁶¹ See PA. CRIME VICTIM'S COMP. BD., ANNUAL REPORT 1992-1993, at 26 (1993) (reporting that DUI accounted for only 16 out of 1669 claims paid in 1992-1993); DIV. OF VICTIM SERVICES AND CRIMINAL JUSTICE PROGRAMS, ANNUAL REPORT 1992-1993, at 18 (1994) (reporting that, in Florida, 4.7% of awards in 1992-1993 were made to DUI victims).

⁶² NIJ SUMMARY, *supra* note 36, at 20. More recent experience may be less pronounced. For example, in California, DUI injuries represented 3.3% of claims received and 4.5% of dollars paid in 1991-1992. CAL. ST. BD. OF CONTROL, BIENNIAL REPORT, *supra* note 50, at 30. The comparable figures for Texas were 3.3% and 4.2% respectively. TEX. CRIME VICTIMS COMP., ANNUAL REPORT, *supra* note 50, at 16, 18. In Minnesota, 5% of claims and 7% of payments arose from DUI cases. MINN. CRIME VICTIMS REPARATIONS BD., ANNUAL REPORT, *supra* note 50, at 6, 10. Figures produced by the Office for Victims of Crime (on file) suggest that payments in DUI claims in 1993 averaged \$3741 nationwide, as compared with the overall average payment of \$2084.

other cases and note that dealing with two insurance companies and numerous attorneys—as is the norm in these cases—greatly increases the length of time from filing to payment.⁶³

It seems likely, however, that such problems are being ameliorated as programs become more familiar with DUI claims. The net result is that this initiative, despite some concerns, is being successfully incorporated into the state programs.

(c) Domestic Violence

Prior to 1979, the British Scheme did not allow compensation for most injuries arising from domestic violence.⁶⁴ Once again, a similar exclusion also operated in the United States. Boards in the United States, however, sometimes granted an award when “the interests of justice so require[d].”⁶⁵ The rationale for this exclusion is familiar to a British observer:

The victims of a large percentage of crimes are relatives by blood or marriage of the offender or his accomplice, or live in the same household with him. The award of [compensation] in these cases involves serious questions of policy. Among those questions are the cost of the program, the possibility of fraud and collusion, and other social judgments. [Permitting a Board to refuse compensation where the award would unjustly benefit the offender or his accomplice] may or may not alone provide adequate protection.⁶⁶

In 1978, because of growing public concern about domestic assaults on women and children, it became accepted in Great Britain that a general “domestic violence” exception could cause injustice. The British Scheme was accordingly amended to allow claims by such victims, but with certain requirements.⁶⁷ Shortly thereafter, a similar de-

⁶³ NIJ SUMMARY, *supra* note 36, at 21.

⁶⁴ See generally GREER, *supra* note 10, at 84-93; MIERS, *supra* note 10, at 153-56. This remains the law for injuries sustained before 1979. See *Regina v. Criminal Injuries Comp. Bd., ex parte P* [1994] 1 All E.R. 80 (compensation not payable for child sex abuse by stepfather committed before Scheme amended in 1979); an appeal to the Court of Appeal has been dismissed. THE INDEPENDENT, May 12, 1993.

⁶⁵ This was the case in Kansas and Minnesota. See CARROW, *supra* note 52, at 42-43; MCGILLIS & SMITH, *supra* note 1, at 64-65.

⁶⁶ 1973 UNIFORM ACT, *supra* note 2, § 5(c), comment. See, e.g., *Hollis v. State*, 468 N.E.2d 553 (Ind. Ct. App. 1984); *Weisinger v. Van Rennselaer*, 362 N.Y.S.2d 126 (1974). Compare CRIMINAL VICTIMIZATION IN THE UNITED STATES 1992, at 149 (1994) (“Family violence [against persons aged 12 or older] accounted for 7% of all violent crimes . . . 53% of the . . . violent crimes occurring between relatives involved the spouse or the ex-spouse of the victim.”).

⁶⁷ BRITISH SCHEME, *supra* note 10, ¶ 8. In the case of adult victims, compensation is payable only where the offender has been prosecuted (or there are good reasons why a prosecution has not been brought), the offender and victim no longer live together in the same household, and the Board are satisfied that the offender will not benefit from any award. A child victim of domestic violence does not have to satisfy the living apart requirement, but he or she may be refused compensation where an award would be “against the

velopment occurred in the United States. In 1982, the President's Task Force on Victims of Crime commented that:

The states' desire to minimize fraud is laudable; however, many innocent victims of violence in the home are being unfairly ignored. Some states have successfully experimented with allowing flexibility in this area as long as the award will not unjustly benefit the offender. A blanket exclusion may be particularly devastating to child victims of intra-family abuse who, as a result, are denied adequate treatment.⁶⁸

Two years later, the Attorney General's Task Force on Family Violence also concluded that "this blanket exclusion [of victims of domestic violence] is unwarranted and blatantly unfair."⁶⁹ Not surprisingly, in 1988 congress amended VOCA. Federal support would now be given only to state programs that do

not, except pursuant to rules issued by the program to prevent unjust enrichment of the offender, deny compensation to any victim because of that victim's familial relationship to the offender, or because of the sharing of a residence by the victim and the offender⁷⁰

Accordingly, the states amended their programs to this effect.⁷¹ Some even require unjust enrichment to be "substantial," as opposed to "minimal" or "inconsequential."⁷² But a concern lingered over the necessity of further safeguards, like those in the British Scheme, to prevent possible abuse. Some programs, for example, contained provisions like the following:

Except in the case of rape, a member of the family of the offender or a person maintaining sexual relations with the offender shall not be eligible to receive compensation for injuries sustained in an alleged crime committed by the offender unless:

minor's interest." See generally GREER, *supra* note 10, at 84-93.

⁶⁸ TASK FORCE FINAL REPORT, *supra* note 4, at 41.

⁶⁹ *Id.* at 53.

⁷⁰ 42 U.S.C. § 10602(b)(7) (1988). Note that rules relating to unjust enrichment apply to *all* claims, but in practice have greatest significance in domestic violence claims. Program guidelines issued by the Department of Justice in 1990 list four factors which states should consider in developing rules governing domestic violence claims and stress that "such rules cannot have the effect of denying most domestic violence victims of compensation." 55(2) FED. REG. 3180, 3184 (1990).

⁷¹ See, e.g., the Florida program was amended in 1990 to comply with VOCA. FL. DIV. OF VICTIM SERVICES, ANNUAL REPORT 1990-1991, at 15 (1992). Some programs now expressly cover injuries arising from the crime of "domestic violence." See, e.g., N.J. STAT. ANN. § 52:4B-11(b) (West Supp. 1994); see *supra* text accompanying note 35.

⁷² See, e.g., CONN. GEN. STAT. ANN. § 54-211(b) (West 1985 & Supp. 1994) ("No compensation shall be awarded if . . . the offender is unjustly enriched by the award, provided compensation . . . which would benefit the offender in a minimal or inconsequential manner shall not be considered unjust enrichment"). N.J. ADMIN. CODE tit. 13 § 13.75-1.6(c) (1992) lists eight factors to be considered in determining whether unjust enrichment is "substantial." Compare the National Association of Crime Victim Compensation Board's "recommended rules" set out in CVCB HANDBOOK, *supra* note 56, at XIV-3 to XIV-4.

- (1) such compensation would be in the interests of justice;
- (2) such compensation would not unjustly benefit the offender; and,
- (3) the claimant verifies . . . that [he] has cooperated with law enforcement or the prosecution of the crime . . . or . . . demonstrates to the court that he possesses or possessed a reasonable excuse for failing to cooperate.⁷³

Another cautious approach can be found in Missouri, where the Board awards compensation "only if [it] can *reasonably* determine [that] the offender will receive no substantial economic benefit or unjust enrichment from the compensation."⁷⁴ By way of contrast, a more constructive provision is found in New York:

[If] the Board determines . . . that the person criminally responsible will receive substantial economic benefit or unjust enrichment from the compensation . . . the award may be reduced or structured in such way as to remove the substantial economic benefit or unjust enrichment to such person or the claim may be denied.⁷⁵

Because of these requirements, the number of *adult* domestic violence claims, though increasing, has remained relatively low:

In Fiscal Year 1990, the states awarded roughly \$2.2 million to slightly over 1600 domestic violence victims. By the close of Fiscal Year 1992, the number of claims awarded to domestic violence victims increased by 1005 and payments increased by nearly \$1.5 million.⁷⁶

It may be that victims of domestic violence often do not report the crime, or if they do, they do not then cooperate in investigations. And both steps are required for a successful claim.

On the other hand, child molestation or abuse has become a major source of compensation claims in some states. In California, such claims represented 7.0% of all claims made in 1983-1984. In 1991-1992 (as indicated in Table 1) this figure rose to 31.8% of claims and 27.2% of payments. The California State Board of Control com-

⁷³ MASS. GEN. LAWS ANN. ch. 258A, § 3 (Law. Co-op. 1992). The Massachusetts legislature has repealed conditions (1) and (3) effective 1995. MASS. GEN. LAWS ANN. ch. 258C, § 2(d) (Law. Co-op. Supp. 1994).

⁷⁴ MO. REV. STAT. § 595.020.2 (Vernon 1994) (emphasis added). N.H. CODE ADMIN. R. JUS. r. 606.01 (1993) and WYO. STAT. § 1-40-106(b)(i) (Supp. 1993) are similar.

⁷⁵ N.Y. EXEC. LAW § 624(2) (McKinney Supp. 1994). Cf. V.I. CODE ANN. tit. 34, § 164(d) (1992). Under PA. STAT. ANN. tit. 71, § 180-7.3(b) (Supp. 1993), the Attorney General may sue the offender or the victim or both to recover the award if the offender at any time benefits from it.

⁷⁶ 1994 VOCA REPORT, *supra* note 8, at 16. Information provided by the Office for Victims of Crime (on file) suggests that in 1993 the number of claims rose to 5055 (or 3.1% of all claims), and that 3469 claims totalling \$4.9 million were paid. There may, however, be some under-reporting in all these estimates, given that domestic violence resulting in death may be classified as "homicide" rather than "domestic violence." For an assessment of the scope of such violence, see Lucy N. Freedman & Minna Shulman, *Domestic Violence—The Criminal Justice Response*, in VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS 27, 87 (Arthur J. Lurigio et al. eds., 1990).

mented that this increase resulted from many factors:

These include a more realistic societal recognition of child molest issues . . . expansion of the [Victims of Crime] Program . . . to provide for a more comprehensive treatment for these victims and their families; and a greater awareness, in general, by the public of the Victims of Crime Program.⁷⁷

Unfortunately, it appears that other programs have experienced similar, if somewhat less pronounced, trends.⁷⁸ Nationwide, payments for child abuse claims rose from \$6.2 million in 1986 to \$36.6 million in 1991.⁷⁹ Coincidentally, the British Board also commented recently on the noticeable increase in child abuse claims.⁸⁰

In light of this experience, a number of states have modified their procedural requirements in domestic violence cases. In Minnesota, a victim of criminal sexual conduct "who does not report the crime within [the normal limit of] five days of its occurrence is deemed to have been unable to . . . report it within that period."⁸¹ In many states, special provision is made for the victims of child sexual abuse. For example, in Michigan, where claims must normally be filed within one year after the commission of the crime, victims subjected to criminal sexual conduct when under the age of eighteen may report the crime before attaining the age of nineteen and then have another year within which to file their claim.⁸² In some programs, the reporting requirement is satisfied in domestic violence cases if the victim makes a report to an appropriate agency other than the police. In a related development, compensation may be awarded for "emergency

⁷⁷ VICTIMS OF CRIME PROGRAM, ST. BD. OF CONTROL, CAL. CARES 15 (1990).

⁷⁸ See e.g., MINN. CRIME VICTIMS REPARATIONS BD., *supra* note 50, at 6, 10 (child abuse 18% of all claims and 9% of payments); N.J. VIOLENT CRIMES COMP. BD., 1992-1993 ANNUAL REPORT (child abuse and incest 8.4% of claims and 2.3% of payments); TEX. CRIME VICTIMS COMP., *supra* note 50, at 16, 18 (child abuse 14.7% of claims and 5.2% of payments).

⁷⁹ 1994 VOCA REPORT, *supra* note 8, at 23. Information from the Office for Victims of Crime for 1993, when child abuse claims represented 21% of all claims nationwide and 16.5% of payments (totalling \$39 million), confirms that such claims are overwhelmingly for sexual abuse.

⁸⁰ CRIMINAL INJURIES COMP. BD., 28TH ANNUAL REPORT 1991-1992, 1992, Cmnd. 2122, at 9-10; 29TH ANNUAL REPORT 1992-1993, 1993, Cmnd. 2421, at 2. Child abuse claims, including non-"domestic" cases, rose from 4825 in 1989-1990 to 7211 in 1992-1993. *Id.* This accounts for roughly 11% of all applications. A special leaflet on "Child Abuse and the Criminal Injuries Compensation Scheme" was published by the Board in 1990.

⁸¹ MINN. STAT. ANN. § 611A.53(2)(a) (West 1987 & Supp. 1994). THE REPORT OF THE ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 53 (1984) recommended that "eligibility criteria should allow extended reporting periods for all cases of sexual assault when the victim is a child or elderly person." NEV. REV. STAT. ANN. § 217.220(2)(a) (Michie 1992) extends this concession to minors involved in the production of pornography.

⁸² MICH. COMP. LAWS § 18.355(2)(a) (1994). The Michigan program further requires the Board to publish "an informational pamphlet or card for victims of domestic violence explaining the legal rights and services available to them." *Id.* at § 18.353a. For a more general review, see Note, *Eligibility Requirements*, CRIME VICTIM COMP. Q., No. 2, 1994, at 8.

shelter care expenses" to enable a victim to avoid contact with the offender.⁸³

2. Law Enforcement

Although VOCA does not contain a "good samaritan" or "intervenor" provision for persons injured or killed while attempting to enforce the law, most state programs, like the British Scheme,⁸⁴ include (or are complemented by) one. A fairly typical formula is found in Wisconsin:

The department may order the payment of an award for personal injury or death which results from . . . (a) preventing or attempting to prevent the commission of a crime; apprehending or attempting to apprehend a suspected criminal; aiding or attempting to aid a police officer to apprehend or arrest a suspected criminal; aiding or attempting to aid a victim of a [violent] crime⁸⁵

It is normal for the provisions to exclude police and fire officers (and sometimes other persons whose employment includes the duty to protect the public safety) presumably because other sources sufficiently compensate persons who are injured or killed in the line of duty.⁸⁶ The British Scheme does not have an *express* exclusion, but it achieves much the same result by stating that where a person is accidentally injured in the course of law enforcement, compensation is not paya-

⁸³ See, e.g., IND. CODE ANN. § 5-2-6.1-21(c)(3) (West 1989 & Supp. 1994); N.Y. EXEC. LAW § 626(1) (McKinney 1982 & Supp. 1994). See also *In re Heery* 541 N.E.2d 1097, 1099 (Ohio Ct. Cl. 1988) (compensation for attorney fees incurred in attempt to keep parent away from abused child's home).

⁸⁴ BRITISH SCHEME, *supra* note 10, ¶ 4(b). See GREER, *supra* note 10, at 53-59.

⁸⁵ WIS. STAT. ANN. § 949.03(1)(a) (West 1982 & Supp. 1993). There are of course considerable variations, but it is thought that most programs cover such cases, although California, for example, has a separate program with a lower compensation limit. CAL. GOV'T CODE § 13970 (West 1992). Some programs extend to persons "giving aid and assistance to a member of a fire department, who is being obstructed from performing lawful duties," IND. CODE ANN. § 5-2-6.1-12(8)(B) (West 1989 & Supp. 1994), or to those injured or killed as a result of rescuing a person "in immediate danger of injury or death as a result of fire, drowning or other catastrophe" CAL. GOV'T CODE § 13970 (West 1992).

⁸⁶ See, e.g., TEX. CRIM. PROC. CODE ANN. art. 56.32(7) (West 1994); *Auber v. Commonwealth of Pa. Crime Victims Comp. Bd.*, 582 A.2d 76, 78 (Pa. Commw. 1990). Police officers may be covered by workers' compensation, other forms of insurance or benefits provided under the Public Safety Officers' Benefits Act of 1976. 42 U.S.C. § 3796a (1988 & Supp. 1993) (benefits of \$100,000 payable to survivors of officer killed in the line of duty). Some programs, however, do provide for cases where other compensation may not be available. See, e.g., N.Y. EXEC. LAW § 631(5)(e) (McKinney 1982 & Supp. 1994) (compensation for unreimbursed counseling expenses of family of police officer or firefighter killed in the line of duty); KY. REV. STAT. ANN. § 346.155(1) (Baldwin 1993) (sum not exceeding \$25,000 payable to family of police officer killed in the line of duty and not eligible to receive benefits under a pension plan). See also *Puntasecca v. Violent Crimes Comp. Bd.*, 519 A.2d 890, 892-93 (N.J. Super. Ct. App. Div. 1986) ("fireman's rule" does not disbar fireman from compensation for injuries from an arson-caused fire).

ble "unless the Board is satisfied that the applicant was at the time taking an exceptional risk which was justified in all the circumstances."⁸⁷

Many of the state programs provide that the claimant's effort must be made in "good faith,"⁸⁸ be one which would be expected of a reasonable person under similar circumstances,⁸⁹ or be made "lawfully" or "not recklessly."⁹⁰ However, the general rule to refuse or reduce an award where the victims' conduct contributed to their injury or death does not apply to good samaritans. In addition, good samaritans may also be exempted, at least in part, from a general requirement to show "financial difficulty."⁹¹ Good samaritans play an *active* role in crime prevention and control and should therefore receive extra consideration of this kind. Nonetheless, it appears that relatively few claims are made under these provisions.

C. THE NATURE OF THE INJURY

1. Primary Victims: Personal Injury

All state programs agree with the British Scheme that death and "physical" (or "bodily") injuries resulting from a crime of violence qualify a victim for compensation.⁹² To avoid doubt, some programs have expressly provided that "injury" includes pregnancy,⁹³ rape "in

⁸⁷ BRITISH SCHEME, *supra* note 10, ¶ 6(d); GREER, *supra* note 10, at 37-41, 53-59.

⁸⁸ See, e.g., ARIZ. CRIMINAL JUSTICE COMM'N, CRIME VICTIM COMP. PROGRAM RULES R10-4-103(20) (1993); IDAHO CODE § 72-1003(7)(b) (Supp. 1994); N.Y. EXEC. LAW § 621(7) (McKinney 1982 & Supp. 1994).

⁸⁹ See e.g., COLO. REV. STAT. § 24.4.1-102(10) (Supp. 1993); D.C. CODE ANN. § 3-401(7)(A)(iii) (1994); WYO. STAT. § 1-40-102(a)(ix) (Supp. 1994) ("good faith and reasonable effort").

⁹⁰ FLA. STAT. ANN. § 960.03(6) (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 9006(b) (1987) ("lawful"); GA. CODE ANN. § 17-15-7(a)(3) (Harrison 1990 & Supp. 1994); R.I. GEN. LAWS § 12-25-3(d) (Supp. 1993); S.C. CODE ANN. § 16-3-1110(9) (Law Cop 1985 & Supp. 1993).

⁹¹ CARROW, *supra* note 52, at 39. See, e.g., N.Y. EXEC. LAW § 631(5)(c) (McKinney 1982 & Supp. 1994) (injured good samaritan may be awarded out-of-pocket losses "without regard to . . . financial difficulty" and dependents of a good samaritan who was killed may be awarded up to \$20,000 for actual loss of support "without regard to . . . financial difficulty."). A good samaritan is also entitled to compensation of up to \$5000 for any loss of property suffered by him during the course of his actions. *Id.*

⁹² "Injury" is seldom defined, but problems of interpretation do not arise, possibly as a result of minimum loss requirements. See *infra* text accompanying note 236. Compare ALA. CODE § 15-23-3(3) (Supp. 1994) with OR. REV. STAT. § 147.005(4) (1993) (requiring "serious personal injury."). The current British Scheme does not include a definition, but the Criminal Justice Act 1988 § 109(1) provided that "[i]njury" includes any harm to a person's physical . . . condition . . ." *Id.*

⁹³ See, e.g., HAW. REV. STAT. § 351-2 (Supp. 1992); MICH. COMP. LAWS § 18.351(1)(f) (1994); MINN. STAT. ANN. § 611A.52(9) (West 1987 & Supp. 1994).

and of itself,"⁹⁴ sexual assault "without regard to whether bodily injury occurred,"⁹⁵ and venereal and presumably other sexually transmitted disease.⁹⁶ The principal significance of such provisions is that the real injury may be psychological or emotional rather than "physical," but if the victim sustains even a minor "physical injury" (which might be no more than unlawful touching), that person will qualify for compensation for mental health care and counseling.⁹⁷ In such cases, victims do not need to prove "nervous shock." However, many states still exclude "non-physical" injuries because their inclusion would facilitate fraudulent claims, complicate proof of the necessary causal connection, exacerbate the difficulties of assessing compensation, and generally add to the complexity and costs of administration.⁹⁸ Such considerations, familiar to tort lawyers on both sides of the Atlantic, can no longer justify a blanket exclusion of "non-physical" injuries, and indeed, many state programs now expressly provide (as has the British Scheme since 1964) that "injury" includes "mental or nervous shock."⁹⁹ In such cases, compensation will normally be payable (in the absence of any "physical" injury) for any recognized psychiatric illness traumatically induced as a result of a qualifying offense. It is at this point, which also represents English common law, that the British Scheme draws the line.¹⁰⁰

⁹⁴ FLA. BUREAU GUIDELINES, ¶ 10L-2.02(4) (1986).

⁹⁵ See, e.g., ME. REV. STAT. ANN. tit. 5, § 3360.B.1.B (West Supp. 1993). Under CAL. GOV'T CODE § 13960(b) (West 1992), the victim of a sexual offense who sustains "emotional injury" is presumed to have sustained physical injury. Similarly in NEV. REV. STAT. § 217.050(3) (Michie 1993), "personal injury" includes "any harm which results from sexual abuse." *Id.*

⁹⁶ See, e.g., IDAHO CODE § 72-1003(6) (Supp. 1994).

⁹⁷ As required by VOCA § 10602 (b)(1)(A), all programs define the expenses payable to a victim as including "psychological" or "psychiatric" services and treatment, or both.

⁹⁸ See, e.g., CARROW, *supra* note 52, at 33; COLO. REV. STAT. § 24-4.1-102(8) (Supp. 1993) ("actual bodily harm"); ME. REV. STAT. ANN. tit. 5, § 3360.2 (West Supp. 1993) ("physical pain, physical illness or any impairment of physical condition . . ."); MICH. COMP. LAWS § 18.351(1)(f) (1994); TEX. CRIM. PROC. CODE ANN. § 56.32(9) (West Supp. 1994) ("physical harm to a victim"); WYO. STAT. § 1-40-102(a)(vii) (Supp. 1994) ("actual bodily harm").

⁹⁹ See, e.g., HAW. REV. STAT. tit. 20, § 351-2 (Supp. 1992); IDAHO CODE § 72-1003(6) (1994); MINN. STAT. ANN. § 611A.52(9) (West 1987 & Supp. 1994); N.J. STAT. ANN. § 52:4B-2 (West 1986 & Supp. 1994); WIS. STAT. ANN. § 949.01(5) (West 1982 & Supp. 1993). These terms are not normally defined, but Idaho provides that "extreme mental distress" means "a substantial personal disorder of emotional processes, thought or cognition which impairs judgment, behavior or ability to cope with the ordinary demands of life." IDAHO CODE § 72-1003(6) (1994).

¹⁰⁰ *Alcock and Others v. Chief Constable of the South Yorkshire Police* [1992] 1 A.C. 310. For a recent comparison of American and English tort law, see David Robertson, *Liability in Negligence for Nervous Shock*, 57 MOD. L. REV. 649 (1994). The Criminal Justice Act 1988 § 109(2) would have restricted compensation for "harm to a person's mental condition" to two situations, *viz.*, where it is attributable to the victim having been put in fear of immediate physical injury to himself or another or to the victim being present when

Some American programs appear to go further. "Injury" has been defined as including "mental harm"¹⁰¹ and "emotional injury" even though in the latter case compensation will not normally be awarded "unless that injury is incurred by a victim who also sustains physical injury or threat of physical injury."¹⁰² Indeed, it has been stated recently that "about half the states . . . pay for mental health counseling for individuals who are threatened with physical harm during a crime, but who do not sustain physical or sexual injury or contact."¹⁰³ In at least one program (New York), compensation for counseling services is also payable to elderly and disabled victims who have not necessarily been physically injured.¹⁰⁴ Such provisions suggest that compensation is payable even to *primary* victims who do not sustain what in British terms would be classified as a "recognised psychiatric illness." However, this apparent generosity may be offset by the low limits placed on mental health care and counseling expenses and by other safeguards designed to protect programs from excessive or spurious claims.

2. Secondary Victims: Emotional Distress

American programs invariably provide that compensation is payable to the relatives of one who has died as a result of a crime of violence. This is meant to cover their financial losses or expenses resulting from the death. Some programs go further than the British

another person sustained a criminal injury; these restrictions are being amplified in the new "Tariff" Scheme. See *supra* note 10. The large number of nervous shock claims arising from "the Troubles" in Northern Ireland have led to even more restrictive legislation. See D.S. Greer, *Criminal Injuries Compensation for Nervous Shock: Freezing the Law in a Rigid Posture?* 43 N.IRELAND LEGAL Q. 396 (1992).

¹⁰¹ See, e.g., N.Y. EXEC. LAW § 621(11) (McKinney 1982 & Supp. 1994) ("child victim" includes a person under 18 who suffers "mental or emotional injury . . . as a direct result of a crime or as a result of witnessing a crime."). The court in *In re Clapacs*, 567 N.E.2d 1351, 1354 (Ohio Ct. Cl. 1989), held that "personal injury" includes "emotional distress and anxiety due to a direct awareness of a criminal incident." The 1992 UNIFORM ACT, *supra* note 2, § 304(1), provides that compensation is payable to a victim who has suffered "physical, emotional or psychological injury . . ." (emphasis added). TEX. CODE CRIM. PROC. ANN. art. 56.32(9) (West 1994) has recently been amended to delete reference to "mental" harm, although compensation for psychiatric care and counseling of certain secondary victims is provided for in art. 56.32(10) (E), (F) and (H).

¹⁰² CAL. GOV'T CODE § 13960(b) (West Supp. 1994) (provided threat "results in a need for medical treatment"). NEV. REV. STAT. ANN., § 217.050.2 (Michie 1992) ("[the statute also covers] any harm [to a minor involved in the production of pornography] which results in a need for medical treatment or any psychological or psychiatric counseling . . ."). VA. CODE ANN. § 19.2-368.2 (1990) (victim includes a person "who suffers personal emotional injury as a direct result of being the subject of a robbery [or] abduction").

¹⁰³ CVCB HANDBOOK, *supra* note 56, at II-2.

¹⁰⁴ N.Y. EXEC. LAW § 631(8) (McKinney 1982 & Supp. 1994). See also, N.J. ADMIN. CODE tit. 13, § 13:75-1.31 (1993) (compensation payable in certain circumstances for "emotional distress" directly related to burglary). See *infra* note 132.

Scheme and provide compensation for *any* person (*i.e.*, for a non-relative as well as a relative) who was in fact financially dependent, wholly or partially, upon the deceased.¹⁰⁵

What is much more noteworthy, however, is the extent to which American programs compensate secondary victims for non-financial "loss." Under the British Scheme, compensation, in the form of a fixed sum (now £7500, or approximately \$11,250), is payable by way of "bereavement," but only to the deceased's lawful spouse or to the parents of an unmarried minor (*i.e.*, a victim under the age of eighteen).¹⁰⁶ Unless a person has suffered "nervous shock" as a *direct* result of a criminal injury to a close relative or friend,¹⁰⁷ compensation cannot be paid even for crimes such as a rape or brutal assault, and even if that person is his or her closest relative. In the United States, however, attention has turned to the plight of those who require mental health care and counseling as a result of the victimization of a loved one. Such emotional distress may be caused not only by witnessing the crime itself, but also by experiencing the consequential effects of the crime. California provides an example of the first case: compensation is payable in certain cases to a "derivative" victim who is "another [*i.e.*, not immediate] family member of the [primary] victim, including the victim's fiancé, and witnessed the crime . . ." ¹⁰⁸ This may add little to a "normal" nervous shock provision. What clearly goes beyond this is the kind of provision found in a number of programs that "the spouse, parent, child, brother or sister of a victim who is killed as a result of criminally injurious conduct is entitled to reimbursement for mental health treatment received as a result of the victim's death."¹⁰⁹ The same or a similar list of persons may also recover

¹⁰⁵ See, *e.g.*, MINN. STAT. ANN. § 611A.52(7) (West 1987); OHIO REV. CODE ANN. § 2743.51(D) (Baldwin 1990).

¹⁰⁶ BRITISH SCHEME, *supra* note 10, ¶ 12, *discussed in* GREER, *supra* note 10, at 127-28. This is the law in England and Wales; Scots law is more generous. *Id.* at 128-30. For recent criticism of the English law, see REPORT OF AN INDEPENDENT WORKING PARTY: COMPENSATING THE VICTIMS OF CRIME ¶ 6.04 (1993).

¹⁰⁷ See, *e.g.*, Regina v. Criminal Injuries Comp. Bd., *ex parte* Johnson, *cited in* THE INDEPENDENT, July 22, 1994 (V, who suffered nervous shock on discovering body of murdered friend, is entitled to compensation).

¹⁰⁸ CAL. GOV'T CODE §§ 13960(a)(2)(C) & 13965(a)(1)(D) (West 1992 & Supp. 1994) (compensation is limited to \$3000). See also LA. REV. STAT. ANN. § 46:1802(8)(b)(iv) (West 1982 & Supp. 1994) (compensation is payable in case of death "for counseling or therapy for any surviving family member of the victim or any person in close relationship to such victim, if such member or person was physically present and directly observed the commission of the crime"); 740 ILCS 45/2(d)(5) (Michie 1993) ("[victim includes] a child who personally witnessed a violent crime perpetrated or attempted against a relative").

¹⁰⁹ See *e.g.*, IDAHO CODE § 72-1019(9)(a) (1989 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 258A, § 3(d) (West 1994); NEV. REV. STAT. ANN. § 217.160(4) (Michie 1992); N.Y. EXEC. LAW § 626(1) (McKinney 1982 & Supp. 1994); PA. STAT. ANN. tit. 71, § 180-7.3(d) (1993).

for mental health treatment received where the primary victim has been sexually assaulted.¹¹⁰ Another recognized category is the immediate family of a child victim.¹¹¹ California goes further by permitting certain "derivative" victims, who are members of the victim's family, to recover compensation (limited to \$3000) for mental health counseling which is necessary as a direct result of *any* crime which caused the victim's injury.¹¹²

Until 1993, California's provision included one further type of secondary "victim," a member of the family of the primary victim, or a person in close relationship to that victim, "whose treatment or presence during treatment is medically required for the successful treatment of the [primary] victim."¹¹³ As the Attorney-General's Task Force on Family Violence explained, eligibility for psychological counseling should be extended:

to include the non-offending parents of children who are victims of sexual abuse. The non-offending parent is also a victim who suffers as a result of criminal behavior. Unless the innocent parent is helped to understand the situation and that neither they nor the child is to blame, the parent may unintentionally undermine the best efforts of a good therapist. If not helped through their own anxieties, they cannot be a resource and support for the child.¹¹⁴

See also IOWA CODE ANN. § 912.6.6 (West 1994) ("[includes] persons cohabiting with or related by blood or affinity to the victim.").

¹¹⁰ See, e.g., IDAHO CODE § 72-1019(9)(b) (1989 & Supp. 1994); MONT. CODE ANN. § 53-9-128(9)(b) (1993). In *In re Kaman*, 598 N.E.2d 236, 240 (Ohio Ct. Cl. 1991), where a mother suffered emotional distress when she discovered that her 5-year-old girl had been sexually assaulted, the court held that the mother was "a victim in her own right, even though she did not witness her daughter being sexually assaulted or even learn of the incident until four months later." But see N.Y. EXEC. LAW § 626(1) (McKinney 1982 & Supp. 1994) (compensation only payable to "the eligible spouse of the victim of any . . . sex offense who resides with the victim . . .").

¹¹¹ See N.Y. EXEC. LAW § 626(1) (McKinney 1982 & Supp. 1994); TEX. CODE CRIM. PROC. ANN. art. 56.32(10)(H) (West Supp. 1994). A recent survey has in fact identified 18 different secondary victim provisions among 30 programs. Note, *Survey Finds Wide Variation in Secondary Victim Coverage*, CRIME VICTIM COMP. Q., No. 1, 1994, at 6-7.

¹¹² CAL. GOV'T CODE §§ 13960(a)(2) and 13965(a)(1)(D) (West 1992 & Supp. 1994). Prior to 1993, compensation of up to \$10,000 was payable for medical and/or counseling expenses to "any member of the family of [a primary victim] . . . when the family member has incurred emotional injury as a result of a crime." CAL. GOV'T CODE § 13960(a)(4) (West 1992).

¹¹³ CAL. GOV'T CODE § 13960(a)(3) (West 1992). Cf. *Cano v. State Bd. of Control*, 9 Cal. Rptr.2d 355 (Cal. Ct. App. 1992) (provision limited to direct victim and does not extend to children of sister of murder victim). The current law limits the payment of compensation to "group or family . . . counseling expenses provided for the successful treatment or recovery of the victim to family members of the victim . . ." CAL. GOV'T CODE § 13960(d)(5) (West 1992 & Supp. 1994).

¹¹⁴ TASK FORCE FINAL REPORT, *supra* note 4, at 54. See, e.g., *In re Kaman*, 598 N.E.2d 236, 240 (Ohio Ct. Cl. 1991) (when 5-year-old girl was sexually assaulted, compensation is payable for counseling of mother if necessary for victim's psychological well-being and mother's

Provisions such as these acknowledge a generally accepted phenomenon.¹¹⁵ But they may have significant cost implications, given that treatment may be required for some considerable time.¹¹⁶ In addition:

Compensation for mental health counselling raises particular problems, including assessing the causal link between the [need for the] proposed treatment and the crime, the appropriateness of the treatment modality chosen, the qualifications of the provider and the necessary duration of treatment.¹¹⁷

These difficulties and the dangers of spurious claims are well-known. The problem in practice is the identification of genuine and deserving claimants. Given the difficulty of making such determinations on a case-by-case basis, it seems almost inevitable that programs will resort to bright line tests, with somewhat arbitrary results. But apart from limitations to certain classes of persons, crimes, or circumstances, the major safeguards appear to be detailed regulation of the provision of mental health care and counseling, and the imposition of a low limit on the compensation payable for such expenses.¹¹⁸ As to the first, it is not unusual to find a provision along the following lines:

[I]f treatment is likely to continue longer than six months . . . and the cost of the additional treatment will exceed \$1500, or if the total cost of treatment in any case will exceed \$4000, the provider shall first submit to the board a plan which includes the measurable treatment goals, the estimated cost of the treatment, and the estimated date of completion of the treatment¹¹⁹

A good example of the second approach is found in Maryland, where the overall maximum is \$45,000, but "compensation . . . for the pur-

ability to function as a nurturing parent).

¹¹⁵ David S. Riggs & Dean G. Kilpatrick, *Families and Friends: Indirect Victimization by Crime*, in *VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 120, 134 (Arthur J. Lurigio et al. eds., 1990) ("While the percentage of indirect victims of crime who experience psychological problems is apparently somewhat smaller than in the case of direct victims, the problems they suffer are just as real."). See also Patricia A. Resick, *Victims of Sexual Assault*, in *VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 69 (Arthur J. Lurigio et al. eds., 1990); Dean G. Kilpatrick & L.J. Veronen, *The Psychological Impact of Crime*, cited in *VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 85 (Arthur J. Lurigio et al. eds., 1990).

¹¹⁶ See *Recent Trends from VOCA Performance Reports*, *CRIME VICTIM COMP. Q.*, No. 1, 1993, at 8. In 1992, compensation for mental health counseling was reported to have exceeded 20% of total program costs in seven states, including California, where counseling awards totalled \$29.1 million—or 39% of all compensation paid. *Id.*

¹¹⁷ NIJ SUMMARY, *supra* note 36, at 5.

¹¹⁸ See generally NAT'L ASS'N OF CRIME VICTIM COMP. BOARDS, *EVALUATION AND PAYMENT OF MENTAL HEALTH COUNSELING CLAIMS* (1994).

¹¹⁹ MINN. STAT. ANN. § 611A.52(8)(a)(3) (West 1992 & Supp. 1993). In Minnesota, the Board has the power to elect to pay claims under this clause on a quarterly basis. *Id.* For a summary of state mental health cost control rules, see NAT'L ASS'N OF CRIME VICTIM COMP. BOARDS, *supra* note 118, Appendix A.

poses of psychiatric, psychological or mental health counseling shall not exceed \$2000"¹²⁰

In spite of measures such as these, program expenditure on mental health counseling nationwide has increased from \$8.1 million in 1987 to \$48.1 million in 1991.¹²¹

3. Primary Victims: Property Damage

An established principle of the British Scheme is that "compensation will not be payable for the loss of or damage to . . . any property whatsoever" ¹²² A similar principle operates in the United States. Thus, VOCA funding does not cover compensation for damage to property,¹²³ and most state programs exclude it as well.¹²⁴ However, compensation may be awarded for personal aids—to cover the cost of replacing prosthetic devices such as eyeglasses, hearing aids, and dentures that were taken, lost, or damaged as the direct result of a qualifying crime.¹²⁵

Any further provision is usually subject to strict financial limits and may also be restricted to certain types of victims, such as elderly victims. But in some ways, these programs are more flexible than the British Scheme. For instance, certain programs include the reasonable replacement value of clothing or other property held for evidentiary purposes, and costs associated with securing and cleaning up a crime scene.¹²⁶ Colorado's program allows compensation (up to

¹²⁰ MD. CODE ANN. Crim. Inj. Comp. Act § 12(a)(3) (1993). The normal limit appears to be about \$2000-\$3000. See Note, *State Counseling Limits*, CRIME VICTIM COMP. Q., No. 1, 1994, at 7.

¹²¹ NAT'L ASS'N OF CRIME VICTIM COMP. BOARDS, *supra* note 118, at 1. Information on file with the Office for Victims of Crime (On file) suggests that expenditure on mental health counseling in 1993 totalled \$44.2 million, or 18.9% of total compensation.

¹²² BRITISH SCHEME, *supra* note 10, ¶ 17. Compensation for property may be included if "the Board are satisfied that the property was relied upon by the victim as a physical aid." *Id.* Note, however, that in Northern Ireland there is a statutory scheme of public compensation for terrorist damage to property. See D.S. GREER & V.A. MITCHELL, *COMPENSATION FOR CRIMINAL DAMAGE TO PROPERTY* (1982).

¹²³ 42 U.S.C. § 10602(a)(1) (1988) (repealed 1988). This does not prevent state programs from using their own funds for such a purpose.

¹²⁴ NIJ SUMMARY, *supra* note 36, at 4, 23. See also LeRoy L. Lamborn, *The Scope of Programs for Governmental Compensation of Victims of Crime*, 1973 U. ILL. L. F. 21, 22-29; CARROW, *supra* note 52, at 34-36.

¹²⁵ NIJ SUMMARY, *supra* note 36, at 4, 23. See, e.g., MINN. STAT. ANN. § 611A.52(8)(b) (West Supp. 1994); TENN. CODE ANN. § 29-13-106(b) (Supp. 1994). But see BRITISH SCHEME, *supra* note 10, ¶ 17 ("Compensation will not be payable for the loss of or damage to clothing or any property whatsoever . . . unless the Board are satisfied that the property was relied upon by the victim as a physical aid.").

¹²⁶ See, e.g., IOWA CODE ANN. § 912.6(3), (7) (West 1994) (limit of \$100 for evidentiary purposes, \$1000 for cleaning); N.H. CODE ADMIN. R. Jus 603.01, 603.02(a) (1993) (limit of \$5000 to award for economic loss which includes securing and cleaning a crime scene and

\$250) for damage to windows, doors, locks, or other security devices of a residential building.¹²⁷ Louisiana allows compensation for "a catastrophic property loss," which means "loss of abode," where such loss causes "overwhelming financial effect on the victim," but such compensation is subject to that program's overall maximum of \$10,000.¹²⁸

Until recently, New York had led the way in the coverage of property loss and damage, with three provisions covering the loss of or damage to "essential personal property." First, where a victim was injured or killed, compensation of up to \$500 could be awarded for "the unreimbursed cost of repair or replacement of articles of essential personal property, lost, damaged or destroyed as a direct result of the crime."¹²⁹ These had to be "articles of personal property necessary and essential to the health, welfare or safety of the victim,"¹³⁰ but could include cash losses.¹³¹ Compensation could be awarded to elderly or disabled victims even if they had not been physically injured.¹³² Finally, when a "good samaritan" was injured or killed, compensation of up to \$5000 was awardable "for any loss of property . . . suffered by the victim during the course of his actions as a good samaritan."¹³³ Thus, compensation for property was a significant part of the compensation payment in New York. In fact, in 1991-1992, almost \$2 million (15% of the amount awarded for personal injury) was paid for property losses.¹³⁴ However, in 1992, the limit for awards for essential personal property was reduced to \$100.¹³⁵ This will significantly reduce this category of expenditure.

In some exceptional cases compensation may be payable to a victim who has suffered neither personal injury nor damage to property. For example, in New York:

[A]n elderly or [previously] disabled victim who has not been physically injured as a direct result of a crime, shall . . . be eligible for an award that

replacement value of any clothing or bedding held for evidence purposes); Wis. STAT. ANN. § 949.06(1)(c), (cm), (f) (West Supp. 1993) (limits "evidentiary" compensation to \$300 for clothing and bedding, \$200 for other property rendered unusable by crime laboratory testing and evidentiary purposes, and \$1000 for cleaning).

¹²⁷ COLO. REV. STAT. §§ 24-4.1-102(8.5), 24-4.1-109(1.5) (1988 & Supp. 1993).

¹²⁸ LA. REV. STAT. ANN. § 46:1802(8)(c) (West 1982). Exceptions to the \$10,000 limit are provided in LA. REV. STAT. ANN. § 46:1810 (West Supp. 1994) for those victims who are permanently, totally, or permanently and totally disabled as a result of a crime.

¹²⁹ N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1994).

¹³⁰ *Id.* § 621(8).

¹³¹ *Id.* § 631(9).

¹³² *Id.* § 631(8).

¹³³ *Id.* § 631(5)(c).

¹³⁴ N.Y. STATE CRIME VICTIMS BD., 1991-1992 ANNUAL REPORT 22 (1993). Claims for essential personal property were estimated to represent 43% of the claims accepted by the Board. *Id.* at 15. See also *infra* Table 4.

¹³⁵ N.Y. EXEC. LAW § 631(9) (McKinney 1994).

includes . . . transportation expenses incurred for necessary court appearances in connection with the prosecution of such crimes¹³⁶

Also, in Pennsylvania, compensation is payable for:

the cash equivalent of one month's social security, railroad retirement, . . . child support or spousal support payment, where said payment is the primary source of the victim's income and where the victim is deprived of the money as a direct result of a crime.¹³⁷

IV. REFUSAL OR REDUCTION OF COMPENSATION

One of the most noteworthy features of the British Scheme is its restriction of the payment of compensation to "innocent" victims.¹³⁸ From the outset, the Board has been required, or has been given discretion, to refuse compensation altogether or to make a reduced award to "unmeritorious" victims who otherwise qualify for compensation. The very concept of the "innocent" victim has given rise to much academic controversy and practical difficulty.¹³⁹ State legislatures have actually dealt with this issue in the United States by creating three main categories of victims who, to a greater or lesser extent, fail to qualify as "innocent" or deserving: (a) the "guilty" victim; (b) the uncooperative victim, and (c) the financially sound victim.

A. THE GUILTY VICTIM

Consideration of the British Scheme and of state programs reveals that legislators do not see victims as simply "guilty" or "innocent." In fact, it is difficult to do justice to the seemingly infinite variety of provisions. The clearest case is the injured victim who is guilty of the crime or is an accomplice of the offender. Such a victim is patently "guilty" of criminal conduct which contributed to the injury. It does not inevitably follow that the victims should be denied com-

¹³⁶ *Id.* § 631(8).

¹³⁷ PA. STAT. ANN. tit. 71, § 180-7 (1993). In 1992-1993, such cases accounted for 28% of all awards, but only 5% of compensation paid. PA. CRIME VICTIM'S COMP. BD., ANNUAL REPORT 1992-1993, *supra* note 61, at 26, 29 (1994) (emphasizing that such compensation is limited to one month's entitlement). In 1992, this category was expanded to include any retirement, pension, or disability check proceeds. *Id.*

¹³⁸ "The Board may withhold or reduce compensation if they consider that, . . . having regard to the conduct of the applicant before, during or after the events giving rise to the claim or to his character as shown by his criminal convictions or unlawful conduct . . . it is inappropriate that a full award, or any award at all, be granted." BRITISH SCHEME, *supra* note 10, ¶ 6(c), *discussed in* GREER, *supra* note 10, at 60-79, and MIERS, *supra* note 10, at 72-99.

¹³⁹ See, e.g., David R. Miers, *Compensation and Conceptions of Victims of Crime*, 8 VICTIMOLOGY 204 (1983); CANE, *supra* note 12, at 263-65. See CARROW, *supra* note 52, at 44, for an interesting attempt to justify such provisions by reference to the tort, welfare, and risk-sharing "theories" underlying the award of public compensation in the United States.

pensation, but that is the result in all state programs.¹⁴⁰ At the other end of the spectrum are the victims whose conduct was neither criminal nor contributory to their injuries, but who may not deserve compensation because of their immoral conduct or simply bad character—*e.g.*, the work-shy, the philandering husband, and the “no-good” drifter. No program has been found which refuses compensation on these grounds—although many refuse compensation to prison inmates,¹⁴¹ and some take lesser offenses into account.¹⁴² Between these two extremes are numerous intermediate provisions, and it is hoped that what follows will give some impression of what are, at times, the finely shaded distinctions between them.

Victims who, while not guilty of the crime itself, “initiated,” “provoked,” “encouraged,” “consented to,” “facilitated,” “colluded with,” “(knowingly and willingly) participated in any way in,” or “prolonged” the commission of the offense are normally refused compensation.¹⁴³ Also, victims who were guilty of some other offense “which violation caused or contributed to the victim’s injury or death,”¹⁴⁴ or who were guilty of “intentional or knowing unlawful conduct which substantially provoked or aggravated the incident giving rise to the injury,”¹⁴⁵ are not compensated. In some programs, victims may be penalized for “contributory fault,”¹⁴⁶ for “contributing to the infliction of death or

¹⁴⁰ States use different formulae, but Pennsylvania provides a typical statute: “[a] person who is criminally responsible for the crime upon which a claim is based or an accomplice of such person shall not be eligible to receive compensation with respect to such claim.” PA. STAT. ANN. tit. 71, § 180-7.3(b) (1993).

¹⁴¹ See *infra* note 28.

¹⁴² See, *e.g.*, WIS. STAT. ANN. § 949.08(2)(g) (West Supp. 1993) (compensation not payable if victim delinquent in child support or maintenance payments); N.J. STAT. ANN. § 52:4B-18 (West Supp. 1994) (Board may deny or reduce compensation where “victim has not paid in full any payments owed on [compensation] assessments . . . or restitution ordered following conviction for a crime.”). See *infra* text accompanying notes 153 to 161.

¹⁴³ See, *e.g.*, ALA. CODE § 15-23-12(a)(2) (Supp. 1994); ARIZ. CRIMINAL JUSTICE COMM’N, CRIME VICTIM COMP. PROGRAM RULES R10-4-103(3) (1993); CAL. GOV’T CODE § 13964(c)(1) (West Supp. 1994); DEL. CODE ANN. tit. 11, § 9006(1) (1992); HAW. REV. STAT. § 351-31(c) (1985); N.J. STAT. ANN. § 52:4B-10 (West 1986).

¹⁴⁴ See, *e.g.*, ALASKA STAT. § 18.67.080(c) (1991); CONN. GEN. STAT. § 54-211(b)(2) (Supp. 1994); D.C. CODE ANN. § 3-401(7)(B) (1994); ME. REV. STAT. ANN. tit. 5, § 3360-C(2)(B) (West Supp. 1993); NEB. REV. STAT. § 81-1822(3) (Supp. 1993). See also *In re McNeil*, 453 N.E.2d 1309, 1313 (Ohio Ct. Cl. 1983) (victim’s solicitation of a prostitute may be sufficient, in and of itself, to constitute contributory misconduct so as to deny the victim award of reparations).

¹⁴⁵ See, *e.g.*, D.C. CODE ANN. § 3-401(7)(B) (1994) (excluding any person injured or killed “as an indirect result of his or her participation in an unlawful or criminal activity”); DEL. CODE ANN. tit. 11, § 9006(c) (1987); V.I. CODE ANN. tit. 34, § 164(b)(4) (1994) (compensation refused if victim and offender “at the time when the injury or death was caused, were engaged in a common unlawful enterprise or activity”).

¹⁴⁶ See N.H. REV. STAT. ANN. § 21-M:8-h(IV) (1993); see also MINN. STAT. ANN. § 611A.54(2) (West Supp. 1994) (refers to “contributory misconduct”). Some statutes pro-

injury,"¹⁴⁷ or for "other behavior [or conduct] . . . that directly or indirectly contributed to the victim's injury or death."¹⁴⁸ In Louisiana, victims may have their compensation refused or reduced if their "behavior . . . at the time of the crime was such that the victim bears some measure of responsibility for the crime."¹⁴⁹

These formulae clearly differ as to whether the conduct to be considered must be criminal, unlawful (tortious), or some other form of "misconduct."¹⁵⁰ But all agree that the relevant conduct must both take place at or about the time of the crime which gave rise to the victim's injury and "contribute" in some way to the infliction of that injury. Illinois and Ohio Programs contain variations on these provisions. In Illinois, compensation may be reduced or denied "according to the extent to which . . . any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to [that victim's] injury or death;"¹⁵¹ Ohio penalizes "any conduct of the victim . . . that

vide that a victim may be penalized for having "engaged in conduct which should have been foreseen as leading to death or injury." KY. REV. STAT. ANN. § 346.140(3) (Michie/Bobb-Merrill 1993); WIS. STAT. ANN. § 949.08(2) (a) (West 1982). A similar test was applied by the court in *Evans v. N.C. Dep't of Crime Control*, 398 S.E.2d 880, 885 (N.C. Ct. App. 1990), *stay granted*, 400 S.E.2d 446 (N.C. 1991). In Maryland, compensation may be reduced or denied if the victim "unreasonably failed to avoid a physical confrontation with the offender." MD. ANN. CODE art. 26A, § 12(e) (3) (Supp. 1992). *But cf. In re Thorpe*, 593 N.E.2d 499, 503 (Ohio Ct. Cl. 1990) (holding that the victim may have been negligent but was not guilty of "unlawful or intentionally tortious" conduct, even though he got into a car whose driver he knew to be intoxicated).

¹⁴⁷ IDAHO CODE § 72-1016(7)(b) (Supp. 1994); IND. CODE ANN. § 5-2-6.1-34(a) (Burns 1994); MICH. COMP. LAWS ANN. § 18.361(5) (West 1994); MONT. CODE ANN. § 53-9-125(7) (1993); N.Y. EXEC. LAW § 631.5(a) (McKinney 1994). Under GA. CODE ANN. § 17-15-8(d) (1994), the board may consider conduct which contributed to the infliction of injury or financial hardship.

¹⁴⁸ ALASKA STAT. § 18.67.080(c) (1991); DEL. CODE ANN. tit. 11, § 9006(b) (1992); FLA. STAT. ANN. § 960.13(6) (West Supp. 1994); NEV. REV. STAT. ANN. § 217.180(1) (Michie 1992); *see, e.g., Industrial Accident Bd. v. Martinez*, 836 S.W.2d 330 (Tex. Ct. App. 1992) (holding that victim's membership of an allegedly "hazardous profession," such as a security guard in an allegedly "rough" bar, would not in itself constitute "behavior" contributing to victim's death).

¹⁴⁹ LA. REV. STAT. ANN. § 46:1809(B)(4) (a) (West 1982); *see also* HAW. REV. STAT. § 351-31(c) (1985); TEX. CRIM. PROC. CODE ANN. § 56.45(2) (West Supp. 1994) (victims not entitled to compensation if their behavior "bears a share of the responsibility for the [injury] . . ."); *cf.* 1992 UNIFORM ACT, *supra* note 2, § 309(a) (advising that a board "may reduce or deny compensation to a claimant who is accountable for the crime or a crime arising from the same conduct, criminal episode or plan"). *But cf.* PA. STAT. ANN. tit. 71, § 180-7.9(f) (Purdon 1993) (conduct of victim "shall not be considered" where the crime is rape).

¹⁵⁰ *See, e.g., D.C. CODE ANN. § 3-401(7)(B)* (1994) (distinction between "unlawful" and "criminal" activity); *Evans v. N.C. Dep't of Crime Control*, 398 S.E.2d 880, 885 (N.C. Ct. App. 1990) (Greene, J.) ("[w]hile misconduct includes unlawful conduct as a matter of law, it may be something less than unlawful conduct, though more than an act done in poor taste. Misconduct requires some deviation from the accepted norm or standard of proper behavior . . .").

¹⁵¹ 740 ILCS 45/10.1(d) (Michie 1993); *see also* WYO. STAT. § 1-40-110(b)(i) (1988) (in-

is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim."¹⁵²

But a victim may also be penalized for non-contributory (mis)conduct. That appears to be the import of a Florida provision stating that "any person who . . . [w]as engaged in an unlawful activity at the time of the crime upon which the claim is based, shall not be eligible to receive an award"¹⁵³ The Ohio program goes further:

[The commissioners] shall [not] make an award to . . . a victim [or a claimant], who, within ten years prior to the criminally injurious conduct that gave rise to the claim, was convicted of a felony or who is proved by a preponderance of the evidence . . . to have engaged, within ten years prior to . . . [such] criminally injurious conduct . . . , in conduct that, if proven by proof beyond a reasonable doubt, would constitute a felony¹⁵⁴

structuring a board to take into account "all circumstances surrounding the victim's conduct determined to be relevant which directly contributed to the victim's injury").

¹⁵² OHIO REV. CODE ANN. § 2743.51(M) (Baldwin 1990). See also *In re Jones*, 546 N.E.2d 978 (Ohio Ct. Cl. 1988) (where victim slapped offender and offender left, returned with a gun, and shot and killed victim, the court held that victim engaged in contributory misconduct). Cf. W. VA. CODE § 14-2A-3(l) (Supp. 1994) (adds "the voluntary intoxication of the claimant . . . when the intoxication has a causal connection or relationship to the injury sustained"). But cf. *In re Uhnak*, 578 N.E.2d 906 (Ohio Ct. Cl. 1988) (where victim attempted to hit offender with a bar table and offender left, the court held that victim did not engage in contributory misconduct because offender's reaction was not foreseeable); *In re Ewing*, 515 N.E.2d 666 (Ohio Ct. Cl. 1987) (where victim and offender had history of past confrontations, victim slapped offender, and offender subsequently ran down victim with automobile, the court held that victim did not engage in contributory misconduct because offender's reaction must be foreseeable in light of victim's conduct in order to satisfy the causal connection requirement).

¹⁵³ FLA. STAT. ANN. § 960.065(2)(b) (West Supp. 1994). MINN. STAT. ANN. § 611A.53(2)(d) (West 1987 & Supp. 1994) is similar, but it is expressly limited to the victim or claimant who was "in the act of committing a crime at the time the injury occurred." See also WASH. REV. CODE ANN. § 7.68.070(3)(b) (West 1992 & Supp. 1994) (V committing felony). In UTAH CODE ANN. § 63-63-15(1)(b) (1993), the Reparations officer may take into account "the misconduct of the claimant or of a victim through whom he claims." IDAHO CODE § 72-1016(7)(b) (1989 & Supp. 1994), is more precise: compensation is reduced by 50% if at the time of the injury V was engaged in a felony. A further reduction is required if V's actions contributed to the injury. *Id.*

¹⁵⁴ OHIO REV. CODE ANN. § 2743.60(E) (Baldwin 1990). In *In re Cowan*, 499 N.E.2d 937 (Ohio Ct. Cl. 1986) and *State ex rel. Madden v. Brown*, 519 N.E.2d 865 (Ohio Ct. App. 1987), this provision was held to be constitutional as being rationally related to the state's legitimate interest of ensuring that awards were made only to innocent, law-abiding victims of crime. But see *In re Gumpf*, 541 N.E.2d 501 (Ohio Ct. Cl. 1989) (provision not applicable to claimant where victim deceased); *In re Jackson*, 619 N.E.2d 1238 (Ohio Ct. Cl. 1993) (provision does not apply to felonies committed after offense giving rise to claim). See also ARK. CODE ANN. § 16-90.712(a)(5) (Michie Supp. 1993) (compensation not payable to victim convicted of felony involving criminally injurious conduct); ALA. CODE § 15-23-23 (Supp. 1994) (a victim who is convicted of felony after making an application is not eligible for compensation); WYO. STAT. § 1-40-106(c) (1988 & Supp. 1994) (same); CAL. GOV'T

Such a provision is redolent of one of the most controversial aspects of the British Scheme—that the Board may refuse compensation because of conduct by the victim (or claimant) that in no way contributed to the injury for which the victim claims compensation. Until 1990, the Board could refuse or reduce compensation by reference to the victim's "character and way of life." Presently, the Board may consider the victim's "character as shown by his criminal convictions or unlawful conduct."¹⁵⁵ Some American programs may achieve the same result by reference to an even more general formula: "In determining whether to make an order under this section, the board shall consider all circumstances determined to be relevant, including . . . the prior case or social history, if any, of the victim . . . and any other relevant matters."¹⁵⁶ It is not clear what this means, and there appears to be no relevant American caselaw.¹⁵⁷ Coincidentally, Northern Ireland uses similar language in its statutory scheme.¹⁵⁸ The courts there have held it to connote "any circumstance which logically or reasonably bears on *the question whether the applicant ought to receive or be denied compensation.*"¹⁵⁹ This in turn has been taken to include:

[C]ircumstances related to the conduct of the applicant, circumstances in the events leading up to and subsequent to the injury, his conduct in relation to the injury after it had been received, his conduct in relation to those who inflicted the injury . . . and his conduct in pursuing the claim.¹⁶⁰

CODE § 13960.2(a), (c) (West 1992 & Supp. 1994) (compensation may be paid to a person convicted of felony (whether or not imprisoned) "only after . . . all awards . . . to the nonfelon applicants have been made").

¹⁵⁵ BRITISH SCHEME, *supra* note 10, ¶ 6(c). See *Regina v. Criminal Injuries Comp. Bd., ex parte Thompstone and Crowe*, [1984] 1 W.L.R. 1234; *Miers, supra* note 10, at 76-82 and 91-99.

¹⁵⁶ ALASKA STAT. § 18.67.080(c) (1991). See also DEL. CODE ANN. tit. 11, § 9006(b) (1987); HAW. REV. STAT. § 351-31(c) (1985 & Supp. 1992); NEV. REV. STAT. ANN. § 217.180(1) (Michie 1992); N.J. STAT. ANN. § 52:4B-10(c) (1986). The Alaska and Nevada programs refer to "the prior case or social history, if any, of the victim . . ." N.J. ADMIN. CODE tit. 13, § 13:75-1.6(d) (1993) refers to "the prior case history of the victim, which may also include matters pertaining to the victim's medical history . . ."

¹⁵⁷ A LEXIS search revealed no caselaw interpreting this phrase, nor has the author come across definitions or explanations in those administrative rules which he has consulted. Compare with *Smith, supra* note 17, at 71, who states that the "relevant circumstances" provision in New Jersey means that "a victim with a demonstrable criminal history may be denied recovery . . . based, at least in part, upon his own criminal record"—but no authority is given.

¹⁵⁸ Criminal Injuries (Compensation) Order 1988, N. Ir. Stat. (S.I. No. 793 (N.I.4)), art. 6(1) (1988). The phrase appears to have originated in New Zealand. Criminal Injuries Compensation Act, N.Z. Stat. 1963, No. 134 § 17(3). It was not used in the British Scheme.

¹⁵⁹ *Cahill v. Secretary of State*, [1977] N. Ir. 53, 57 (emphasis added) (quoting *Cahill v. Secretary of State*, [1976] N.I.J.B. 9 (High Ct.)). See D.S. GREER, COMPENSATION FOR CRIMINAL INJURY IN NORTHERN IRELAND 108 (1990).

¹⁶⁰ *Moore v. Secretary of State*, [1977] N. Ir. 14, 18 (McGonigal, L.J.).

The full sweep of this definition has not been explored in the courts, but it has been held to include "circumstances discreditable to the victim which, like provocation or negligent behavior, render him more likely to suffer injury or death from attack," and failure by victims to follow medical advice relating to the treatment of their injury.¹⁶¹

All of these provisions have theoretical significance in that they elaborate upon the concept of the "innocent" or "deserving" victim. They also confer upon a board a substantial amount of discretion, which qualifies a victim's "right" to compensation. As a result, the question of misconduct by a victim or applicant is "one of the most difficult and important issues facing compensation programs."¹⁶² In practice, this question may, and indeed may be required to, be determined by administrative regulations or guidelines which indicate in more detail the (contributory) misconduct which the board will take into account.¹⁶³

Such guidelines may, however, also confirm the broad scope of the board's power to refuse or reduce compensation. For example, the Pennsylvania Rules provide that the Board should take into account "the behavior of a victim, including illegal activity, relating to the circumstances which gave rise to the claim determined not only at the instance of a crime but also from the past practices of the victim."¹⁶⁴ They continue:

A claimant may be ineligible [for compensation] if . . .

(i) the victim initiated, provoked or prolonged a physical confrontation with the offender;¹⁶⁵

¹⁶¹ *Cahill*, [1977] N. Ir. at 57-58. See generally GREER, *supra* note 159, at 107-18.

¹⁶² CVCB HANDBOOK, *supra* note 56, at II-4. Section VI of this handbook provides a helpful analysis of the current provisions.

¹⁶³ See, e.g., UTAH CODE ANN. § 63-63-2(21) (1993) ("Misconduct . . . means conduct . . . as provided by rules promulgated by the board . . ."). Cf. CVCB HANDBOOK, *supra* note 56, at VI-1 ("many [programs] simply proceed on a case-by-case basis, and rulings may vary to a significant degree"). In a number of programs, the burden of proving that the victim was guilty of "contributory misconduct" is normally on the state. Under OHIO REV. CODE ANN. § 2743.60(F) (Baldwin 1990), however, the claimant has the burden of proof on this issue if (1) he "was convicted of a felony more than ten years prior to [injury] . . . or has a record of felony arrests," or (2) "[t]here is good cause to believe that the victim engaged in an ongoing course of criminal conduct within five years or less of the criminally injurious conduct that is the subject of the claim." See, e.g., *In re Martin*, 578 N.E.2d 562, 564 (Ohio Ct. Cl. 1988).

¹⁶⁴ 37 PA. ADMIN. CODE §§ 191.1 and 191.9(k)(2) (1994). For similar guidelines, see D.C. MUN. REGS., tit. 28, § 2309.9 (1992), FLA. VICTIM COMP. PROGRAM RULES, r. 2A-2.003(h) and MINN. R. § 7505.2900 (1994). The British Board has published detailed guidelines. See CRIMINAL INJURIES COMP. BD., GUIDE ¶¶ 30-36 (1991), discussed in GREER, *supra* note 10, at 63-79.

¹⁶⁵ See also Branson v. Violent Crimes Comp. Div., 505 N.E.2d 69 (Ind. Ct. App. 1987) (V and X involved in fight, which ended; V then initiated a second fight in which he was

(ii) the victim was participating in an illegal drug transaction;¹⁶⁶ drunk in public; creating a public disorder; frequenting a place of prostitution; frequenting a place where drugs or alcohol are illegally bought, sold or consumed;¹⁶⁷ frequenting a place where illegal gambling is conducted, or participating in other illegal conduct

The Rules further provide that "contributory conduct" may include "conduct where the victim used poor judgment causing him to place himself in a situation where bodily injury would occur,"¹⁶⁸ the victim used poor judgment because of intoxication or drug involvement, or both."

Such guidelines may be stated to be inapplicable in certain special cases, such as sexual assaults or domestic abuse.¹⁶⁹ Special provision may also be made for claims arising out of (criminal) road accidents. In Louisiana, for example, the Board may reduce compen-

killed; compensation refused). *Compare with In re Strong*, 577 N.E.2d 163 (Ohio Ct. Cl. 1988) (V had argument with O's wife; O went to get his shotgun; the argument had ended and V was leaving when O returned and shot and killed V; V's defendants awarded full compensation because (i) abusive language alone does not constitute contributory misconduct, and (ii) the argument was not the proximate cause of V's death, the "determining superseding cause" of which was O's conduct); *Cooper v. Dep't of Employment Serv.*, 588 A.2d 1172 (D.C. 1991) (V initiated argument with two men which escalated into physical confrontation during which V was severely beaten; Board not entitled to hold that V ineligible for compensation solely for initiating argument); *Anne B. v. State Bd. of Control*, 209 Cal. Rptr. 83 (Ct. App. 1984) (V raped by man with whom she had had "on-off" relationship; no contributory misconduct because O's "past romantic or sexual involvement with [V] does not in any way legitimate an act of force or violence"). A victim is also entitled to act in self-defense. *See, e.g.*, 37 PA. CODE § 191.9(k)(2)(i) (1994); *In re Marshall*, 566 N.E.2d 198 (Ohio Ct. Cl. 1989) (V used knife in self-defense; shot dead by O; V may not have been wise, but entitled to defend herself; no contributory misconduct).

¹⁶⁶ *See, e.g.*, *Spicer v. Delaware Violent Crimes Comp. Bd.*, No. CIV.A.91A-03-002, 1991 Del. Super. LEXIS 281 (August 9, 1991). In *Spicer*, O duped V and a female companion into buying fake cocaine. V realized this almost immediately and jumped into car driving after O, eventually forcing O to stop. A fight ensued in which V was injured. The court denied compensation. *Id.*

¹⁶⁷ *See also McMillan v. Crime Victims Comp. Bd.*, 399 N.W.2d 515, 519 (Mich. Ct. App. 1986). In *McMillan*, V was shot in an unlicensed bar. Although mere presence in the bar violated a criminal statute, V was not responsible for contributory misconduct because gunshot injury not a reasonably foreseeable risk of being there. As the court stated, "if the risk of injury due to the victim's particular type of violation of a criminal statute is very remote and unforeseeable, the Board cannot deny or reduce his award" *Id.*

¹⁶⁸ *See, e.g., In re Pettry*, 587 N.E.2d 983, 984 (Ohio Ct. Cl. 1990) ("[W]hen a 'victim' challenges another, or the 'victim' accepts the challenge of another, to engage in a physical encounter, or voluntarily participates in a multi-person fracas, wherein . . . any of the parties receive physical injuries, whether by fair or foul means, such 'victim's' conduct constitutes 'contributory misconduct' . . ."); *In re Jones*, 546 N.E.2d 978, 980 (Ohio Ct. Cl. 1988) (refusing to compensate V due to contributory misconduct, applying test "whether a prudent, reasonable man would or would not expect retaliation in a violent manner").

¹⁶⁹ *See, e.g., PA. STAT. ANN. tit. 71, § 180-7.9(f)* (1993) ("[W]here the crime was rape . . . the conduct of the victim shall not be considered . . ."). *See also MINN. R. 7505.2900* (1994) ("Any of these provisions may be waived in cases of domestic abuse or sexual assault.").

sation if the vehicle operated by the victim was uninsured, the victim was a willing passenger in a vehicle driven by a drunken driver, or the victim was not wearing a seat-belt.¹⁷⁰

In some of these "misconduct" cases the Board has no discretion. If certain circumstances exist, it *must* refuse or reduce compensation. In other cases the Board *may* refuse or reduce compensation. Where reduction is appropriate, the Board is normally required to reduce the award "in proportion to what [it] finds to be the victim's contribution to the infliction of death or injury." Such a decision may, however, be facilitated by the use of broad reduction "bands."¹⁷¹

B. THE UNCOOPERATIVE VICTIM

Another common principle of "public" compensation for the victims of crime is the requirement that the victim cooperate with the police and all other relevant authorities. Thus, the British Board may withhold or reduce compensation if they consider that (a) the applicant has not taken, without delay, all reasonable steps to inform the police . . . of the circumstances of the injury and to cooperate with the police . . . or (b) the applicant has failed to give all reasonable assistance to the Board. . . .¹⁷²

Similarly, a compensation program is eligible for federal financial assistance under VOCA only if "such program promotes victim cooperation with the reasonable requests of law enforcement authorities."¹⁷³ Such a requirement is largely unnecessary, since state

¹⁷⁰ LA. REV. STAT. ANN. § 46:1809(4)(c)-(e) (West Supp. 1994). See also N.J. ADMIN. CODE tit. 13, § 13:75-1.7(i) (1993) (no compensation where V is passenger who knew or reasonably should have known driver under influence of drink or drugs); MINN. R. 7505.2900(B) (1994) (compensation refused or reduced where V knowingly and willingly in vehicle operated by driver under influence of drink or controlled substances). In *Newman v. Delaware Violent Crimes Comp. Bd.*, No. CIV.A.92A-03-004, 1993 Del. Super. LEXIS 39 (Feb. 9, 1993), a passenger was killed in an accident caused by the driver of the car. Because both passenger and driver were intoxicated, the passenger's relatives were refused compensation. In *In re Sotak*, 585 N.E.2d 580 (Ohio Ct. Cl. 1990), the court refused to find V guilty of contributory misconduct, even though V was not wearing a seat belt when a car driven by a drunk driver crashed. The court reasoned that "[t]he essence of contributory misconduct is the causal connection between the injured party's conduct and the offender's conduct rather than the injuries arising from that conduct. Put simply, the offender's decision to drive drunk was not motivated or instigated by the applicant's decision not to wear a seat belt." *Id.* See also *supra* text accompanying note 59.

¹⁷¹ See, e.g., FLA. VICTIM COMP. PROGRAM RULES, 2A-2003(2)(h)(4) (1992) ("Contributory assessments shall be made in increments of 25%. When the assessment exceeds 50%, the claim shall be denied."). In HAW. REV. STAT. § 351-31(c) (1992), "if [the victim's] proportion [of responsibility for the crime] is greater than the responsibility of the [offender] . . . the [Board] shall not award any compensation to such victim." For an illuminating analysis of other factors which may affect the exercise of these powers, see CVCB HANDBOOK, *supra* note 56, at VI-4 to VI-7.

¹⁷² BRITISH SCHEME, *supra* note 10, ¶ 6.

¹⁷³ 42 U.S.C. § 10602(b)(2) (1988). The VOCA Guidelines allow each state to deter-

programs invariably require both that the crime is reported promptly (normally within two to five days) to the police *and* that afterwards the victim cooperates with the prosecuting authorities and with the adjudicating body; failure to satisfy the adjudicating body in any of these regards normally leads to the refusal—or forfeiture—of compensation.¹⁷⁴ With regard to the former requirement, the rationale has been summarized as follows:

First, prompt notification . . . increases the chances of apprehending the offender. Second, the encouragement of crime reporting leads to . . . a better picture of the overall crime situation. [Third] is the idea that one who does not report a crime has failed in his public duty and thereby waived his right to receive public aid. Finally, and perhaps most important, the reporting requirement is seen as a means of curbing fraud.¹⁷⁵

These principles of prompt reporting and cooperation are not an issue in any program. What may cause difficulty in practice is whether the victim had any “good,” “just,” or “reasonable” cause for failing to comply promptly with such requirements, and what is meant by “reasonable cooperation” with the authorities. Apart from recognizing particular cases where a victim may indeed have good reason for not making a prompt report to the police,¹⁷⁶ compensation programs are also recognizing the difficulties which particularly vulnerable classes of victims—*e.g.*, victims of sexual offenses, domestic violence, and child abuse—may face.¹⁷⁷

mine what such co-operation entails. CVCB HANDBOOK, *supra* note 56, at II-3.

¹⁷⁴ See, *e.g.*, CAL. GOVT. CODE § 13962(c) (Deering 1994) (“The victim shall co-operate with . . . the [B]oard . . . in the verification of the information contained in the application; [if he fails to do so] . . . the [B]oard . . . in its discretion, may reject the application on this ground alone”); IND. CODE ANN. § 5-2-6.1-19 (Burns 1994) (“A claimant who fails to fully cooperate with law enforcement personnel . . . after an award is paid forfeits the award.”).

¹⁷⁵ CARROW, *supra* note 52, at 47. See also CVCB HANDBOOK, *supra* note 56, at II-3 (“Victims who frustrate law enforcement efforts should not be rewarded with public funds.”).

¹⁷⁶ See, *e.g.*, *White v. Violent Crimes Comp. Bd.*, 388 A.2d 206 (N.J. 1978) (“[A report may be delayed] for the period of the victim-applicant’s crime-induced incapacity in circumstances where the late-filing of the application for compensation does not prejudice the ability of the Board to verify the victim’s eligibility.”). See also TEX. ADMIN. CODE tit. 1, § 61.6 (1992) (“[T]he limitation period will not include that period of physical incapacity which reasonably prevented the claimant from filing an application . . .”).

¹⁷⁷ The 1984 ATTORNEY GEN. TASK FORCE REP. ON FAMILY VIOLENCE 53 (1984) recommended that “[e]ligibility criteria should allow extended reporting periods for all cases of sexual assault when the victim is a child or elderly person.” See, *e.g.*, IOWA CODE ANN. § 912.4(3) (West 1994) (provision for report to Dep’t of Human Services, instead of local police, if crime allegedly committed by person responsible for care of child); MINN. STAT. ANN. § 611A.53(2)(a) (West Supp. 1994) (relaxation of time limit for reporting crime for victims of criminal sexual conduct); N.Y. EXEC. LAW § 631(1) (McKinney 1994) (same); MO. REV. STAT. § 595.030.2 (1994) (if V under 18, report to police may be made by member of family, doctor, nurse, or by division of family services personnel); MONT. CODE ANN. § 53-9-125(1) (1993) (relaxation of filing requirement for victims of the “Childhood Criminal Act”); WASH. REV. CODE § 7.68.060(3) (1994) (same).

The administrative codes also provide further details of the general requirement of cooperation:

[In determining whether] the claimant has . . . fully cooperated with appropriate law enforcement agencies, the following criteria shall be used:

(a) The claimant's failure to prosecute a person who engaged in criminally injurious conduct or appear as a witness constitutes noncooperation and the claim shall be denied;¹⁷⁸

(b) The claimant initially decided not to prosecute but later changed his mind. If this causes a person who engaged in criminally injurious conduct to escape prosecution or directly negatively affects the prosecution, the claim shall be denied;

(c) If law enforcement authorities indicate that the claimant was reluctant to give information pertaining to the claim, failed to appear when requested without good cause, gave false or misleading information, or attempted to avoid law enforcement authorities, the award may be reduced or denied;¹⁷⁹

(d) an operational unit may make a full award to an uncooperative claimant if the claimant can convincingly demonstrate that the failure to cooperate was due to a compelling health or safety risk.¹⁸⁰

C. THE FINANCIALLY SOUND VICTIM

Criminal injuries compensation in Great Britain has never been means tested. It comes as something of a surprise, therefore, to find that in 1983 approximately one-third of all programs in the United States had financial tests requiring claimants to prove that they would suffer "substantial financial hardship" if not awarded compensation, or enjoining the Board to take the victim's financial resources into

¹⁷⁸ In *In re Dray*, 579 N.E.2d 788 (Ohio Ct. Cl. 1989), and *Ellis v. North Carolina Crime Victims Comp. Comm'n*, 432 S.E.2d 160 (N.C. Ct. App. 1993), the courts held that V's refusal to prosecute O is not in itself a failure to cooperate fully with law enforcement authorities. The Court in *Dray*, however, added that:

As a general rule, any action, inaction, or inexcusable neglect by an applicant which substantially impedes or impairs investigation or prosecution proceedings which have been initiated by the law enforcement authorities, or which would have been initiated but for the action, inaction, or inexcusable neglect, constitutes a failure to fully cooperate

In re Dray, 579 N.E.2d at 789-90.

¹⁷⁹ See, e.g., *In re Simmons*, 579 N.E.2d 311 (Ohio Ct. Cl. 1989) (V refused to name or describe assailant and failed to appear at trial, despite assuring prosecutor that he would appear; compensation denied). But see, e.g., *Randall v. Department of Employment Serv.*, 551 A.2d 90 (D.C. 1988) (V who engaged in "harassing and disruptive tactics" directed against a prosecutor who had decided *not* to prosecute V's assailant was held not to be guilty of failure to co-operate with the prosecutor).

¹⁸⁰ ARIZ. CRIMINAL JUSTICE COMM'N, CRIME VICTIM COMP. PROGRAM RULES R10-4-108(E)(3)(d) (1993). See also D.C. CODE ANN. § 3-403(c)(3) (1994) (V excused from testifying if subject to "a substantial risk of serious physical or emotional injury"); FLA. CRIM. INF. COMP. GUIDELINES, r. 10L.4-06; 37 PA. CODE § 191.9(c) (1992).

account when determining whether to make an award.¹⁸¹ However:

A number of states are considering eliminating the means test due to the high costs of investigations regarding financial hardship, the gross inequities that can occur in denying benefits to victims who have been diligent in saving money (especially when those victims are the elderly on fixed incomes), and the chilling effect that such means tests can have on the willingness of victims, even those experiencing severe financial hardship, to apply for compensation.¹⁸²

These considerations obviously had effect. By 1991, the number of programs with means tests had gone down considerably,¹⁸³ though they still apply in such populous states as Florida, Michigan, and New York.¹⁸⁴ A typical provision is that found in the District of Columbia:

An award of compensation shall be denied if it is determined that *the claimant* will not suffer undue financial hardship if not granted financial assistance A claimant suffers undue financial hardship if the claimant cannot maintain the customary level of health, safety, and education for himself or herself or his or her dependents¹⁸⁵

Such general provisions are then usually, and sometimes required to be,¹⁸⁶ supplemented by rules indicating, in detail, what resources and liabilities the Board must consider or ignore.¹⁸⁷ On occasion, the statute also gives the Board a precise indication of what constitutes "undue financial hardship." Thus, the Florida statute, until recently, advised that

¹⁸¹ MCGILLIS & SMITH, *supra* note 1, at 19 (1983). See also CARROW, *supra* note 52, at 54. But does it reflect "welfare" theory? The "clear preference" of the 1973 UNIFORM ACT, *supra* note 2, was "to eliminate any 'financial needs' or 'financial stress' test as a condition precedent to receipt of benefits." *Comm'r's Prefatory Note*. See 11 UNIFORM LAWS ANN: CRIMINAL LAW AND PROCEDURE 33 (1974). The 1992 UNIFORM ACT, *supra* note 2, contains no provision requiring economic or financial hardship on the part of the victim. *Id.* at 375.

¹⁸² MCGILLIS & SMITH, *supra* note 1, at 19.

¹⁸³ NIJ SUMMARY, *supra* note 36, at 23, places the figure at 11, but note that this report does not cover 10 or so programs. The test frequently does not apply to small awards, such as those under \$5000, N.Y. EXEC. LAW § 631(6)(a) (McKinney 1994), or to "good samaritans," N.Y. EXEC. LAW § 631(5)(c) (McKinney 1994).

¹⁸⁴ FLA. STAT. ANN. § 960.13(7) (West 1993); MICH. COMP. LAWS § 18.361(6) (1994); N.Y. EXEC. LAW § 631(6)(a) (McKinney 1994) (not applicable to awards under \$5000).

¹⁸⁵ D.C. CODE ANN. § 3-403(c)(1) (1994) (emphasis added). But see D.C. CODE ANN. § 3-402(a)(5) (allowing this requirement to be waived "in cases involving extraordinary circumstances where the interests of justice so require"). Cf. N.Y. EXEC. LAW § 631(6)(d) (McKinney 1994) (whereby the Board is advised that, "nothing contained in this [provision] shall be construed to mean that the [B]oard must maintain the same standard of living enjoyed by the claimant prior to the death or injury").

¹⁸⁶ KY. REV. STAT. ANN. § 346.140(3) (Baldwin 1993) requires "specific standards by rule." For an example of a very detailed provision, see 1973 UNIFORM ACT, *supra* note 2, § 5(g). But see *supra* note 181. The N.Y. EXEC. LAW § 631(6)(e) (McKinney 1994) also provides a detailed financial test.

¹⁸⁷ See, e.g., FLA. ADMIN. CODE ANN. r. 2A-2.003(3) (1992); MICH. COMP. LAWS § 18.361(6) (1994); NEB. REV. STAT. § 81-1822(5) (1992); NEV. REV. STAT. ANN. § 217.220(4) (Michie 1992); N.Y. EXEC. LAW § 631(6) (McKinney 1994).

A serious financial hardship is considered to exist if the victim's . . . liquid assets are not adequate on a dollar basis to absorb the loss created as a result of the injury . . . and/or if the difference in the victim's annual net excess income and the loss incurred as a result of the crime does not exceed 10% of the victim's net income or \$2500, whichever is greater.¹⁸⁸

Suppose a victim had a net annual income of \$29,000, net annual expenses of \$19,000, and, as a result of the injury, incurred a financial loss of \$7000. The difference between the net excess income (\$10,000) and the loss is \$3000, which exceeds ten percent of the net annual income (which in turn exceeds \$2500). Therefore, the victim does not suffer "serious financial hardship" as a result of the injury and is not entitled to any compensation. But a more generous test has since been introduced. Compensation is now payable where "the claimant's assets at the time of the crime were less than the actual loss amount plus six months' estimated income prior to the crime."¹⁸⁹ Thus, a victim who had no assets at the time of the injury would now be entitled to compensation.¹⁹⁰

D. OVERALL EFFECT OF "MISCONDUCT" PROVISIONS

The net result of the "refusal" provisions in the British Scheme is that approximately one-third of all applications are denied.¹⁹¹ In the United States, it has been estimated that "the number of claims awarded equaled about seventy percent of the number of claims filed."¹⁹² A more useful indication may be the number of denials as a percentage of the number of claims *determined*. As may be expected—and no doubt in part as a result of different classification criteria—the picture varies from state to state, as indicated by Table 2.¹⁹³ However, it is noticeable that overall denial rates, while sometimes lower and sometimes higher, appear generally to be of much the same order in

¹⁸⁸ FLA. GUIDELINES (1986), ch. 10L-4.01(4). The example which follows was given in these Guidelines.

¹⁸⁹ FLA. ADMIN. CODE ANN. r. 2A-2.003(3)(d)(4) (1992).

¹⁹⁰ *But see* NEB. REV. STAT. § 81-1822(5) (1992), which follows 1973 UNIFORM ACT, *supra* note 2, § 5(g)(2) (whether V's loss exceeds 10% of his "net financial resources" as defined in the statute). In New York, where the test is "financial difficulty [taking into account] . . . all relevant factors," a victim with savings of \$24,000, stocks worth \$4275 and an interest in some real property did not suffer financial hardship when he incurred a loss of \$594 as the result of a crime. *See* *Regan v. Crime Victims Comp. Bd.*, 442 N.Y.S.2d 170 (App. Div. 1981), *aff'd*, 441 N.E.2d 1070 (N.Y. 1982). *But see* IND. CODE ANN. § 5-2-6.1-14(a) (West Supp. 1994) (no award if V had "a net worth of greater than \$200,000" at time of injury).

¹⁹¹ *See infra* Table 2.

¹⁹² NIJ SUMMARY, *supra* note 36, at 4, 12-13.

¹⁹³ A similar survey of six programs (including Pennsylvania and Texas) in 1994 also produced wide variations. *See* Note, *Strategies and Solutions: Expanding Eligibility and Benefits*, CRIME VICTIM COMP. Q., No. 2, 1994, at 7-12 [hereinafter CVCQ SURVEY].

the United States as in Great Britain.¹⁹⁴ Claims appear to be most frequently closed or denied because of (1) the failure by the victim or claimant to provide the necessary information or otherwise to cooperate with the board; (2) the absence of a "crime of violence;" or (3) the fact that the claimant has suffered no net loss or a net loss below the statutory minimum (where the higher figure for Britain clearly reflects the comparatively high threshold in the British Scheme).¹⁹⁵ Contributory misconduct is also a frequent cause for denial. But the table suggests that claims are seldom rejected on the grounds of failure to make a timely report to the law enforcement authorities or because of the lack of "serious financial hardship."¹⁹⁶

Table 2: DISTRIBUTION OF CLAIMS DENIED¹⁹⁷

	GB	FLA	MICH	MINN	NY	PA	TEXAS
Failure to supply information/claim abandoned	5.2	89.7	24.0	1.2	66.5	8.2	6.1
No crime of violence	12.0	0.8	7.9	8.1	1.7	6.1	16.2
No police report	N/A	0.2	3.1	3.1	1.2	0.9	5.4
Failure to cooperate with Board/law enforcement	20.6	0.79	10.1	5.4	1.7	20.6	26.1
Claimant's conduct	24.2	1.7	9.5	15.6	2.1	14.2	39.0
No physical injury		3.6	1.7	4.2	1.5	N/A	N/A
No net loss	N/A	0.8	26.3	49.7	13.5	2.1	N/A
No minimum loss	25.2	N/A	11.8	6.4	N/A	8.2	N/A
No serious financial hardship	N/A	0.6	0.0	N/A	0.1	N/A	N/A
Other	12.7	1.9	5.6	6.3	11.6	10.5	7.2
Denials as % of all claims determined	33.7	62.4	58.2	N/A	60.2	20.1	35.3

¹⁹⁴ The range revealed in Table 2 (with a median figure of 34.5%) is somewhat higher than the 17-37% range (median of 25-29%) in the CVCQ SURVEY, *supra* note 193, at 12. Cf. Sarnoff, *supra* note 19, at 138-44 (finding denial rates ranging from 11% to 76%). Information supplied by the Office for Victims of Crime in Washington, D.C. (on file in office) suggests that some 37% of claims nationwide were "not approved" in 1993, comprising 10.7% of claims "not processed" and 26.4% of claims "denied."

¹⁹⁵ See *infra* text accompanying note 237.

¹⁹⁶ But see CVCQ SURVEY, *supra* note 193, at 7:

The most frequent reason for denial or closure in some states was failure on the victim's part to provide required information to the program to determine the claim; in some states, this constituted close to 50% of all denials or closures. Contributory conduct denials also were significant, ranging from a low of 6% . . . to a high of 39% . . . with an average at 14%. Collateral-source reimbursement precluded about 20% of claimants from collecting in half our sample states. Interestingly enough, failure to report to police promptly, and to file a timely claim with the compensation program, figured in a relatively small number of denials.

Id.

¹⁹⁷ See CRIMINAL INJURIES COMP. BD., 29TH REPORT, 1993, Cmnd. 2421, at 22; FLA. DIV. OF VICTIM SERV. AND CRIMINAL JUSTICE PROGRAMS, 1992-1993 ANNUAL REPORT 16-17 (1993);

Separate figures are not given for American programs with respect to *reduction* of compensation, but if the British experience is indicative,¹⁹⁸ this power is exercised in relatively few cases.

V. ASSESSMENT OF COMPENSATION

A. GENERAL PRINCIPLES

Until 1994, a victim who came within the British Scheme qualified, in principle, for compensation "assessed on the basis of common law damages."¹⁹⁹ Therefore, awards were designed to reimburse financial losses and expenses in full, and to provide a reasonable sum to cover the victim's pain and suffering, and loss of amenities. Notwithstanding frequent use of terms such as "compensation," "indemnification," and "restitution," most state programs are less ambitious. Their objective may be more accurately reflected in the words of the Wisconsin program:

It is the intention of the legislature that the state should provide sufficient assistance to victims of crime and their families in order to ease their financial burden and to maintain their dignity as they go through a difficult and often traumatic period.²⁰⁰

All states compensate victims for net lost earnings and medical and other "reasonable" expenses. Also, if a person has been killed, each

MINN. CRIME VICTIMS REPARATIONS BD., 1993 ANNUAL REPORT 8 (1993); PA. CRIME VICTIMS COMP. BD., 1992-93 ANNUAL REPORT 10, 30 (1993); MICH. CRIME VICTIMS COMP. BD., 1991-92 ANNUAL REPORT 23-24 (1992); N.Y. CRIME VICTIMS BD., 1991-92 ANNUAL REPORT 12, 17 (1992); OFFICE OF THE ATT'Y GEN., *supra* note 50, at 23.

¹⁹⁸ During the period 1984-1992, 2.5% of awards under the BRITISH SCHEME were reduced (and 4% abandoned), while 21% were denied. CRIMINAL INJURIES COMP. BD., 28TH ANNUAL REPORT, 1992, Cmnd. 2122, at 26.

¹⁹⁹ BRITISH SCHEME, *supra* note 10, ¶ 12. Compensation could not be awarded for punitive damages, *id.* ¶ 14(b), and there was a cap on awards for loss of earnings, *id.* ¶ 14(a), with the result that compensation awards were in some cases lower than tort damages. For further discussion, see GREER, *supra* note 10, ch. 4. However, under the new "Tariff" Scheme (if ultimately implemented, see *supra* note 10), compensation will be determined according to the nature of the injury suffered by the victim irrespective of the actual financial loss or pain and suffering. All conceivable injuries have been classified into some 200 categories, and these in turn have been reduced to 25 "tariff" bands ranging from £1000 to £250,000 (\$1500 to \$375,000 approximately). See CRIM. INJURIES COMP. 11-16 (1994). For an explanation of the reasons for and nature of this new approach, see COMPENSATING VICTIMS OF VIOLENT CRIME: CHANGES TO CRIM. INJURIES COMP. SCHEME, 1993, *supra* note 10.

²⁰⁰ WIS. STAT. ANN. § 949.001 (West 1983). See also FLA. STAT. ANN. § 960.02 (West 1984 & Supp. 1994); N.Y. EXEC LAW § 620 (McKinney Supp. 1994); W. VA. CODE § 14-2A-2 (1991). Compare TASK FORCE FINAL REPORT, *supra* note 4, at 38 ("No amount of money can erase the tragedy and trauma imposed on [victims of crime]; however, some financial redress can be an important first step in helping people begin the often lengthy process of recovery.") with Lamborn, *supra* note 124, at 50 ("[L]egislators . . . hesitate to provide unlimited benefits to victims of crime when victims of work-related injuries receive restricted awards . . . [under workers' compensation].").

state provides compensation for loss of financial support and funeral services for the victim's dependents. But in both cases compensation is payable only insofar as these losses and expenses are not met from other (collateral) sources.²⁰¹ Initial payments may be made on an "emergency" basis, with final payment at a later date, either in the form of a lump sum or by way of periodic payments. The detail of the programs may differ with regard to the precise definition of lost earnings, the scope of medical expenses, and the relatives entitled to compensation for loss of support. But once again, the general principle is not an issue with respect to such "losses." However, some noteworthy developments have taken place under the umbrella of "reasonable expenses." Thus, in certain cases, compensation is payable for the cost of "mental health counselling," and indeed, "[p]erhaps more than any other single medical expenditure, demand for mental health counseling benefits has risen dramatically over the past few years."²⁰² Compensation has also become payable to victims of domestic violence for the cost of temporary alternative accommodations which enable them to avoid contact with the offender.²⁰³ The cost of substitute child care, to replace that which the victim would have provided, may be paid to enable "the victim [or his or her spouse] . . . to engage in gainful employment."²⁰⁴ However, at least one court has drawn the line against allowing compensation for expense incurred through post-natal day care services for a child born as the result of a rape.²⁰⁵

The first notable point for a British observer²⁰⁶ is that VOCA

²⁰¹ For a summary of state programs, see CVCB HANDBOOK, *supra* note 56, § III. See also NIJ SUMMARY, *supra* note 36, ch. 4; 42 U.S.C. § 10602(b)(1) (1988).

²⁰² CVCB HANDBOOK, *supra* note 56, at III-2. In 1991, there were "dramatic" increases in claims for psychiatric treatment in Texas and several other major states. In Texas, the Attorney General brought proceedings against a private psychiatric hospital chain alleging use of "bounty hunters" to attract patients and collect fees from the state crime victims compensation fund; the claim was settled out of court. See, e.g., Louise Kertesz, *Hospital Chain Sues Insurers over Mental Care Claims*, BUS. INS., July 27, 1992, at 1, 45. New administrative rules designed to contain medical costs and clarify "unethical and fraudulent practices" were introduced in 1992 and were reported to have reduced expenditures by \$9 million in 1992-1993. See OFFICE OF THE ATT'Y GEN., *supra* note 50, at 3, 22.

²⁰³ See *supra* note 83.

²⁰⁴ See, e.g., LA. REV. STAT. ANN. § 46:1802(8)(b)(iii) (West Supp. 1994); MINN. STAT. ANN. § 611A.52(8)(a)(5) (West Supp. 1994); TEX. CODE CRIM. PROC. ANN., arts. 56.32(8)(A)(iii), 56.42(a)(4)(C) (Vernon Supp. 1994) (limit varies with number of children: maximum is \$125 per week for three or more children).

²⁰⁵ *In re Hensley*, 579 N.E.2d 557, 557 (Ohio Misc. 1989) (mother was entitled to compensation, however, for prenatal medical care, delivery expenses, and the cost of post-natal care).

²⁰⁶ As previously explained, until 1994 compensation under the BRITISH SCHEME was assessed "on the basis of common law damages," thereby entitling victims to compensation for pain and suffering. See BRITISH SCHEME, *supra* note 10, ¶ 12. That will no longer be the case if the new "Tariff" scheme is implemented, *supra* note 10, although it has been

makes no provision for, and in general state programs do not award, any compensation for pain and suffering.²⁰⁷ This may be a matter of principle, given that the state is not the tortfeasor and, therefore, is not liable to compensate victims on that basis. But more often the exclusion of pain and suffering reflects a pragmatic decision to avoid administrative and assessment difficulties and to keep costs down.²⁰⁸ This general rule has three exceptions: in certain programs, compensation is payable for pain and suffering though usually subject to a (relatively low) maximum limit;²⁰⁹ in one state, such compensation is payable only to victims of rape and crimes involving sexual deviancy;²¹⁰ and some programs retain elements of earlier linkage to workers' compensation. These programs provide that permanent partial or total disability qualifies for compensation on a basis that does not necessarily reflect loss of earnings resulting from that disability.²¹¹

State programs have always stipulated a maximum limit on compensation for losses incurred by victims after deductions for "collat-

claimed that the method of determining the tariff bands "reflects more closely the value of the pain and suffering element of the award. . . ." COMPENSATING VICTIMS OF VIOLENT CRIME: CHANGES TO CRIM. INJURIES COMP. SCHEME, *supra* note 10, ¶ 15.

²⁰⁷ See, e.g., OHIO REV. CODE ANN. § 2743.51(E) (Baldwin 1993) (Compensation is not payable for "non-economic detriment" (e.g., pain and suffering, inconvenience, physical impairment, or other non-pecuniary damage); however, the section adds that "economic loss may be caused by pain and suffering or physical impairment."). The logical result of this approach can be seen in *Dill v. Commonwealth*, 562 N.E.2d 468 (Mass. 1990) (V was assaulted and left "legally blind"; however, V suffered no net loss of earnings or medical expenses, and was therefore not entitled to any compensation). KAN. STAT. ANN. § 74-7301(B)(i) (1992), explains that compensation is payable for economic loss "caused" by physical impairment or pain and suffering (presumably where this is the direct result of the injury); and, of course, compensation is payable for the cost of mental health care and counseling of eligible victims. See *supra* text accompanying notes 97 to 121.

²⁰⁸ CARROW, *supra* note 52, at 31-33 (1980); Lamborn, *supra* note 124, at 34-36.

²⁰⁹ See, e.g., HAW. REV. STAT. § 351-62(b) (1985 & Supp. 6 1992) (subject only to overall limit of \$10,000); R.I. GEN. LAWS § 12-25-5(c) (1993) (apparently subject only to overall limit of \$25,000); see also R.I. GEN. LAWS § 12-25-6(b) (1981 & Supp. 1993) (authorizing the Board to take into account the amount of funds available and the number of claims pending); see generally *Jones v. Rhode Island* 495 A.2d 224 (R.I. 1985) (upholding an award of \$950 for pain and suffering on appeal); V.I. CODE ANN. tit. 34, § 163(b)(3)(B) (1992) (compensating up to \$5000 for "pain and suffering"). At least two programs have recently repealed similar provisions. W. VA. CODE, § 14-2A-14(g) (repealed 1992) (compensated up to \$15,000 to victim for "emotional distress and/or pain and suffering" and up to \$5000 to the spouse and children of a deceased victim for "sorrow, mental anguish, and solace"); DEL. CODE ANN. tit. 11, § 9005(1) (repealed 1992) (compensation (subject to overall limit of \$25,000) payable for "any scarring, disfigurement, or mental suffering, resulting from injuries of a permanent nature provided that such scarring, disfigurement, or mental suffering are a direct result of such crime").

²¹⁰ See, e.g., TENN. CODE ANN. § 29-13-107(3) (Supp. 1994) (subject to maximum of \$3000 and "taking into account the particular circumstances involved in such crime").

²¹¹ *Id.* § 29-13-107(1) (based on current workers' compensation schedule). See also WASH. REV. CODE ANN. § 7.68.070(13) & (14) (West Supp. 1994) (subject to maxima of \$15,000 and \$40,000 respectively).

eral" benefits.²¹² Table 3 compares the position in 1993 to the position in 1983.²¹³ However, the programs do not readily lend themselves to such tabulation. The maximum limit is normally for all claims arising out of the crime, but occasionally it is applicable only to each *claimant*.²¹⁴ Similarly, a number of programs now have separate maxima for death and injury.²¹⁵ Finally, many programs have individual limits for certain types of compensation—such as loss of earnings²¹⁶ and medical expenses²¹⁷—which may operate separately, or within the overall maximum.²¹⁸ Nonetheless, Table 3 gives some indication of the general maximum level of compensation.

Table 3: MAXIMUM COMPENSATION PAYABLE IN STATE PROGRAMS

	1993	1983
\$50,000 and over	4 ²¹⁹	1
\$26,000 - \$49,000	6 ²²⁰	3
\$25,000	16 ²²¹	7
\$11,000 - \$24,000	7 ²²²	8
\$10,000	16 ²²³	12
Under \$10,000	3 ²²⁴	2
	<hr/> 52	<hr/> 33

²¹² See, e.g., VA. CODE ANN. § 19.2-368.11:1(F) (Michie 1990 & Supp. 1994); *In re Edmundson*, 625 P.2d 372, 377 (Haw. 1981).

²¹³ Based on NIJ SUMMARY, *supra* note 36, at 29, but amended to make data more up to date. The figures for 1983 are taken from MCGILLIS & SMITH, *supra* note 1, at 17-18 (Exhibit 1.4).

²¹⁴ See, e.g., NEB. REV. STAT. § 81-1823 (Supp. 1992) (\$10,000 "for each applicant per incident") as applied in, *Lambert v. Nebraska Crime Victims Reparations Bd.*, 336 N.W.2d 320 (Neb. 1983) (awarding \$10,000 to each of two children). See also N.H. REV. STAT. ANN. § 21-M:8-h(V) (Supp. 1993) (\$5000 "per claimant per incident"); V.I. CODE ANN. tit. 34, § 164(a) (1992) (\$25,000 "to any one applicant").

²¹⁵ See, e.g., ALASKA STAT. § 18.67.130(c) (1991) (\$25,000 per victim, but \$40,000 if V dies leaving more than one dependent); CONN. GEN. STAT. ANN. § 54-211(d) (West Supp. 1994) (General limit \$15,000, but up to \$25,000 payable to dependents of homicide victim); LA. REV. STAT. ANN. § 46.1810(A) (West Supp. 1994) (Limit is \$10,000 "except for those victims who are permanently, totally, or permanently and totally disabled as a result of the crime, [when] the aggregate award shall not exceed \$25,000").

²¹⁶ A maximum limit for earnings may be fixed by dollar amounts, see, e.g., N.Y. EXEC. LAW § 631(3) (McKinney Supp. 1994) (\$400 per week "provided . . . that the aggregate award for such loss shall not exceed twenty-thousand dollars"), or be expressed as a percentage (or fraction) of the victim's earnings or of state average weekly earnings (sometimes as determined for workers' compensation purposes), or both. See, e.g., MONT. CODE ANN. § 53-9-128 (1993); PA. STAT. ANN. tit. 71, § 180-7.9(c) (1990 & Supp. 1994); UTAH CODE ANN. § 63-63-14(4)(d) (1993).

²¹⁷ This is particularly noticeable with regard to awards for the cost of mental health care and counseling where the individual limit may be as low as \$500 in a program with an overall limit of \$15,000 or \$25,000. See *supra* text accompanying note 120.

²¹⁸ See, e.g., IOWA CODE ANN. § 912.6 (West 1994 & Supp. 1994), which does not stipulate any general maximum, but lays down limits for seven types of particular losses or expenses. For a list of individual limits by state, see Sarnoff, *supra* note 19, at 133.

To a British observer, these maxima might seem comparatively

²¹⁹ New York does not limit the compensation payable for "indebtedness reasonably incurred for medical . . . services necessary as a result of the injury . . ." N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1994). However, it does limit the other heads of compensation. Indeed, these limits have recently been reduced. The maximum that can now be awarded for loss of earnings or loss of support is \$20,000, reduced from \$30,000 in 1991. *See generally* N.Y. EXEC. LAW § 631 (McKinney Supp. 1994); WASH. REV. CODE ANN. § 7.68.070(13) (West Supp. 1994) (benefits not exceeding \$40,000 may be granted for total permanent disability or death); WASH. REV. CODE ANN. § 7.68.085 (West 1992) (medical benefits subject to a "cap" of \$150,000); MINN. STAT. ANN. § 611A.54(3) (West Supp. 1994) (\$50,000); OHIO REV. CODE ANN. § 2743.60(I) (Baldwin 1993) (\$50,000).

²²⁰ CAL. GOV'T CODE § 13965(f) (West Supp. 1994) (\$46,000). Until 1993, a further \$10,000 could be paid under subd. (i) "to or on behalf of a victim of a crime involving sexual assault . . . who has made more than two appearances in open court . . . in criminal actions involving the defendant, over an extended period of time." *See also* MD. CODE ANN. art. 26A, § 12(2) (Supp. 1993) (\$45,000); ALASKA STAT. § 18.67.130(c) (1992) (\$40,000 only when the victim is killed); WIS. STAT. ANN. § 949.06(2) (West Supp. 1993) (\$40,000); PA. STAT. ANN. tit. 71, § 180-7.9(b) (1990 & Supp. 1994) (\$35,000); W. VA. CODE § 14-2A-14(g) (Supp. 1994) (\$30,000 when victim dies, otherwise maximum is \$20,000).

²²¹ CONN. GEN. STAT. ANN. § 54-211(d) (West Supp. 1994) (only where victim dies); DEL. CODE ANN. tit. 11, § 9007(d) (1992); D.C. CODE ANN. § 3-403(b) (1994); IDAHO CODE § 72-1019(5)(a) (Supp. 1994); 740 ILCS 45/10.1(f) (Michie 1993); KAN. STAT. ANN. § 74-7305(i) (1992 & Supp. 1993); KY. REV. STAT. ANN. § 346.130(6) (Baldwin 1993); LA. REV. STAT. ANN. § 46.1810(A) (West Supp. 1994) (but only where V is "permanently, totally, or permanently and totally disabled as a result of the crime"); MASS. ANN. LAWS ch. 258A, § 5 (Law. Co-op. 1994) (repealed 1995); MASS. ANN. LAWS ch. 258C, § 3 (Law. Co-op. 1995) (retains maximum of \$25,000); MONT. CODE ANN. § 53-9-128(5) (1993); N.J. STAT. ANN. § 52:4B-18 (West Supp. 1994); N.D. CENT. CODE § 54-23.4-06(8) (1993); R.I. GEN. LAWS § 12-25-6(b) (1981 & Supp. 1993); TEX. CRIM. PROC. CODE ANN. art. 56.42(b) (West 1994); UTAH CODE ANN. § 63-63-14(6) (1993) (reduced from \$50,000 in 1993, *see* NIJ SUMMARY, *supra* note 213); V.I. CODE ANN. tit. 34, § 164(a) (1992) (but limit applies "to any one applicant"); *see supra* note 214.

²²² IOWA CODE ANN. § 912.6 (1994) (approximately \$22,600, *see supra* note 218); MICH. COMP. LAWS ANN. § 18.361(1) (West 1994) (\$15,000 "per claimant"); NEV. REV. STAT. ANN. § 217.200(3) (Michie 1992) (\$15,000); N.C. GEN. STAT. § 15B-11(g) (Supp. 1993) (\$20,000 "in addition to allowable funeral, cremation, and burial expenses"); N.M. STAT. ANN. § 31-22-14B (Michie 1994) (\$20,000); OR. REV. STAT. § 147.035(2)(b) (1993) (\$23,000); VA. CODE ANN. § 19.2-368.11:1(F) (Michie 1990 & Supp. 1994) (\$15,000).

²²³ ALA. CODE § 15-23-15(b) (1994); ARIZ. COMP. ADMIN. R. & REGS. R10-4-108(D)(1) (1990); ARK. CODE ANN. § 16-90-716(a) (Michie Supp. 1993); COLO. REV. STAT. § 24-4.1-109(2)(b) (1988 & Supp. 1993) ("unless otherwise determined by the . . . Board to address situations catastrophic to the victim," when limit is \$15,000); FLA. STAT. ANN. § 960.13(8) (West Supp. 1994); HAW. REV. STAT. § 351-62(b) (1985 & Supp. 6 1992); IND. CODE ANN. § 5-2-6.1-35(a)(1) (West Supp. 1994); MISS. CODE ANN. § 99-41-23(2) (1994); MO. ANN. STAT. § 595.030.6 (Vernon Supp. 1994); NEB. REV. STAT. § 81-1823 (1992) ("for each applicant per incident" an award may exceed \$10,000 where "expenses for job retraining or similar . . . rehabilitative services for the victim are deemed necessary"); OKLA. STAT. ANN. tit. 21, § 142.13(B) (West Supp. 1994); S.C. CODE ANN. § 16-3-1180(C) (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 23A-28B-21 (Supp. 1994); TENN. CODE ANN. § 29-13-106(e) (Supp. 1994) (provided sufficient funds); VT. STAT. ANN. tit. 13, § 5356 (Supp. 1993); WYO. STAT. § 1-40-109(b) (1988). *See infra* note 231.

²²⁴ GA. CODE ANN. § 17-15-8(c)(1) (1994) (\$5000 as of July 1994, previous limit was \$1000); ME. REV. STAT. ANN. tit. 5, § 3360-E (West Supp. 1993) (\$5000); N.H. REV. STAT. ANN. § 21-M:8-h(V) (Supp. 1993) (\$5000 for each claimant per incident). *See supra* note

low—the British Board has made awards in excess of \$750,000.²²⁵ However, only 5.5% of awards under the British Scheme in 1992-1993 were for \$15,000 or above, and the average award was about \$6250.²²⁶ The average awards in the United States appear to range from \$1000 or less to more than \$8000, with a nationwide average of \$2084 in 1993.²²⁷ It is not known how many maximum awards are made overall. Connecticut's maxima of \$25,000 for death and \$15,000 for injury are fairly typical and it gives the maximum about ten percent of the time.²²⁸

Awards under many programs are also subject to the availability of funds, thereby limiting the victim's "right" to compensation.²²⁹ When a Board assesses the amount of compensation, the statute may require it take available funds into account.²³⁰ Boards are frequently authorized to "prorate" awards or to make "appropriate proportionate reductions" if they find or anticipate that sufficient funds are not avail-

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²²⁵ Four such awards were made in 1992-1993. CRIMINAL INJURIES COMP. BD., 29TH ANNUAL REPORT, 1993, Cmnd. 2421, at 5 (£1 taken to be worth \$1.50). However, under the new "Tariff" Scheme the maximum award (for quadriplegia/tetraplegia or permanent and extremely serious brain damage) will be \$375,000. See COMPENSATING VICTIMS OF VIOLENT CRIME, *supra* note 10, at 11.

²²⁶ *Id.* 273 awards (*i.e.*, 0.7% of the total number) exceeded \$75,000 (over £50,000); 31,625 (86%) were for less than \$7500 (£5000).

²²⁷ Sarnoff, *supra* note 19, at 145-46 (average award ranges from \$695 to \$8800). Cf. CVCB Handbook, *supra* note 56, at X-1 (range is from \$1000 to \$5000). See *e.g.*, PA. CRIME VICTIMS COMP. BD., 1992-1993 ANNUAL REPORT 10 (approx. \$2245); FLA. DIV. OF VICTIM SERV. AND CRIMINAL JUSTICE PROGRAMS: 1992-1993 ANNUAL REPORT 18 (\$3559); OFFICE OF THE ATT'Y GEN., *supra* note 50, at 11 (\$3867); COURT OF CLAIMS OF OHIO, 1992-1993 ANNUAL REPORT 2 (\$2694); STATE OF MICH. CRIME VICTIMS COMP. BD., 1991-1992 ANNUAL REPORT 11 (\$2260). The nationwide figure was supplied by the Office for Victims of Crime (on file).

²²⁸ CONN. COMM'N ON VICTIM SERVICES, 13TH ANNUAL LEGISLATIVE REPORT 1990-1991, at 10 (1992). Compare with New Jersey, where the limit is \$25,000, the corresponding figure was 2.6%. N.J. VIOLENT CRIMES COMP. BD., 1989-1990 ANNUAL REPORT 21 (1991). CVCB HANDBOOK, *supra* note 56, at X-1 estimates that "less than 5% of awards will reach the maximum." Cf. John H. Laub, *Patterns of Criminal Victimization in the U.S.*, in VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS 23, 42 (Arthur J. Lurigio et al. eds., 1990) (just over 16% of victims suffering personal injury as a result of crime receive "serious" injuries). According to CRIMINAL VICTIMIZATION IN THE UNITED STATES 1992, at 68 (1994), "about 8%" of victims of violent crime received hospital care, and the same percentage lost time from work.

²²⁹ See, *e.g.*, MO. REV. STAT. § 595.035(1) (Supp. 1994); S.D. CODIFIED LAWS ANN. § 23A-28B-10 (Supp. 1994); TEXAS CRIM. PROC. CODE ANN. § 56.54(d) (Vernon Supp. 1994); N.J. STAT. ANN. § 52:4B-9 (West Supp. 1994). The court in *White v. Violent Crimes Comp. Bd.*, 388 A.2d 206, 214 n.3 (N.J. 1978), held that "there [was] no 'excess' liability on the part of the public treasury for valid claims which cannot be paid because of insufficient funding." *Id.*

²³⁰ See *e.g.*, ME. REV. STAT. ANN. tit. 5, § 3360-F(3) (West Supp. 1993) (Board to consider the amount available to pay claims and the number and amount of currently pending claims).

able.²³¹ Alternatively, they may establish an order of priority for the payment of compensation:

Payment to treatment providers may be deferred until the payment of economic loss is complete. Funds available after payment to the applicant for economic loss shall be equitably distributed among all . . . eligible treatment providers.²³²

In such cases, "topping-up" payments cannot usually be made unless and until the legislature specifically makes the necessary arrangements.²³³ Occasionally there is a complete embargo where "no further awards . . . shall be made until sufficient funds are available."²³⁴ In recent years, many programs have availed themselves of such provisions and suspended or reduced awards otherwise payable to victims.²³⁵

It comes as no surprise to find that many programs have a minimum as well as a maximum level of compensation—normally \$100-\$200²³⁶ or two-to-three weeks' loss of earnings or both. Sometimes this minimum is stated as a threshold; in other cases it operates as a deductible. These minima are low by British standards—the lower limit under the British Scheme is now \$1500.²³⁷ Also, many programs

²³¹ See, e.g., MO. REV. STAT. § 595.045(10) (Supp. 1994); MINN. R. § 7505.3000 (1992) (repealed); MONT. CODE ANN. § 53-9-108 (1993); OR. REV. STAT. § 147.125(2) (1993); S.C. CODE ANN., § 16-3-1330 (Law. Co-op. Supp. 1993). Cf. TENN. CODE ANN. § 29-13-106(h) (Supp. 1993) (Board may pay an additional sum of up to \$3000 by way of "supplemental award" (for losses exceeding \$7000), but only if sufficient funds available).

²³² FLA. ADMIN. CODE ANN. r. 2A-2.010 (1992) (proposed to "conserve and efficiently manage the distribution of the limited funds available"). TEX. ADMIN. CODE tit. 1, § 61.14 (1992) contains a similar provision.

²³³ See, e.g., MONT. CODE ANN. § 53-9-108 (1993). When sufficient funds do become available, full awards may have to be made "in chronological order." ARK. CODE ANN. § 16-90-712(7) (Michie Supp. 1993); MO. REV. STAT. § 595.045(10) (Supp. 1994).

²³⁴ VT. STAT. ANN. tit. 13, § 5356 (1993); D.C. CODE ANN. § 3-403(a) (1994); N.C. GEN. STAT. § 15B-22 (1993).

²³⁵ In California, a funding deficit caused payment of compensation to be suspended in 1993. Note, *California Gets \$44 Million to Cover Deficit*, CRIME VICTIM COMP. Q., 1994, No. 1, at 3. In Maryland, budget cuts forced (temporary) "shutdown" of Board in 1991. Note, *Victims Aid Board Cut in Budget Woes*, WASHINGTON TIMES, Dec. 9, 1991 at B2. The New Jersey Board would not pay more than 75% of medical expenses or loss of earnings (later restored to 100%). See *Resolving a Fiscal Crisis*, CRIME VICTIM COMP. Q., No. 4 1992, at 9. In Texas, medical payments were temporarily reduced by 40%. See *Texas Restores 100% Benefit*, CRIME VICTIM COMP. Q., No. 1, 1994, at 3. A survey by the National Association of Crime Victim Compensation Boards in 1992 suggested that 35 state programs were suffering "some degree of financial difficulty, ranging from a cessation of payments for months at a time, to a negative cash flow eating into reserves." *Association Backs VOCA Changes*, CRIME VICTIM COMP. Q., No. 4, 1992, at 1.

²³⁶ NJ SUMMARY, *supra* note 36, at 30. Note also that the financial needs/hardship test may operate as "a floating lower limit tied to the resources of the individual" victim. Lamborn, *supra* note 124, at 53.

²³⁷ BRITISH SCHEME, *supra* note 10, ¶ 5 (£1000). This figure has been criticized as being too high. See GREER, *supra* note 10, at 95-96; MIERS, *supra* note 10, at 69-70. A particular

provide that the minimum does not apply to claims by certain classes of victims, such as the elderly, the previously disabled, victims of sexual offenses, or even cases in which "it is determined that the interest of justice would not be served by such a limitation."²³⁸

Predictably, Table 4 suggests that the money is spent "primarily on medical expenses." The most notable figure is the high expenditure on psychotherapy expenses in California—an apparent result of both the large number of child abuse claims and that program's generous provisions for secondary victims.²³⁹

Table 4: DISTRIBUTION OF COMPENSATION AWARDS²⁴⁰

	CALIF	MINN	NY	TEXAS	OTHERS	ALL
Medical expenses	44.3	53.0	47.0	67.7	61	47.7
Mental health care	38.3	12.2		5.5	13	18.9
Loss of income/support	17.3	23.0	27.1	17.4	15	19.7
Funeral expenses	-	11.8	14.8	8.9	9	8.1
Other	0.1	-	11.0	0.6	2	5.6

B. COLLATERAL BENEFITS

From the outset, criminal injuries programs have, as in Britain, adopted a policy against double compensation, so that a victim does not obtain compensation from the program in addition to financial assistance from social security, insurance, and other sources:

To make the restitution fund meaningful, it must be limited to compensating financial losses not offset by support payments which would not have been received except for the criminal act.²⁴¹

concern is that this threshold will preclude the payment of compensation to the archetypal victim—the "little old lady" who is mugged in the street. But the Board has stressed that it will consider such claims sympathetically. See GREER, *supra* note 10, at 96.

²³⁸ TENN. CODE ANN. § 29-13-106(d) (Supp. 1993). See, e.g., CAL. GOV'T CODE. § 13960(d)(3) (West 1992 & Supp. 1994); MICH. COMP. LAWS § 18.354(3) (1994); MISS. CODE ANN. § 99-41-17(1)(f) (1994); N.J. STAT. ANN. § 52:4B-18 (West Supp. 1994).

²³⁹ See *supra* text accompanying notes 77 and 108, respectively.

²⁴⁰ CAL. STATE BD. OF CONTROL, *supra* note 50, at 32; MINN. CRIME VICTIMS REPARATIONS Bd., 1993 ANNUAL REPORT 9 (1994); N.Y. CRIME VICTIMS Bd., 1991-1992 ANNUAL REPORT 22 (1992); OFFICE OF THE ATT'Y GEN., *supra* note 50, at 14. "Others" refers to a survey of 7 states in Note, *Percentage of Payments by Type of Expense* CRIME VICTIM COMP. Q. No. 2, 1994, at 12, and "All" refers to a survey of 49 programs in 1993 (information on file supplied by Office for Victims of Crime). The British Board does not give such information, but it may be assumed that because of the National Health Service much less is payable in Britain by way of medical expenses. In contrast, a substantial percentage of compensation represents payments for pain and suffering.

²⁴¹ Fierro v. State Bd. of Control, 236 Cal. Rptr. 516, 518 (Cal. Ct. App. 1989). In County of Alameda v. State Bd. of Control, 18 Cal. Rptr. 2d 487, 493 (Cal. Ct. App. 1993), *review denied*, 1993 Cal. LEXIS 3382 (1993), a compensation program was described as "a source of last resort." Occasional exceptions may be found. E.g., WASH. REV. CODE. § 7.68.050(1) (1992) (V "may elect to seek damages [from O] . . . and such victim . . . is

Of the various sources available to the victim, criminal injuries compensation is primary in two senses: First, social security authorities, insurance companies, and others who have made payments to the victim are normally not entitled to recover those sums under the program; second, victims who have been paid or who are entitled to be paid from a collateral source will generally have their compensation claims reduced accordingly. This is not always the case, however, and some recent decisions have given rise to concern that compensation programs are not sufficiently recognized as "payors of last resort."²⁴²

The usual provision for the deduction of collateral benefits is derived from the Uniform Crime Victims Reparations Act of 1973:

'Collateral source' means a source of benefits or advantages for economic loss otherwise reparable under [this Act] which the victim or claimant²⁴³ has received, or which is readily available to the victim, from: (1) the offender;²⁴⁴

entitled to the full compensation . . . provided by this chapter regardless of any election or recovery made pursuant to this section"); MICH. COMP. LAWS § 18.361(4)(c) (1994) (disability or death benefits paid to peace officer or corrections officer on account of injuries sustained in the course of employment not deducted); PA. STAT. ANN. tit. 71, § 180-7.9(e) (Supp. 1994) (collateral payments deducted "except for any payments or proceeds that are specifically denominated as compensation for dismemberment or loss of an eye").

²⁴² Compare *United States v. Maryland*, 914 F.2d 551 (4th Cir. 1990) and *United States v. Ohio*, 957 F.2d 231 (6th Cir.), cert. denied, 113 S. Ct. 75 (1992) (federal statute granting Veterans' Administration right to recover cost of medical care from third party preempts state statute denying compensation to crime victim who receives "free" care at VA hospital) with *County of Alameda v. State Bd. of Control*, 18 Cal. Rptr. 2d 487 (Cal. Ct. App. 1993) (indigent V who received "free" treatment at County hospital suffered no loss and therefore not entitled to compensation). In 1990, "state Medicaid programs were instructed by federal authorities that under federal law, victim compensation was the primary payor . . . for Medicaid-eligible victims." CVCB HANDBOOK, *supra* note 56, at VII-3. The Office for Victims of Crime has called for legislation "to unequivocally designate the VOCA victim compensation program as the payor of last resort." 1994 VOCA REPORT, *supra* note 8, at 27. This recommendation has now been implemented by the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 10601, *et seq.* (1994) (state compensation program not to pay "costs that a Federal program, or a federally financed State or local program, would otherwise pay.").

²⁴³ Each claimant must be separately considered, so that the compensation payable, *e.g.*, to the daughter of a victim, is not to be reduced by collateral benefits paid to her mother. "The statute plainly does not intend that payment from a collateral source to a claimant who may have no legal obligation to provide assistance to other dependents of the crime victim will preclude an award to other claimants." *Jennings v. Division of Crime Victims Comp. Fund*, 365 S.E.2d 241, 243 (Va. Ct. App. 1988). But what if C1 does have a legal obligation to assist C2?

²⁴⁴ Many states add "anyone paying on behalf of the offender." See, *e.g.*, IND. CODE ANN. § 5-2-6.1-32(2) (Burns 1994); MICH. COMP. LAWS § 18.361(4)(a) (1994); TENN. CODE ANN. § 29-13-106(f)(1)(a) (1994). But even this addition does not appear to catch a third party tortfeasor (*e.g.*, the negligent innkeeper or landlord). Compare 1992 UNIFORM ACT, *supra* note 2, § 316(a) (referring to "the person responsible or any other public or private alternative source." Wis. STAT. ANN. § 949.06(3)(e) (West 1993) expressly deducts any payment received, or to be received, from "one or more third parties held liable for the offender's acts." And, indeed, in most programs the Board is entitled to subrogation to "any" right

- (2) the Government of the United States or any agency thereof, a state or any of its political subdivisions,²⁴⁵ or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under [this Act];
- (3) Social Security,²⁴⁶ Medicare and Medicaid;²⁴⁷
- (4) state required temporary non-occupational disability insurance;
- (5) workers' compensation;
- (6) wage continuation programs of any employer;²⁴⁸
- (7) proceeds of a contract of insurance payable to the victim for economic loss sustained because of the crime;²⁴⁹
- (8) a contract providing prepaid hospital and other health care services, or benefits for disability;
- (9) any private²⁵⁰ source as a voluntary donation or gift.²⁵¹

which V may have to recover losses arising from the crime. *See, e.g.*, FLA. STAT. ANN. § 960.16 (West 1993); MICH. COMP. LAWS § 18.364 (1994). *See further infra* text accompanying notes 269 to 279.

²⁴⁵ This general wording appears to include a provision which is made explicit in some programs: that any sum received by the victim under the criminal injuries compensation scheme of another state or foreign country will be deducted. *See, e.g.*, OHIO REV. CODE ANN. § 2743.51(B)(10) (Baldwin 1993), as applied in *In re Cooper*, 593 N.E.2d 506, 508 (Ohio Ct. Cl. 1990).

²⁴⁶ It is not always clear whether this means all such benefits or only those intended to replace lost income. *See, e.g.*, MO. REV. STAT. § 595.035(4) (1994) (monthly social security disability and retirement benefits not deducted). *Compare* *Scott v. Labor and Indus. Relations Comm'n*, 757 S.W.2d 635 (Mo. Ct. App. 1988) with *Jennings v. Division of Crime Victims Comp.*, 365 S.E.2d 241 (Va. Ct. App. 1988).

²⁴⁷ *But see supra* note 242.

²⁴⁸ *But see* MINN. STAT. ANN. § 611A.54 (West 1994) ("No employer may deny an employee an award of benefits based on the employee's eligibility or potential eligibility for [criminal injuries compensation] . . .").

²⁴⁹ Apparently this category includes vehicle, commercial, and residential insurance. *See, e.g.*, CAL. VICTIMS OF CRIME REGS. r. 649 and FLA. STAT. ANN. § 960.13(2) (West 1993). All or some of the proceeds of life insurance are sometimes ignored. *See, e.g.*, MINN. STAT. ANN. § 611A.52(5) (West 1994) (ignored altogether); TENN. CODE ANN. § 29-13-106(f)(2) (1993) (same); 740 ILCS 45/10.1(e) (Michie 1993) (proceeds in excess of \$25,000 ignored); W. VA. CODE § 14-2A-3(b)(9) (1994) (proceeds under \$25,000 ignored); OHIO REV. CODE ANN. § 2743.51(B)(9) (Baldwin 1993) (proceeds in excess of \$50,000 deducted). "Some programs have implemented administrative policies whereby life insurance is not considered a collateral resource unless the claimant's dependents received proceeds earmarked for funeral and burial costs." CVCB HANDBOOK, *supra* note 56, at VII-3. Note also that the proceeds of life insurance may be taken into account in determining whether a claimant will suffer "serious financial hardship" if not awarded compensation. *Id.*

²⁵⁰ Financial assistance from family members, private persons or from private charitable organizations is not deducted. *See, e.g.*, GA. CODE ANN. § 17-15-8(f)(2) (1994). *Cf.*, N.M. STAT. ANN. § 31-22-3(B)(8) (1994) (deducts "cash donations" apparently of any kind).

²⁵¹ 1973 UNIFORM ACT, *supra* note 2, § 1(d), as enacted in MINN. STAT. ANN. § 611A.52, subd. 5(9) (West 1994). The 1992 UNIFORM ACT, *supra* note 2, § 316(a), prefers the general formula quoted *supra* note 244. The other common provision—which has much the same effect—requires the deduction of "any payments received or to be received . . . (a) from or on behalf of the person who committed the crime; (b) under insurance programs mandated by law; (c) from public funds, and (d) under any contract of insurance wherein the claimant is the insured or beneficiary . . ." *See, e.g.*, N.Y. EXEC. LAW § 631(4) (McKin-

It is, of course, a truism that state programs are required in the first place because the offenders who will be paying the damages either cannot be found or are impecunious. During the past decade, however, both the United States and Great Britain have made vigorous attempts to make the offender pay, by imposing "restitution" or "compensation" orders on them when they are convicted of the offense.²⁵² Thus, the Task Force on Victims of Crime recommended that courts should order offenders to make restitution to the victim in all cases "unless the court provides specific reasons for failing to require it."²⁵³ As a result, the Victim and Witness Protection Act of 1982 provided that federal courts should order the payment of restitution to the victim "in addition to or in lieu of any other penalty." or state *on the record* why it has not done so.²⁵⁴ Most state legislatures have followed suit in one form or another. But conflicting objectives (punishment or rehabilitation of the offender versus compensation of the victim),²⁵⁵ procedural weaknesses,²⁵⁶ and the obstinate fact that, despite various schemes,²⁵⁷ offenders generally still lack the necessary

ney 1994). CVCB HANDBOOK, *supra* note 56, at section VII provides a useful survey of "collateral resources" and comments, at VII-6, that a "thorough familiarity with [such] resources . . . is essential if programs are to . . . spend funds wisely . . . [and] victims [are to] be directed toward those programs that, in the long run, will provide them with the best financial assistance for their needs."

²⁵² See, e.g., Susan Hillenbrand, *Restitution and Victim Rights in the 1980s*, in VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS 188 (Arthur J. Lurigio et al. eds., 1990); A.R. KLEIN, ALTERNATIVE SENTENCING—A PRACTITIONER'S GUIDE ch. 5 (1988); DANIEL MCGILLIS, CRIME VICTIM RESTITUTION: AN ANALYSIS OF APPROACHES (1986). For a summary of developments in Great Britain, see GREER, *supra* note 10, at 167-87 and MIERS, *supra* note 10, chs. 10-11 and pp. 316-24.

²⁵³ TASK FORCE FINAL REPORT, *supra* note 4, at 18.

²⁵⁴ 18 U.S.C. §3251 (1988). See, e.g., *Hughey v. United States*, 495 U.S. 411 (1990). The English courts were given a similar power in 1972. See Criminal Justice Act §§ 1-5 (1972), re-enacted in Powers of Criminal Courts Act §§ 35-38 (1973) (as amended).

²⁵⁵ Compare *People v. Frey*, 256 Cal. Rptr. 810, 812 (Cal. Ct. App. 1989) (additional means of punishing O) and *People v. Williams*, 255 Cal. Rptr. 778, 780 (Ct. App. 1989) (rehabilitation of O), with *People v. Rivera*, 261 Cal. Rptr. 93, 95 (Ct. App. 1989) (purpose is to compensate V) and *People v. Beck*, 21 Cal. Rptr. 2d 250, 254 (Ct. App.), *review denied*, 1993 Cal. LEXIS 5428 (1993) (restitution compensates V for economic loss).

²⁵⁶ For a variety of reasons, federal courts have, since 1982, "generally imposed [restitution] in less than half of the sentences for the types of crimes in which it would have been appropriate." Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90, 95 (1993). Ensuring that restitution payments are actually made is another problem. See, e.g., ADMIN. OFFICE OF UNITED STATES COURTS, BRINGING CRIMINAL DEBT INTO BALANCE: IMPROVING FINE AND RESTITUTION COLLECTION (1992). The inauguration of the National Fine Center is intended to provide an effective response to problems of compliance and enforcement. *Id.*

²⁵⁷ E.g., deductions from "earnings" paid to prison inmates. *State v. Wagner*, 484 N.W.2d 212, 219 (Iowa Ct. App. 1992) (O was ordered to pay 25% of his monthly prisoner's pay of \$7.20; since the restitution to be paid amounted to \$109,000, the court itself calculated that it would take O some 5046 years to do so).

means, have meant that "even the most successful programs are able to recoup losses for relatively few victims."²⁵⁸ However, American programs have been more successful in recouping the cost of compensating victims from offenders *collectively*.

Normally, the statutes require the Board to reduce the victim's compensation by the sums which the victim has already received or will receive from any of the stipulated sources.²⁵⁹ The Board is also empowered to recoup any payment from a collateral source not taken into account in the making of an award because it was made *after* compensation had been awarded.²⁶⁰ Conversely, when the Board deducts an expected collateral payment which the victim does not receive, the Board may have to reconsider the case.²⁶¹

There is some disagreement on the question of the victim's responsibility to pursue collateral sources. The majority position appears to be that victims should take "reasonable steps" to recover such benefits before their criminal injuries claim is settled. If they do not take the necessary steps, the Board may deduct the value (as calculated by the Board) from their compensation "to the extent that it is reasonable to do so."²⁶² Some programs take a somewhat tougher line and make the appropriate deduction if the victim did not pursue recovery against available collateral sources.²⁶³ Others are less demanding:

[The Board] shall not require any claimant to seek or accept any collateral source contribution, unless the claimant was receiving or was enti-

²⁵⁸ Hillenbrand, *supra* note 252, at 195 (observing that "if the sole aim is to reimburse victims, the cost of staffing and running [restitution] programs relative to the funds collected might suggest that public monies would better be provided directly to crime victims . . .").

²⁵⁹ See, e.g., OHIO REV. CODE ANN. § 2743.60(D) (Baldwin 1993).

²⁶⁰ See, e.g., N.H. REV. STAT. ANN. § 21-M:8-h(v) (1993). See also *infra* text accompanying notes 269 *et seq.*

²⁶¹ See, e.g., N.C. GEN. STAT. § 15B-11(d) (1993); W. VA. CODE § 14-2A-14(f) (1993)

²⁶² See, e.g., MINN. STAT. ANN. § 611A.54(1) (West 1994); OHIO REV. CODE ANN. § 2743.60(H) (Baldwin 1993). Two Ohio cases illustrate the application of this rule. In *In re Hanratty*, 579 N.E.2d 306 (Ohio Ct. Cl. 1989), V was admitted to a local hospital after an assault. His medical insurance did not cover treatment in that particular hospital, but V did not fail to obtain a "readily available collateral source" by moving hospitals: "once in a place where treatment was being rendered and where he was told he should remain until his condition stabilized, the applicant should not be expected to defy medical advice . . ." *Id.* at 306. In *In re Schroeffer*, 448 N.E.2d 528 (Ohio Ct. Cl. 1983), however, where a V knew that he was entitled to Medicaid benefits, but simply failed to apply for them within the applicable time-limit, the court deducted the value of the benefits. "It was the [applicant's] duty to recover from that collateral source, and he has no right to an award of reparations to the extent of his failure to secure those benefits." *Id.* at 533.

²⁶³ IND. CODE ANN. § 5-2-6.1-32(c) (Burns 1994). See also 740 ILCS 45/10.1(g) (Michie 1993) (Vs must show that they have exhausted the collateral benefits "reasonably available" to them).

tled to receive such benefits prior to the [crime] . . . ; provided, however, no applicant shall be denied compensation solely because such applicant is entitled to income from a collateral source.²⁶⁴

Certain states specifically *require* victims to claim restitution from the offender: "No award may be made unless the board . . . finds that: . . . the applicant has pursued restitution rights against any person who committed the crime unless the board . . . determines that such action would not be feasible."²⁶⁵ Alternatively, the Board may be empowered to take direct action by initiating restitution hearings itself or intervening therein.²⁶⁶

Since victims may need prompt financial assistance, compensation programs come under pressure to make the initial payments, to be recouped later from collateral sources:

Most states . . . reported that they pay qualified victims and commence subrogation procedures to recover a portion of any future settlements from insurance claims, civil suits or restitution. This enables the victim to be fully compensated (within the limits set by the program) without having to wait months, or even years, for civil litigation to conclude or restitution to be completed. However, it required the program to wait for months or years for revenues, if any, it may recoup. . . . And, of course, the state bears an added risk, since there is always the chance a civil case will never be settled²⁶⁷

Boards can reduce some of these problems by making the victim an "emergency" award, rather than a final award. Most programs empower boards to do this, albeit with limits ranging from \$100 to \$5000—although, occasionally they may make unlimited emergency awards.²⁶⁸

When a board does not take a payment from a collateral source into account when it awards compensation, and that payment is made or becomes due at a later date, the Board is usually²⁶⁹ entitled²⁷⁰ to

²⁶⁴ ALA. CODE. § 15-23-9 (1993). *See also* ARK. STAT. ANN. § 16-90-714(d) (Michie 1993); OKLA. STAT. ANN. tit. 21, § 142.7 (West 1994).

²⁶⁵ GA. CODE ANN. § 17-15-8(a)(4) (1994).

²⁶⁶ *See* ALA. CODE §15-23-14(c) & (d) (1993).

²⁶⁷ NIJ SUMMARY, *supra* note 36, at 30. "Across all programs subrogation accounts for less than one percent of total program revenues." *Id.*

²⁶⁸ *Id.*

²⁶⁹ *But see* State v. Livingston, 592 So. 2d 721 (Fla. Dist. Ct. App. 1991), in which the court awarded compensation of \$10,000 and V later settled a tort claim under uninsured motorist coverage for \$165,000. The court held that the Board was not entitled to reimbursement from the settlement because the damages did not constitute "payment of the same expenses" for which the compensation had been awarded and V's injuries "far exceed both payments." *Id.* at 763. The Florida statute was amended in 1992 to include subrogation to any claim which V might have "under any insurance provision, including an uninsured motorists provision." FLA. STAT. ANN. § 960.16 (West 1993). *Compare with* State of Nevada Victims of Crime Fund v. Barry, 792 P.2d 26 (Nev. 1990), where V was awarded compensation of \$15,000 and later settled a tort claim for \$540,000. The Board was held

reimbursement up to the amount of the compensation paid. This right may take one or more of five forms: (a) assignment of the claimant's right to recover from the collateral source;²⁷¹ (b) subrogation of the Board to the claimant's right to receive such payments;²⁷² (c) where a person is convicted of the crime for which compensation was paid, authorization for the state to bring civil proceedings against the offender for recovery of all or part of the compensation;²⁷³ (d) a requirement that the collateral source make the payments directly to the program;²⁷⁴ or (e) an undertaking by, or obligation by way of lien or trust imposed upon, the victim to reimburse the Board for such payments.²⁷⁵ To improve the Board's chances of recovery, programs often require claimants to give the Board written notice of the additional payment or their intention to claim it, and to cooperate fully with the Board.²⁷⁶ Alternatively, the statute may require a claimant to bring the proceedings "as a trustee on behalf of the state to recover reparations awarded," or the Board may "join in the action as a party

entitled to full reimbursement from the damages, without any deduction for V's time, risk or expense in pursuing the tort claim. *See further infra* note 279.

²⁷⁰ But the Board is not usually *obliged* to do so. *See, e.g.*, N.J. ADMIN. CODE tit. 13, § 13:75-1.26(b) (1993) (the Board may (i) take prompt action to seek reimbursement, (ii) reserve its position until V's action has been completed, or (iii) waive its rights).

²⁷¹ *See, e.g.*, MINN. R. 7505.0700 (1992) (assignment of V's right to recover "from any source which is, or if readily available . . . would be, a collateral source"); N.J. ADMIN. CODE tit. 13, § 13:75-1.26(b)(2) (1993) (Board may require claimant to execute an assignment to the Board for the amount of the compensation); UTAH CODE ANN. § 63-63-22(1) (1993) (acceptance of award by V automatically assigns to the state all claims against any third party up to the amount paid to the victim by the state).

²⁷² ALA. CODE § 15-23-14(a) (1993); *see also* CAL. GOV'T CODE § 13966.01(a) (Deering 1994); TEX. CODE CRIM. PROC. ANN. art. 56.51 (West 1994). In WIS. STAT. ANN. § 949.15(1) (West 1993) (reversing the decision in *Hamed v. Milwaukee County*, 321 N.W.2d 199 (Wis. 1982) (O's employer was not "the person responsible" for V's injury), the right of subrogation expressly included "the cause of action of the claimant against one or more third parties liable for the acts of the person responsible for the injury or death." This provision now states simply that the Board is subrogated "to the rights of the claimant . . ." WIS. STAT. ANN. § 949.15(1) (West Supp. 1994). In D.C. CODE ANN. § 3-406(b) (1994) subrogation is limited to "the claimant's right against the offender . . ." *Id.* *See also* *Hulsey v. Commonwealth Crime Victims Comp. Bd.*, 628 S.W.2d 890 (Ky. Ct. App. 1982) (Board subrogated to V's right to workers' compensation).

²⁷³ *See, e.g.*, ARK. CODE ANN. § 16-90-715(a) (Michie 1993).

²⁷⁴ *See, e.g.*, NEV. REV. STAT. ANN. § 217.180(2) (Michie 1992).

²⁷⁵ *See, e.g.*, ALA. CODE § 15-23-14(b) (1993) (collateral payment received by V as trustee for Board and to be paid "promptly" to Board); CAL. GOV'T CODE § 13966.01(b) (Deering 1994); IND. CODE ANN. § 5-2-6.1-23 (Burns 1993) (state entitled to lien in amount of award on any recovery by V).

²⁷⁶ *See, e.g.*, CAL. GOV'T CODE § 13966.01(d) (Deering 1994); FLA. CRIM. INJURIES COMP. R. 2A-2.012; MINN. STAT. ANN. § 611A.56(1)(b) (West 1994). Quite often, such an assignment or subrogation agreement is a condition of receipt of an award. *See, e.g.*, TENN. CODE ANN. § 29-13-109(e) (1993) (no compensation paid until subrogation agreement executed by V). In Texas, failure to notify filing of a suit to recover damages "will be just cause for reconsideration of the award." TEX. ADMIN. CODE tit. 1, § 61.19 (1992).

plaintiff²⁷⁷ The Board may also encourage the claimant to bring proceedings directly²⁷⁸ or indirectly.²⁷⁹

It is difficult to estimate the impact of the general deduction of collateral benefits on the cost of criminal injuries compensation. On the one hand, it has been estimated that private medical insurance or a public medical assistance program covered about two-thirds of violent crime victims.²⁸⁰ Subject to coverage restrictions and deductibles (which may now be substantial), such victims may incur minimal medical expenses, and thus make no claim (or only a substantially reduced claim) for compensation. Similarly, many victims will suffer little or no net loss of earnings by reason of access to collateral sources or wage continuation schemes. On the other hand, it appears that the cost of compensation is not significantly reduced by the offenders themselves or by tortfeasors:

All awards made by compensation programs to victims are potentially recoverable. In an ideal world, if all offenders or liable third parties were held accountable for the harm done to victims and if those responsible had the resources to pay, compensation programs might not even be necessary, or at most would simply pay victims while they awaited payment from others. But the reality is somewhat different. A significant number of perpetrators are never found. If they are, prosecutors may fail to request restitution in criminal trials, judges often fail to order it, court clerks and probation and parole authorities may be lax in collecting it. In any event, many offenders don't, and never will have, resources to pay. Similarly civil suits filed by victims or compensation programs against offenders or third parties are relatively rare, since civil litigation is expensive and time consuming and the outcome is uncertain.²⁸¹

²⁷⁷ See, e.g., N.J. ADMIN. CODE tit. 13, § 13:75-1.26(b)(1) (1993); KAN. STAT. ANN. § 74-7312(b) (1992); TEX. CODE CRIM. PROC. ANN. art. 56.52(a)(1) (Vernon 1994).

²⁷⁸ See, e.g., GA. CODE ANN. § 17-15-12(b) (1994). ("Acceptance of an award . . . shall constitute an agreement on the part of the recipient reasonably to pursue any and all civil remedies . . . against the" offender). In N.Y. EXEC. LAW § 634(1)(a) (McKinney 1994), the Board may request V to commence an action against O or a responsible third party; V's failure to do so operates as an assignment of his claim to the Board to the extent of the compensation paid.

²⁷⁹ E.g., TEX. CODE CRIM. PROC. ANN. art. 56.52(b) (Vernon 1994) ("If the claimant brings the action as trustee and recovers compensation awarded by the [Board], the claimant may deduct from the benefits recovered on behalf of the state the reasonable expenses of the suit, including attorney fees, expended in pursuing the recovery for the state."). Compare with State of Nevada Victims of Crime Fund v. Barry, 792 P.2d 26 (Nev. 1990). By CAL. GOV'T CODE § 13966.01(b) (Deering 1994), claimant receives a "bonus" of 25% of the award if he or she files a civil claim within one year.

²⁸⁰ See NIJ SUMMARY, *supra* note 36, at 17.

²⁸¹ CVCB HANDBOOK, *supra* note 56, at VIII-1. According to the NIJ SUMMARY, *supra* note 36, at 30, "program staff . . . expressed frustration with the low amounts they recover in subrogation." The British Board does not consider it worthwhile to have a power to recover compensation from O since there are so few cases in which O would have sufficient means to pay. In 1992-1993 the amount ordered to be paid by offenders by way of com-

By way of illustration, the New York program (which has an impressive array of subrogation provisions) paid out some \$15 million in compensation for personal injury and death in 1991-1992. In return, it received \$21,083 from offenders and \$60,437 from civil actions against third parties—*i.e.*, less than one percent of the total cost of compensation.²⁸² The restitution picture is just as grim. While offenders were ordered to pay just over \$22 million to victims by way of restitution in 1989, recent experience suggests that only one quarter of this amount will actually be paid.²⁸³ Nonetheless, some observers remain optimistic:

While a program should operate under no illusion that even a sustained restitution and subrogation effort will result in a large proportion of its awards being recovered, there are a number of states that have earned a substantial return on their investment of personnel in this area.²⁸⁴

In short, victims and their employers, either directly or indirectly through the deduction of collateral benefits, make a substantial contribution to reducing the cost of compensation; those whose crime or tort results in compensable injury or death generally do not.

VI. FUNDING

The available data suggest that the total amount spent on criminal injuries compensation in Great Britain and in the United States was in the region of \$230 million in each country in 1992-1993.²⁸⁵ But Table 5 suggests that most programs in the United States are still rela-

compensation orders represented less than 1% of the compensation paid by the Board. CRIMINAL INJURIES COMP. Bd., *supra* note 225, at 8.

²⁸² NEW YORK STATE CRIME VICTIMS Bd. 1991-1992 ANNUAL REPORT 39 (1992). According to the NIJ SUMMARY, *supra* note 36, at 40, "funds recovered through subrogation . . . account for 0.5% of all programs' revenues." In Texas, subrogation yielded less than 1% of program income in 1992-1993. OFFICE OF THE ATT'Y GEN., *supra* note 50, at 8.

²⁸³ See *e.g.*, PAMELA Y. SWANIGAN, RESTITUTION IN NEW YORK STATE 16 (1991) (just under 27% of the \$92.3 million ordered in restitution payments in 1985-1989 had been collected by the end of 1989). See also BARBARA E. SMITH ET AL., IMPROVING ENFORCEMENT OF COURT-ORDERED RESTITUTION (1989). The situation in New Jersey appears to be similar. See *State v. Newman*, 623 A.2d 1355, 1362 (N.J. 1993) (in 1992, \$24.2 million in restitution assessed, \$7 million collected).

²⁸⁴ CVCB HANDBOOK, *supra* note 56, at Sec. VIII (various strategies for maximizing returns are summarized). Funding problems have encouraged many programs to seek ways of improving recovery rates. See, *e.g.*, Kelly Brodie & Alison Sotak, *Restitution and Subrogation*, CRIME VICTIM COMP. Q., No. 2, 1993, at 9 (detailing how "aggressive" recovery efforts have "more than doubled" recoveries to "nearly 15%" of compensation payments in Iowa); Curt Soderlund & Jody Patel, *Maximizing Offender Revenue*, CRIME VICTIM COMP. Q., No. 3, 1993, at 9 (details initiatives taken in California).

²⁸⁵ In Great Britain, total compensation of £152.2 million (or \$228.3 million if £1=\$1.50) was paid in 1992-1993. CRIMINAL INJURIES COMP. Bd., 29TH ANNUAL REPORT, *supra* note 225, at 7. In the United States, total dollar amounts paid out in FY 1993 were \$232 million. Information supplied by Office for Victims of Crime (on file).

tively modest by British standards.

TABLE 5:
COMPENSATION PROGRAM COSTS 1981 AND 1988²⁸⁶

	1981	1988	1992	[GB]
No. of programs with total costs of -				
Less than \$1 million	16	16	10	
\$1m - \$5m	9	19	27	
\$5m - \$10m	2	3	4	
More than \$10m	1	3	6	
Total	28	41	47	
Total expenditure	\$57.5m	\$150.5m	\$115m	\$267m
Expenditure on compensation	\$47.3m	\$125.6m	\$104m	\$221.6m
Expenditure on administration	\$10.2m	\$24.9m	\$11m	\$45.4m
Admin. costs as % of total expenditure	17.7	16.5	9.7	17.0

Indeed, without the largest programs (New York, Ohio, and California in 1981 and California, Florida, New Jersey, New York, Texas, and Washington in 1988),²⁸⁷ the average cost of the remaining thirty-five programs in 1988 was in the region of \$1.3 million, as compared with an average of just under \$1 million for the remaining twenty-five programs in 1981. The significance of these figures becomes more clear with a common denominator—the amount of compensation paid per 100,000 head of population:

²⁸⁶ Based on MCGILLIS & SMITH, *supra* note 1, Exhibit 1.5, and Data for Federal Fiscal Year 1992, as recorded in N.J. VIOLENT CRIMES COMP. BD., 1992-1993 ANNUAL REPORT (1994) (no information available for five programs). See also, NIJ SUMMARY, *supra* note 36, Table 5.1 (also incomplete). The British figures are taken from CRIM. INJURIES COMP. BD. 25TH ANNUAL REPORT 1988-1989, 1989, Cmnd. 900, at 8 (£1=\$1.50).

²⁸⁷ Unfortunately, the NIJ SUMMARY, *supra* note 36, does not have a figure for Ohio. In 1991-1992, the total compensation paid in Ohio was \$11 million. CT. OF CL. OF OHIO, ANNUAL REPORT 11 (1992). Without the same six states as in 1988, the average (40%) VOCA grant in FY 1992 was \$0.58 million. 1994 VOCA REPORT, *supra* note 8, at 82-83. This suggests that the other 38 states paid on average some \$1.45 million in compensation in 1990. California remains the most expensive program with expenditure on compensation of \$15.2 million in 1981-1982, \$38.5 million in 1987-1988, and \$81.7 million in 1991-1992. 1990-1992 CAL. STATE BD. OF CONTROL, BIENNIAL REPORT 27 (1993).

Table 6: CRIMINAL INJURIES COMPENSATION PER 100,000 HEAD OF POPULATION 1990²⁸⁸

	POP.(M)	VIOLENT CRIME PER 100,000	COMP.(\$M) (TOTAL)	\$ COMP. PER 100,000
<i>United States</i>				
All	248.7	732	143.7	58,000
California	29.8	1045	48.8	164,000
New York	18.0	1181	7.2	40,000
Texas	17.0	761	15.1	89,000
Florida	12.9	1244	4.6	36,000
Pennsylvania	11.9	431	2.0	17,000
Illinois	11.4	967	3.0	26,000
Ohio	10.8	506	7.1	66,000
Others	136.9	-	55.9	41,000
<i>Great Britain</i>				
	55.5	494	109.1	197,000

It is noticeable that the level of compensation does not appear to depend on the size of the population or on the incidence of violent crime.²⁸⁹ Only the California program compares favorably with the level of compensation paid by the British Scheme.

The programs in operation in 1981 were funded by money raised entirely within the state. Since 1986, however, funding has increasingly been available from money raised at the federal level under the Victims of Crime Act 1984 (as amended). As Table 7 suggests, the bulk of these funds is now raised from contributions made by persons convicted of criminal offenses. This is in stark contrast to the British Scheme, which has, since its inception, been funded entirely by a grant from general tax revenues.²⁹⁰

²⁸⁸ United States: derived from CAL. STATE BD. OF CONTROL, *supra* note 287, at 37; UNITED STATES DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1990, Table 4 (1991). Great Britain: CRIMINAL STATISTICS: ENGLAND AND WALES 1992, 1993, Cmnd. 2410, Table 2.3 and CRIM. INJURIES COMP. BD., 26TH ANNUAL REPORT, 1990, Cmnd. 1365, at 7.

²⁸⁹ *Contra* David C. Nice, *State Programs for Crime Victims*, 17 POL'Y STUD. J. 25, 36 (1988) ("[E]xtensive public action programs [for victims] tend to be found in more metropolitan and densely populated states and in states with higher crime rates and more liberal electorates.").

²⁹⁰ BRITISH SCHEME, *supra* note 10, ¶ 2 (no other source of funding has been seriously considered). For a discussion of American funding theories, see Sveinn A. Thorvaldson & Mark R. Krasnick, *On Recovering Compensation Funds from Offenders*, 5 VICTIMOLOGY 18, 21-27 (1980).

Table 7: COMPENSATION PROGRAMS: SOURCES OF INCOME²⁹¹

	1988		1993	
	Amount	%	Amount	%
General revenue	\$35.5m	21.7	\$32.4m	11.3
Fines/penalties	\$101.1	61.7	\$159.6	55.7
VOCA grants	\$24.9	15.2	\$69.1	24.1
Other	\$2.5	1.5	\$25.2	8.8
Total	\$164.0		\$286.3	

A. STATE FUNDING

Table 8 suggests that in two-fifths of the programs, general revenue provides all or part of the "state" element of funding. This represents a decrease (both relatively and absolutely) since 1988, when it appears that one-half of the programs were funded in this way.²⁹² Further, Table 7 shows that income from general revenue has decreased from 25% to 15% of total state funding during this period. Although a grant from the general revenue raised from taxpayers is a more satisfactory theoretical basis for the public provision of compensation funds for victims of crimes of violence, the practical difficulty of securing adequate funds from legislatures under increasing fiscal and financial pressures appear to have led new programs to prefer what is in effect a tax on those convicted of criminal offenses.

Table 8: COMPENSATION PROGRAMS BY TYPE OF FUNDING²⁹³

	1988	1994
General revenue	12	9
Mixed	7	12
Offender fines/penalties	19	31
Total	38	52

²⁹¹ 1988: NIJ SUMMARY, *supra* note 36, at 38; 1993: information supplied by Office for Victims of Crime (on file). The NIJ survey covered only 38 programs, and may have understated the significance of "fines and penalties" as the major source of funds, since most of the missing programs appear to have come into this category. The CVCQ survey covered all 52 programs.

²⁹² According to MCGILLIS & SMITH, *supra* note 1, Exhibit 6.5, there were 13 "general revenue" and 8 "mixed" programs out of a total of 33 programs (*i.e.*, approximately two-thirds) in 1981. NIJ SUMMARY, *supra* note 36, at 5, commented that "[w]hile historical data are lacking, program directors believe that continuing state fiscal crises have caused legislatures to rely less on appropriations and more on 'abuser taxes'—fines and penalties—to fund victim compensation programs." *Id.*

²⁹³ NIJ SUMMARY, *supra* note 36, at 38; Note, *Program Funding*, CRIME VICTIM COMP. Q., 1994, No. 1 at 12. "General revenue" means that the program derives no (state) funds from fines and penalties, though some funding may come from other sources. A program is "mixed" if it is funded by general revenue, fines and penalties and other sources. If a program received no funding from general revenue, it is classified as "fines and penalties" (though it may also receive some contributions from other sources).

This "tax" can take one—or both—of two forms. The first is a relatively small, additional court fee charged in all criminal and quasi-criminal proceedings.²⁹⁴ The second is a "penalty fine" (which may be substantial) levied on those convicted of almost any criminal offense.²⁹⁵ The constitutionality of this method of funding compensation programs was upheld in *State v. Champe*,²⁹⁶ where a defendant convicted of shoplifting and reckless driving was fined \$300 and ordered to pay a five percent surcharge (\$15) into the criminal injuries compensation fund. The court considered, inter alia, that the surcharge provision benefitted the general public by "shift[ing] a financial burden that would otherwise fall on all Florida taxpayers." Although the defendant had not committed a crime of violence, "[i]t is not irrational for the legislatures . . . to combine all lawbreakers for the purpose of remedying the consequences of violent crime." Such a surcharge would only be invalid if it were so excessive or harsh that it was "plainly and undoubtedly in excess of any reasonable requirements for redressing the wrong."

Michigan provides a copybook example of this approach.²⁹⁷ In 1988, following a referendum, Michigan adopted a constitutional amendment which set out the rights of crime victims. It declared that "the legislature may provide for an assessment against convicted defendants to pay for crime victims' rights."²⁹⁸ A Criminal Assessments Commission was appointed to report annually on the costs and revenues from such assessment and on the adequacy of those funds. In its 1991 Report, the Commission indicated that "[a]ppropriate assessment amounts are those that are equitably shared by all criminal defendants . . . [and] are not so great . . . that they preclude a convicted defendant's ability to pay."²⁹⁹ The assessments should also "demon-

²⁹⁴ See, e.g., FLA. STAT. ANN. § 960.20 (West 1993) (\$20 fee (raised to \$50 in 1992) imposed on any defendant pleading guilty or convicted of a felony, misdemeanor, traffic offense or violation of municipal or county ordinance).

²⁹⁵ See, e.g., ALA. CODE § 15-23-17 (1993), as applied in *Jackson v. State*, 594 So. 2d 1289 (Ala. Crim. App. 1991) (D convicted on one count of kidnapping, and one count of rape, sentenced to life imprisonment, ordered to pay \$740 restitution to V and \$10,000 to crime victims compensation fund). According to CAL GOV'T CODE § 13967(a) (Deering 1994), the court, when setting the fine (of up to \$10,000) "shall consider any relevant factors, including . . . the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, and the extent to which others suffered losses as a result of the crime." *Id.*

²⁹⁶ 373 So. 2d 874, 878 (Fla. 1978). The court struck down a portion of the legislation that permitted such a surcharge to be imposed on those required to pay "civil" fines. *Id.* at 879.

²⁹⁷ See CRIMINAL ASSESSMENTS COMM'N OF MICH., REPORT ON CRIME VICTIMS RIGHTS, SERVICES AND REVENUES (1991).

²⁹⁸ MICH. CONST., art. 1, § 24(3).

²⁹⁹ CRIMINAL ASSESSMENTS COMM'N OF MICH., *supra* note 297, at 8. The Commission,

strate a relationship to the seriousness of the assessable offense" and, in aggregate, "adequately support crime victim rights to services."³⁰⁰

The supreme example of this funding method is California's program, which raised almost \$54 million in 1991-1992.³⁰¹ Over three quarters (77.8%) of that money came from a special \$10 penalty which judges were required to assess on each \$10 in fines, penalties, or forfeitures imposed on those convicted of various misdemeanors. The compensation fund received \$2.20 of each \$10 penalty. If a defendant was convicted of a felony, the judge could impose a "restitution fine" of \$100 to \$10,000; this source yielded 13.6% of the fund in 1991-1992. The compensation fund was also entitled to the first \$20 of fines imposed on those found guilty of driving while under the influence of alcohol or controlled drugs. This yielded 6.4% of the fund. The last two sources, which between them raised only 2.2% of the fund, were (i) escheat of unclaimed checks, warrants, bonds, and coupons (0.3%) and (ii) restitution fines levied on certain "public" offenses (1.9%).

Other sources of state funding include contributions from bail bond forfeitures³⁰² and from the registration fee for lawfully held firearms,³⁰³ payments from the earnings of prison inmates,³⁰⁴ contributions from punitive damages awards,³⁰⁵ and private donations.³⁰⁶ Since 1977, most states have followed New York's example and enacted "Son-of-Sam" laws which provide, in effect, that anyone who contracts with a person convicted of a crime for the re-enactment of

accepting that "excessively high assessments would produce a level of diminishing return," proposed assessments of \$30 per felony (rising to \$100 for a second or additional offense) and \$20 per misdemeanor. *Id.* at 9.

³⁰⁰ *Id.*

³⁰¹ The following details are taken from STATE BD. OF CONTROL OF CAL., BIENNIAL REPORT 1990-1992, at 17-18 (1992). See also CAL. GOV'T CODE § 13967 (Deering 1994); *People v. Broussard*, 856 P.2d 1134 (Cal. 1993). The Texas scheme produced almost \$20 million in 1992-1993. OFFICE OF THE ATT'Y GEN., *supra* note 50, at 8.

³⁰² See, e.g., MONT. CODE ANN. § 53-9-109 (1993); KAN. STAT. ANN. § 74-7336 (1992).

³⁰³ See, e.g., VIOLENT CRIMES COMP. BD. OF N.J., ANNUAL REPORT 1989-1990, at 7 (1990).

³⁰⁴ *Id.* at 6.

³⁰⁵ A number of states have recently enacted "experimental" legislation to give the state a share (ranging from 20-50%) of punitive damages awarded to "a private party" in a civil action against a defendant other than the state itself. See, e.g. Note, *Validity, Construction and Application of Statutes Requiring that Percentage of Punitive Damages Awards be Paid Directly to State or Court-Administered Fund* 16 A.L.R.5th 129 (1993). In most cases, the state's share is simply paid into general state funds. See, e.g., FLA. STAT. ANN. § 768.73(2) (West 1993); N.Y. CIV. PRAC. L. & R. 8701 (McKinney 1994). But at least in one case, part of the award is earmarked for the criminal injuries compensation account. OR. REV. STAT. § 18.540(1)(c) (Supp. 1994). However, enhancement of that account is not a reason for awarding punitive damages. *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1022 (Or. 1990).

³⁰⁶ See, e.g., LA. REV. STAT. ANN. § 46.1816(B)(7) (West 1994); N.H. REV. STAT. ANN. § 21-M:8-g(II) (1993).

that crime, or for the expression of the offender's thoughts about the crime, by way of a movie, TV program, book, or other method of publication, must account to the state for the proceeds of such publication.³⁰⁷ This money is first held in escrow to satisfy judgments obtained by the victims against the offender. Then, after five years, any residue may be paid over to the criminal injuries compensation fund. Although the United States Supreme Court held that the New York law violated the First Amendment because it was too broad,³⁰⁸ it recognized that a state does have a legitimate interest both in preventing wrongdoers from dissipating assets before their victims can sue, and in compensating victims from the fruits of crime. Therefore, a properly drafted statute should be constitutionally acceptable.³⁰⁹ In 1988, however, "Son-of-Sam" laws produced revenue in only two states and accounted for less than 0.1% of total program revenues nationwide."³¹⁰

B. FEDERAL FUNDING

The President's Task Force on Victims of Crime painted a gloomy picture of the state compensation programs operative in 1982:

In many states, program availability is not advertised for fear of depleting available resources or overtaxing a numerically inadequate staff. Victim claims may have to wait months until sufficient fines have been collected or until a new fiscal year begins and the budgetary fund is replenished. Creditors are seldom patient. While waiting for funding that will eventually come, victims can be sued civilly, harassed continually, or forced to watch their credit rating vanish.³¹¹

³⁰⁷ See, e.g., MO. REV. STAT. § 595.045(14) (1994); WIS. STAT. ANN. § 949.165 (West 1993); N.Y. EXEC. LAW § 632-a (McKinney 1991). By December 1991, the New York Board was maintaining eight escrow accounts totalling just over \$79,000. See CRIME VICTIMS BD. OF NEW YORK, 1991-1992 ANNUAL REPORT 38 (1992). There is no equivalent legislation in Great Britain. *But see* MIERS, *supra* note 10, at 327.

³⁰⁸ *Simon & Schuster Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991). The statute singled out income derived from an expressive activity for a burden which the state placed on no other income and was directed only at works with a specific content. See, e.g., Jon Allyn Soderberg, *Son of Sam Laws: A Victim of the First Amendment*, 49 WASH. & LEE L. REV. 629 (1992). See also Sue S. Okuda, *Criminal Anti-Profit Laws: Some Thoughts in Favor of their Constitutionality*, 76 CAL. L. REV. 1353 (1988); David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328 (1988).

³⁰⁹ The New York law (and similar legislation in other states) has now been rewritten. See N.Y. EXEC. LAW § 632-a (McKinney 1994); Lori F. Zavack, *Can States Enact Constitutional "Son-of-Sam" Laws After Simon & Schuster Inc. v. New York State Crime Victims Board?*, 37 ST. LOUIS U.L.J. 701, 723 (1993). The constitutionality of similar legislation in Florida and Maryland was raised, but not decided, in *Rolling v. State ex rel. Butterworth*, 630 So. 2d 635 (Fla. Dist. Ct. App. 1994) and *Curran v. Price*, 638 A.2d 93 (Md. App. 1994).

³¹⁰ NJ SUMMARY, *supra* note 36, at 40.

³¹¹ TASK FORCE FINAL REPORT, *supra* note 4, at 39. In *McMillan v. Crime Victims Comp. Bd.*, 399 N.W.2d 515, 517 (Mich. Ct. App. 1986), Beasley, P.J., commented that "the Michigan program has, from the beginning, suffered from under-funding. . . . Often, the com-

The Task Force identified six possible ways, other than general revenue, of funding compensation programs. These included doubling or even tripling fines and penalties for most federal offenses, intensifying efforts by the Department of Justice to "improve fine collection and accounting procedures," imposing a special fee ranging from \$10 to \$100 for misdemeanors and from \$25 to \$500 for felonies, "assessed in addition to any fine or other penalty on all those convicted of federal offenses," and earmarking a percentage of all federal forfeitures.³¹² Not all of this money would be earmarked for compensation; rather the Task Force had in mind a general Crime Victims' Fund which would subsidize various victim assistance programs and policies.

Congress duly implemented this recommendation in the Victims of Crime Act of 1984, which established a Crime Victims' Fund into which was to be deposited:

- (1) all fines collected from persons convicted of most federal offenses;³¹³
- (2) penalty assessments imposed on all persons convicted of a federal offense, ranging from \$5 to \$125 for infractions and misdemeanors and from \$50 to \$200 for felonies;³¹⁴
- (3) the proceeds of appearance bonds, bail bonds and collateral forfeited by a person released on bail who then fails to appear as required;³¹⁵ and
- (4) any money ordered to be paid into the fund under the federal "Son-of-Sam" law.³¹⁶

mission has seemed to decide claims with one eye on the Legislature's annual appropriations."

³¹² TASK FORCE FINAL REPORT, *supra* note 4, at 44-45. It was also suggested that revenues collected on the sale of handguns could also be diverted into the fund. *Id.* at 44.

³¹³ 42 U.S.C. § 10601(b)(1) (1988 & Supp. 1993). See also Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-996, 98 Stat. 3134, amended by Criminal Fines Improvements Act of 1987, Pub. L. No. 100-185, § 1, 101 Stat. 1279, designed to facilitate the tracking of offenders and to improve fines collection. It appears that these fines account for some 75% of the fund.

³¹⁴ 18 U.S.C. § 3013 (1988 & Supp. 1993). The assessments vary between an "individual" defendant and "a person other than an individual." The rate of assessment on the latter is five times higher than the former. A constitutional challenge to this provision was rejected in *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (since any revenue raised for the general treasury would be incidental to the main purpose of funding compensation, the provision was not a "Bill for raising revenue" within the meaning of the origination clause).

³¹⁵ See 18 U.S.C. § 3146 (1988). Bail procedures were reformed by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

³¹⁶ 18 U.S.C. § 3681(c)(2) (1988). Such proceeds must be held in escrow for five years to satisfy money judgments, etc., made against the defendant in favor of victims. Whatever is left after five years is released from escrow and paid into the crime victims fund. The Department of Justice has apparently drafted a proposed amendment to the federal "Son-of-Sam" law in response to *Simon & Schuster Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991); 1994 VOCA REPORT, *supra* note 8, at 26.

In 1984, Congress also enacted the Criminal Fine Enforcement Act, which increased maximum fines for federal misdemeanors and felonies, permitted the assessment of interest and penalties on overdue fine payments, and transferred responsibility for the collection of fines from the courts to the United States attorneys.³¹⁷ The net result was that in the seven years prior to 1992, some \$830 million was paid into the Crime Victims' Fund.³¹⁸

However, not all of the money deposited in the Fund can be used for the victims of crime, although the "ceiling sum" allocated to crime victims has steadily increased. By Fiscal Year 1992, when the cap was \$150 million, VOCA yielded some \$69 million for criminal injuries compensation grants in 1992-1993.³¹⁹ In 1992, however, the fund was "uncapped," so that in future years the amount available will (subject to the 40% restriction mentioned below) be limited only by the size of the overall fund.³²⁰

State compensation programs which meet the eligibility requirements of VOCA and the implementing guidelines receive grants of up to 40% of the amount paid by them in compensation awards.³²¹ But,

³¹⁷ The maximum for misdemeanors was raised from \$1000 to \$100,000 for both individuals and corporations; the maximum for felonies was raised from \$250,000 to \$500,000, for both types of defendants as well. NIJ SUMMARY, *supra* note 36, at 2. A 1992 amendment to VOCA, which sets aside the first \$6.2 million paid into the Crime Victims Fund, was designed to help with the development of a National Fine Center to improve the collection of fines and restitution. See CRIME VICTIM COMP. Q., No. 3, 1992, at 4.

³¹⁸ 1994 VOCA REPORT, *supra* note 8, at 2.

³¹⁹ Until 1992 VOCA funds were allocated as follows:

First \$100m:	49.5% to compensation programs
	45% to crime victim assistance programs
	5.5% to other victim services
Next \$10m:	to other victim programs
Next \$40m:	47.5% to compensation programs
	47.5% to victim assistance programs
	5% to other victim services

In Fiscal Year 1992, the net total VOCA Fund (based on the amount collected in Fiscal Year 1991) was \$127 million. This meant that \$8.1 million (which is equal to 49.5% of \$17 million), was available for compensation purposes. In Fiscal Year 1992, \$221 million was collected. Applying the cap of \$150 million, only \$69 million was available for compensation purposes in Fiscal Year 1993. Information supplied by Office for Victims of Crime.

³²⁰ The cap, which had been steadily raised from \$100 million to \$150 million, was abolished as of Fiscal Year 1993 by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1001, 106 Stat. 4506, 4520 (codified at 42 U.S.C. § 10601 (1988 & Supp. 1993)). The allocation of the fund has changed slightly in recent years. As a result of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 10601 (d) (3), the first \$6.2 million of the Fund will now be top-sliced for other purposes; thereafter, 48.5% will be available for compensating victims. The amount collected in Fiscal Year 1993 (for allocation in Fiscal Year 1994), however, fell back to \$145 million. CRIME VICTIM COMP. Q., No. 4, 1993, at 5.

³²¹ More precisely, the grant is based on the compensation (other than amounts for property damage) paid "during the preceding fiscal year." 42 U.S.C. § 10602(a) (1988). Thus, in Fiscal Year 1994, a program qualifies for a VOCA grant of 40% of the compensa-

although VOCA has been an important addition to the funding of state programs, it has not eliminated funding problems: "Eighteen programs said resources were inadequate to pay deserving claims. Almost half the program directors reported that funding was inadequate to support program administration."³²² The verdict of the Office for Victims of Crime, which has the responsibility for administering VOCA, is clear and simple: "The need to contain program costs presents perhaps the most formidable challenge for state program administrators across the country."³²³

VII. THE UNMET NEED FOR COMPENSATION.

Any attempt to estimate the number of injured victims of crimes of violence who do not obtain compensation is fraught with difficulty and uncertainty. With respect to the British Scheme, the most recent estimate suggests that, in 1990, the Board made full or reduced awards of compensation from 35% to 49% of those injured by recorded crimes of violence in England and Wales.³²⁴ According to the most recent estimate in the United States, "it appears that about 22% of eligible victims [*i.e.*, those victims of crimes of violence reported to the police who were (a) killed or sufficiently severely injured to require medical attention, (b) 'innocent,' and (c) not able to recoup their losses from collateral sources] are served by compensation pro-

tion paid to victims in Fiscal Year 1992. 1994 VOCA REPORT, *supra* note 8, at 13-14. If the crime victim fund is insufficient to pay 40%, section 10602(a)(2) provides that all programs be awarded the same reduced percentage as is payable. It seems only 37% grants were payable in 1991-1992. See CRIME VICTIM COMP. Q., No. 3, 1992, at 4. In the future, however, there may be a reserve (not exceeding \$20 million) to meet such a contingency. See Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 10602 (b)(3), which requires the state to certify that VOCA grants will not be used to supplant state funds otherwise available for compensation or to cover administrative costs. But the Act does not permit "more than 5%" of a VOCA grant to be used "for the administration of the State crime victim compensation program."

³²² NIJ SUMMARY, *supra* note 36, at 5. The Office for Victims of Crime has recommended that a "floating" percentage be enacted to authorize VOCA funding in excess of 40% whenever possible. 1994 VOCA REPORT, *supra* note 8, at 27.

³²³ 1994 VOCA REPORT, *supra* note 8, lists various cost-containment approaches, not necessarily at the victim's expense. Thus, a number of programs have reduced the fees payable for medical treatment, but only on the basis that the treatment provider accepts the program's rates as payment in full for the services provided. See, *e.g.*, CAL. GOV'T CODE § 13965(k) (Deering 1994).

³²⁴ MIERS, *supra* note 10, at 29-36. The available information suggests that "the eligible population of those victims who have suffered injury as a result of a crime of personal violence in England and Wales would be between 25% and 35% of the total of such reported crime." In 1990, there were 249,904 reported crimes of violence, producing 62,500-87,500 injured victims; in 1990-1991 the British Board received 43,432 claims from England and Wales, and paid full or reduced awards to 30,345 of such claimants (*i.e.*, 35-49% of those injured). See CRIMINAL INJURIES COMP. BD., 27TH ANNUAL REPORT 1990-1991, 1991, Cmnd. 1782, at 25; CRIMINAL STATISTICS, ENGLAND AND WALES 1990 (1991).

grams."³²⁵ Stated differently, less than 10% of *all* victims killed or injured by reported crimes of violence obtained some compensation.³²⁶ This estimate refers to 1987-1988, and recent developments indicate that *both* figures would be higher today.

Viewed from another angle, the total crime victim compensation paid in the United States in 1992 appears to have been in the region of \$230 million,³²⁷ whereas the "direct" economic cost of crimes of violence to victims in that year has been estimated at \$1362 million.³²⁸

Because of the admitted unreliability of both sets of estimates and the difficulty of comparison between Great Britain and the United States, no definitive conclusion can be drawn from these figures. Until more reliable information is provided, the available data suggest that, as compared with Great Britain, fewer (and possibly many fewer) victims receive financial assistance from compensation programs in the United States.

VIII. CONCLUSIONS

The creators of the British Scheme could find "no constitutional or social principle" to justify state compensation for crime victims,³²⁹ and academic commentators were no more successful.³³⁰ Compensation programs in the United States have experienced similar theoretical problems.³³¹ Because *a priori* reasoning is inconclusive, it is necessary to turn to observation and deduction. The "experiments"

³²⁵ NIJ SUMMARY, *supra* note 36, at 16-17. The authors caution: "These estimates . . . should be viewed as rough approximations." *Id.* Cf. A study has found that about 8% of the 45,000 persons victimized by violent crime in New Jersey in 1987 had filed compensation claims. See ALBERT R. ROBERTS, *HELPING CRIME VICTIMS: RESEARCH, POLICY AND PRACTICE* 29-30 (1990).

³²⁶ It was estimated that 632,743 violent offenses resulting in injury or death were reported to the police in 1987. During Fiscal Year 1988, there were 65,799 compensation awards, but a number of these would have been for mental health counseling of "secondary" victims. *Id.* at 3-4, 16-17.

³²⁷ Extrapolated from figures given in 1994 VOCA REPORT, *supra* note 8, at 20.

³²⁸ CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1992 Appendix IV (1994). If allowance is made for pain and suffering, and for the "value" of life, the total is much higher. See Mark A. Cohen, *A Note on the Cost of Crime to Victims*, 27 URBAN STUD. 134 (1990) (cost of rape, robbery, and assault estimated to total \$79.1 billion).

³²⁹ REPORT OF THE WORKING PARTY ON COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, 1961, Cmnd. 1406, ¶ 18.

³³⁰ See, e.g., ATIVAH, *supra* note 12, at 292-96; MIERS, *supra* note 10, at 1-8; Andrew Ashworth, *Punishment and Compensation: Victims, Offenders and the State*, 6 OXFORD J. LEGAL STUD. 86, 99-107 (1986). For the most recent attempt, see John Haldane and Anthony Harvey, *The Philosophy of Compensation*, in REPORT OF AN INDEPENDENT WORKING PARTY, COMPENSATING THE VICTIMS OF CRIME, Appendix A (1993).

³³¹ See especially SMITH, *supra* note 17, at 57; LeRoy L. Lamborn, *Crime Victim Compensation: Theory and Practice in the Second Decade* 1 VICTIMOLOGY 503 (1976); MCGILLIS & SMITH, *supra* note 1, at ch. 2, especially at 27.

conducted over the past thirty years or so, at least when viewed by an observer more familiar with the British Scheme,³³² appear to yield the following results:

1. Crime victims do not have an unequivocal "right" to compensation from the state, in the sense that they do have a fully-fledged right to damages from tortfeasors. Correlatively, the state has no "duty" to provide such compensation (though it is almost universally the case that it will do so) either in recognition of a moral or social responsibility, or for strategic considerations linked to the maintenance of law and order, or to attempts to improve the administration of criminal justice. The absence of a duty enables the state to limit (and *in extremis* to withdraw) the provision of compensation. The imperfect nature of the victim's right also tends to facilitate the refusal of compensation to "undeserving" claimants.
2. Compensation programs have four principal components, each of which is dynamic:
 - (a) *Qualifying offenses*: Programs may focus on the nature of the offense (whether it is a "crime of violence") or on its results (whether it is a "criminal injury"). This distinction may have little practical significance in itself, but treating the injury rather than the crime as the focal point for designating the compensable event encourages the recognition of a broader concept of "victim" entitled to compensation. Restriction to crimes of violence is difficult to justify, but may facilitate a broader approach to other components of the program. Conversely, a causal approach is broader in scope, but may for that reason tend to encourage alternative restrictions.
 - (b) *Recognized injuries*: Two "laws" are generally established—compensation *is* payable for "physical" injury and death; compensation *is not payable* for damage to property or for pure financial loss (*i.e.*, financial loss in the absence of personal injury or death). What remains uncertain, as a result of a conflict between principle and practice, is the extent to which compensation is payable for "mental" suffering. In principle, it is accepted that mental suffering (or at least serious mental suffering) makes a person a victim of crime just as much as physical injury. In practice, however, the provision of compensation for such injuries is not only fraught with difficulties of proof, but is also costly. There

³³² For a recent analysis by an American observer, see Sarnoff, *supra* note 19, at ch. VII.

appears to be no clear understanding or general agreement as to where the balance between principle and practice most appropriately lies. The recognition of "nervous shock" and other mental and emotional suffering as "injuries" makes it difficult to differentiate between primary and secondary victims. Such a distinction, however, may be necessary for practical and funding purposes.

- (c) *Eligible victims*: Two broad bases of eligibility exist: deserving victims receive compensation, while undeserving victims do not receive anything. The principle that compensation is payable only to "deserving" victims is well established, although there is some uncertainty as to its proper ambit. Victims whose (mis)conduct caused or contributed to their injury are invariably denied (and sometimes awarded only reduced) compensation, although there is some disagreement as to how far "contributory" conduct extends. Likewise, a victim who fails to cooperate with law enforcement and other relevant authorities is generally ineligible. But the notion that compensation funds should be based on financial need and not be expended on "financially sound" victims has lost support in principle and is largely rejected in practice. Victims guilty of non-contributory (mis)conduct (*i.e.*, criminal or other conduct which neither causes nor contributes to their injuries) generally qualify for compensation as a matter of principle, although there may be some tendency to deny them compensation in practice. A more recent phenomenon is that, in recognition of the undoubted fact that different classes of eligible victims have special characteristics and particular needs, compensation programs have become less monolithic. Some special consideration can now be found for the elderly, children, victims of sexual offenses, victims of domestic violence, the close family of homicide victims and of the victims of sexual offenses. In other words, those eligible for compensation are no longer being treated as belonging to a single undifferentiated class of victims.
- (d) *Nature of Compensation*: The compensation payable to an eligible victim is not the "full" compensation of tort damages, but "basic" financial assistance to reimburse (or in some cases merely to offset) direct financial losses and expenses incurred by that victim which have not been recouped from other sources. In other words, states do not regard themselves as stepping directly into the shoes of the tortfeasor.

Attempts have, however, been made to assert the primary nature of the offender's (and tortfeasor's) responsibility for the victim's plight, but these have met with limited success. "Basic" compensation nonetheless enables many less seriously injured victims to recoup net financial outlay. Its limitations are most keenly felt by those who have sustained severe injuries. Despite universal agreement that compensation programs are "secondary," less has been done than might have been expected to secure coordination of the various resources available to victims.

3. Although generally described as providing "public" or "state" compensation to crime victims, programs have from the outset been funded to a large extent not by public revenue (*i.e.*, by taxpayers), but by "fines" imposed on persons convicted of criminal offenses. Reliance upon this source appears to be steadily increasing. This approach reinforces the notion that the state has no "duty" to compensate victims and encourages the view that victims are entitled to financial assistance determined by the availability of funds, rather than compensation according to their needs or loss.
4. The provision of financial assistance to victims has generally not been closely linked in practice to the general provision of victim services. Although a Board may be charged with the responsibility not only of determining claims for compensation, but also of providing a general victim assistance program and conducting inquiries into the needs of victims, it appears that, in practice, compensation remains a separate "service"—possibly in view of its "legal," as opposed to "administrative," nature. Greater integration with other victim services might be desirable in principle, but it could further reduce the "right" to compensation in practice.
5. Although compensation programs involve the collection and allocation of considerable sums of money and are of great practical and political interest to victims' organizations, they tend to operate with low *legal* visibility. Relatively few claims come before the courts, and comparatively few board decisions are "reported" in annual reports. After an initial flurry of activity, there has been relatively little interest among scholars in the continuing development and operation of compensation programs.
6. Compensation programs have come a long way since 1965, but they may be facing a crisis of confidence. The rise in the rate of violent crimes means that the number of crime victims

continues to increase. Real developments and political rhetoric over the past decade or so have created greater expectations of assistance, both financial and otherwise, among those victims. Compensation programs have become, or at least have shown the way to become, more sophisticated and responsive to victims' needs. But those same programs are beginning to reflect the pressures imposed by a lack of secure and adequate funding. Hopefully, the somewhat indeterminate status of programs providing compensation for the victims of crime, which may in the past have assisted their development, will not now prove to be their undoing.