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## Crime Compensation

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# CRIME COMPENSATION

Richard Cosway\*

Washington has adopted a system of compensation for innocent victims of crimes, the eleventh state to do so.<sup>1</sup> The principal characteristic which distinguishes the new Washington Act from other present and proposed programs is the connection between it and Industrial Insurance, more commonly known as Workmen's Compensation. This connection has at least three significant consequences: (1) Because the victim is equated with an on-the-job injured employee, the amount of an individual's award is geared to the amount an injured workman or dependents of a deceased workman would receive; (2) the administration of the new program is assigned to the Department of Labor and Industries; (3) the procedures for compensating crime victims, including a modified judicial review, generally will follow those procedures established for settling Industrial Insurance claims.

## I. THEORY OF COMPENSATION OF VICTIMS OF CRIME

### A. *Justification for Compensation*

Frequently raised questions are: "Why compensate crime victims? How are they different from others who suffer loss through accident, such as earthquake or storm? Indeed how are they different from those who suffer injury through human acts which are not identified as criminal?"<sup>2</sup> These kinds of questions usually are raised by opponents of crime compensation. Indeed, if the title of the Act were changed from *crime* victims' reparations to *tort* victims' reparations, the scheme would be foredoomed to failure. Those favoring crime

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1. Ch. 122, [1973] Wash. Laws, 1st Ex. Sess.; WASH. REV. CODE §§ 7.68.010—910 (Supp. 1973).

2. The questions are explored by Professor Frank W. Miller in Miller, *et al.*, *Compensation for Victims of Criminal Violence—A Roundtable Discussion*, 8 J. PUB. L. 191, 203 (1959), and by Walter J. Blum in Blum, *Victims of Crime and Other Victims*, 52 CHICAGO B. REC. 463 (1971).

reparations usually have concluded a priori that the incidence of crime is large enough and yet sporadic enough so that the losses caused by it should be spread throughout society rather than borne by the particular victims.<sup>3</sup> Other catastrophic losses could similarly be spread, but society's inability to provide complete protection from all losses need not deter it from providing partial protection when it is economically and socially feasible.

Though the history of crime victims' compensation schemes may not provide a perfect conceptual answer to their justification, it does suggest some clues. Many historians find the source of crime victims' compensation in the Code of Hammurabi, 2250 B.C.<sup>4</sup> Though interesting historically, this early appearance cannot be said to be influential in modern developments. Instead, the meaningful history began in the second half of this century in New Zealand and Great Britain. The origins of the scheme in Great Britain, at least, suggest an organized program for distribution of governmental largesse:<sup>5</sup>

Compensation will be paid *ex gratia*. The Government does not accept that the State is liable for injuries caused to people by the acts of others. The public does, however, feel a sense of responsibility for and sympathy with the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation on behalf of the community.

The most acceptable justification for compensating crime victims is that the state has failed to provide adequate protection from crime and that, to the extent possible, the state should compensate those who suffer loss through the absence of adequate protection.<sup>6</sup> This analysis seems mandated if the scheme is to escape challenge under provisions of the Washington Constitution prohibiting the giving away of state monies or credit.<sup>7</sup> Indeed, the Washington Crime Compensa-

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3. For a detailed discussion, see Note, *Compensation for the Criminally Injured Revisited: An Emphasis on the Victim?*, 47 NOTRE DAME LAW. 88 (1971).

4. See, e.g., the fine discussion in Wright, *What About the Victims? Compensation for the Victims of Crime*, 48 N.D. L. REV. 473, 475 (1972).

5. HOME OFFICE AND SCOTTISH HOME AND HEALTH DEPARTMENT, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, Cmnd. 2323 Para. 8 (1964).

6. There are several theories supporting compensation to crime victims, and the brief discussion in this article does not pretend to do justice to the entire spectrum. A fine discussion appears in Note, *Compensation for the Criminally Injured Revisited: An Emphasis on the Victim?*, 47 NOTRE DAME LAW. 88 (1971).

7. WASH. CONST. art. VIII, § 5:

CREDIT NOT TO BE LOANED. The credit of the state shall not, in any

tion Act, more forthrightly than any other, appears to be founded on this duty of protection, since it provides for limited payments to victims in consideration for abolishing claims against the state. The Act provides:<sup>8</sup>

In keeping with the intent of the legislature as set forth in section 1 of this act, all civil actions and civil causes of action against the state for injury or death as a consequence of a criminal act, and all jurisdiction of the courts of the state over such causes, are hereby abolished except as in this chapter provided.

It is doubtful, however, that any underlying liability of the state for the criminal acts of third parties actually exists.<sup>9</sup> Perhaps this provision reflects concern regarding the state's liability for injuries inflicted by escaped or paroled offenders. If the provision is an admission of liability, it may well backfire because the statutory compensation scheme is available only to residents of this State.<sup>10</sup> A nonresident

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manner be given or loaned to, or in aid of, any individual, association, company or corporation.

*Id.* art. XII, § 9:

STATE NOT TO LOAN ITS CREDIT OR SUBSCRIBE FOR STOCK. The state shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association or corporation.

8. Ch. 122, § 4 [1973] Wash. Laws, 1st Ex. Sess. Professor Lamborn says of those systems in effect prior to Washington's: "None of the 22 jurisdictions that have established comprehensive crime victim compensation programs has accepted the theory that government has a duty to compensate victims of crime." Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 446, 463 (1973).

9. In LAW REFORM COMMITTEE, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, Cmnd. 1406 (1961), this view is expressed:

The proposition that the State has a duty to protect its members from unlawful violence and that if it fails to do so it should pay compensation seems to us to be both fallacious and dangerous. Fallacious, because we do not believe that the State has an absolute duty to protect every citizen all the time against other citizens: there is a distinction between compensation for the consequences of civil riot, which the force of law and order may be expected to prevent, and compensation for injury by individual acts of personal violence, which can never be entirely prevented. It is true . . . the public generally are prohibited from carrying weapons to protect themselves, but it does not follow that the State has assumed the duty of protecting them everywhere and in all circumstances; the most it has done is to create an assumption that it will provide a general condition of civil peace.

Some landmark decisions impose liability on the state. See *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534 (1958); *Finkel v. State*, 37 Misc. 2d 757, 237 N.Y.S.2d 66 (N.Y. Ct. Cl. 1962). However, these cases obviously involve rather narrow, specific duties of protection and cannot be said to impose the general liability adverted to in the British report.

10. The definition of "victim" limits the persons who suffer compensable injury or death to residents of the state, although persons such as dependents who derive a

might argue that the Legislature has admitted the existence of civil causes of action against the state without abolishing them for nonresidents. It is unclear, however, whether the duty which underlies those causes of action runs to both residents and nonresidents of the state.

A further rationale for crime compensation plans derives from the encouragement they give to third parties to intervene and help prevent crimes or apprehend escaping offenders. Some federal proposals, for example, are more generous toward intervenors than other crime victims.<sup>11</sup> The Washington scheme shows no such partiality, but the desire to encourage intervenors is reflected in the definition of "victim," which includes persons who sustain injury in a "good faith and reasonable effort to prevent a criminal act" or in a "good faith effort to apprehend a person reasonably suspected of engaging in a criminal act."<sup>12</sup>

### B. *Need as a Basis for Compensation*

The history of crime compensation programs in other states provides a revealing glimpse into a limitation that does not exist in the Washington plan. A few states such as California have built a welfare concept into their crime compensation programs by providing compensation only to needy victims.<sup>13</sup> This restriction is not consonant with the rationale of other than an *ex gratia* crime victims' compensation program, because the loss sustained by the rich or middle-class victim is as real as that sustained by the impoverished victim.<sup>14</sup> The apparent explanation for a need requirement is the cost factor. Some would argue that the desirability of limiting costs outweighs any need to compensate a wealthy person who is criminally injured.

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claim through the victim need not be residents of the State. Ch. 122, § 2(3). [1973] Wash. Laws, 1st Ex. Sess.

11. See, e.g., S. 383, 93d Cong., 1st Sess. (1973); S. 2994, 92d Cong., 1st Sess. (1971).

12. Ch. 122, § 2(3). [1973] Wash. Laws, 1st Ex. Sess. While reasonable minds may differ as to the required attitude of the intervenor, a requirement of reasonableness seems to abort the ends sought. If a bystander honestly and in good faith believes he is preventing a crime and subsequently sustains injury, he will be surprised if he is denied compensation because he did not act reasonably. The effect of denying compensation will be to deter future intervenors for they will be reluctant to match wits with a hindsight viewer of their conduct.

13. See Lamborn, *The Scope of Programs for Governmental Compensation of Victims of Crime*, 1973 ILL. L.F. 21, 56 [hereinafter cited as Lamborn].

14. *Id.* at 57.

The perception that crime victim's reparations programs are, in essence, designed to protect only against catastrophic losses provides the principal argument for the need restriction. If a victim can bear his loss without necessitating a substantial change in his life style, the loss should be borne by him and not spread among society. However, this "financial stress" approach is of dubious validity when the compensation program is designed to be a substitute for the civil liability of the State.<sup>15</sup> Thus, the absence of a financial need test in the Washington program is consistent with the program's rationale.

Nevertheless, even in Washington, the last chapter on financial need remains to be written because of the probability of federal entrance into the field of crime compensation. One aspect of the proposed federal enactment that is likely to have an impact on states is a provision that the federal government will pay a substantial share of the cost of acceptable state plans. However, one requirement for an acceptable state plan may well be that the compensation be provided only to alleviate financial stress.<sup>16</sup>

Once a federal program of reimbursement is established, all states will scurry under the umbrella by making their plans commensurate with federal standards. However, the result where state and federal requirements are not parallel is unclear. Perhaps none of the state's costs will be reimbursed. More likely, only those costs incurred in cases meeting federal standards will be reimbursed, leaving to the state the option to provide more extensive coverage in other cases. The gargantuan bookkeeping problems which may result in any state not precisely copying the federal plan will provide inducement for states to follow the federal plan. However, if a federal crime compensation bill is enacted which includes a financial stress requirement, Washington might well decide to forego the federal "manna" because the administrative costs required to make a need determination in each case may be greater than the benefits to be derived from federal reimbursement.

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15. See Note, *What About the Victims? Compensation for the Victims of Crime*, 48 N.D. L. REV. 473 (1972).

16. The "financial stress" requirement was incorporated into the only bill to be passed by the Senate. See S. 300, 93d Cong., 1st Sess. (1973), analyzed in Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 466 (1973). Cf. H.R. 15497, 92d Cong., 2d Sess. (1972), which does not incorporate the test.

### C. *Insurance Proceeds Available to the Victim*

Related to the issue of financial stress or need as a *sine qua non* of granting compensation is the intractable policy question of how to deal with insurance and other compensatory proceeds available to the victim. Is the prudent fellow who has invested \$5,000 in medical care or disability insurance to be treated differently from the fellow who has \$5,000 on deposit in a bank? If financial need is a criterion, the answer is no, but remove that requirement and both the policy of compensation and the words necessary to implement that policy become difficult to determine.

The policy adopted by Washington is to reduce the compensation of victims having insurance by the insurance proceeds, while providing full compensation to all other victims regardless of their financial resources.<sup>17</sup> This approach is typical<sup>18</sup> but difficult to justify because it discriminates between individuals on the basis of their investments. However, the better analysis which justifies the Washington approach is that the victim ought not to be doubly compensated for his injury, and therefore he should not receive the windfall of collecting both insurance and state compensation. As between the insurance company and the state, the primary loss seems a priori properly on the company which has undertaken to insure against the risk.

## II. ADMINISTRATION

With two exceptions, the states other than Washington which have adopted programs for compensating victims of crime have entrusted the implementation of their programs to specially created boards.<sup>19</sup> While the problems and basic philosophy of a crime victims' reparations program dictate using an administrative body uninhibited by the burdens and concepts of unrelated programs,<sup>20</sup> the Washington approach of entrusting administration to the Department of Labor and Industries is certainly a worthy experiment. Undertaking the program

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17. Ch. 122, § 13. [1973] Wash. Laws, 1st Ex. Sess.

18. See Lamborn, *supra* note 13, at 65.

19. Massachusetts utilizes the court system and California has entrusted its program to an established agency. See Brooks, *Compensating Victims of Crime: The Recommendations of Program Administrators*, 7 LAW & SOC'Y REV. 445, 446 (1973).

20. *Id.* at 448.

should not be unduly burdensome on the Department; the number of claims, at least in the early months, should be low so that a relatively small addition to the Department's staff should be sufficient to administer the program. Entrustment of the new program to employees within the Department who are not responsible for other Industrial Insurance cases will protect the scheme's integrity from nuances of workmen's compensation ill-adapted to the administration of a crime compensation program.

The Act does not deal directly with the status of the criminal or alleged criminal in the compensation proceedings. While the treatment accorded the employer in Industrial Insurance claims is specifically made inapplicable to the Act,<sup>21</sup> there is no positive articulation of the criminal's role, if any, in crime compensation proceedings. Several provisions of the Act support the theory that the criminal offender has no status in the compensation proceedings and, indeed, he may not be affected by the proceedings.

A victim's compensation is not dependent upon a criminal conviction. The Act specifically provides:<sup>22</sup>

PROVIDED FURTHER: (a) That neither an acquittal in a criminal prosecution nor the absence of any such prosecution shall be admissible in any claim or proceeding under this chapter as evidence of the noncriminal character of the acts giving rise to such claim or proceeding; (b) that evidence of a criminal conviction arising from acts which are the basis for a claim or proceeding under this chapter shall be admissible in such claim or proceeding for the limited purpose of proving the criminal character of the acts . . . .

The provision in subsection (a) that absence of prosecution is irrelevant to an award is a fairly standard provision, but the stipulation that an acquittal in criminal proceedings does not bar an award is unusual.<sup>23</sup> This latter clause supports the theory that awards of compensation are not related to the criminal prosecution, which in turn leads to the conclusion that the alleged offender has no status in the proceedings for an award. This conclusion is bolstered by another provision which

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21. Ch. 122, § 11, [1973] Wash. Laws, 1st Ex. Sess.

22. *Id.* § 2(2).

23. No doubt the reason behind this provision is that criminal prosecutions must meet the proof beyond a reasonable doubt standard, a burden not to be imposed in compensation schemes. See Lamborn, *supra* note 13, at 46.



apparently precludes the criminal defendant from inspecting the records in compensation proceedings.<sup>24</sup>

This apparent denial of status may not adversely affect most criminal offenders because evidence of awards of compensation cannot be introduced in criminal proceedings. Though the Act does not say so, the standard of proof required for compensation surely is not the reasonable doubt standard required for a criminal conviction. Thus, because of the lesser burden of proof required in compensation proceedings, evidence of awards of compensation and determinations made in the associated administrative proceedings are inadmissible in criminal cases.

Yet, a person who is charged with a crime which forms the basis for a compensation claim is not totally unaffected by the Act. First, records made in compensation proceedings may be a valuable source for criminal defendants seeking pretrial information about the prosecution's case.<sup>25</sup> However, this information source is not available to the criminal defendant in Washington unless he is a party to the proceedings because the public is barred from access to the record. Second, the criminal offender may be financially affected by provisions of the Act respecting reimbursement to the state for funds given to the victim. The Act provides:<sup>26</sup>

Sec. 5 . . . No right of action at law against a person who has committed a criminal act, for damages as a consequence of such act, shall be lost as a consequence of receiving benefits under the provisions of this chapter. In the event any person receiving benefits under this chapter additionally seeks a remedy for damages from the person or persons who have committed the criminal act resulting in damages, then and in that event the department shall be subrogated to and have

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24. Ch. 122, § 14, [1973] Wash. Laws, 1st Ex. Sess., provides:

Information contained in the claim files and records of victims, under the provisions of this chapter, shall be deemed confidential and shall not be open to public inspection (other than to public employees in the performance of their official duties), but a representative of a claimant, be it an individual or an organization, may review a claim file or receive specific information therefrom upon the presentation of the signed authorization of the claimant.

25. Mr. Herbert Edelhertz and Professor Gilbert Geis will probably make this suggestion in their forthcoming book, entitled *PUBLIC COMPENSATION TO VICTIMS OF CRIME* (to be published in the Spring of 1974). The author is indebted to them for their kindness in allowing him to read portions of this work which promises to become the definitive study in the field. Another very valuable and exhaustive study is being published by Professor Lamborn of Wayne State University in article form.

26. Ch. 122, [1973] Wash. Laws, 1st Ex. Sess.

a lien upon any recovery so made to the extent of the payments made by the department to or on behalf of such persons under this chapter.

Sec. 12 . . . Any person who has committed a criminal act which resulted in injury compensated under this chapter may be required to make reimbursement to the department as hereinafter provided.

(1) Any payment of benefits to or on behalf of a victim under this chapter creates a debt due and owing to the department by any person found to have committed such criminal act in either a civil or criminal court proceeding in which he is a party: PROVIDED, That where there has been a superior or district court order, or an order of the board of prison terms and paroles or the department of social and health services, as hereinafter provided, the debt shall be limited to the amount provided for in said order. A court order shall prevail over any other order.

(2) Upon being placed on work release pursuant to chapter 72-65 RCW, or upon release from custody of a state correctional facility on parole, any convicted person who owes a debt to the department as a consequence of a criminal act may have the schedule or amount of payments therefor set as a condition of work release or parole by the department of social and health services or board of prison terms and paroles respectively, subject to modification based on change of circumstances. Such action shall be binding on the department.

(3) Any requirement for payment due and owing the department by a convicted person under this chapter may be waived, modified downward or otherwise adjusted by the department in the interest of justice and the rehabilitation of the individual.

Even though the award of compensation may be eventually charged to an offender, he does not appear to have standing in the compensation proceeding. The need for prompt processing of claims is the essential reason for not giving standing to the offender, who might block or delay awards.

In view of the Act's provision that compensation may be awarded even though there is an acquittal of a particular offender, any criminal culpability of the offender must be established in criminal proceedings. Similarly, the liability for reimbursement to the state must be established independently of the crime compensation proceeding in a civil or criminal proceeding in which the defendant is a party, and any defenses to liability are to be litigated there.<sup>27</sup> Compensation is to

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27. Liability for reimbursement to the state may be determined in either a civil or criminal proceeding in which the alleged offender is a party. *Id.* § 12(1). Generally,

be awarded, in short, irrespective of the potential for reimbursement from an offender.

### III. ENTITLEMENT TO COMPENSATION

The Washington statute allows compensation only for personal injury or death.<sup>28</sup> It does not compensate property damage. At the time of the urban riots some years ago, serious attention was given to the plight of real property owners who were not practically able to obtain insurance. As a result, some states provided compensation to real property owners, but this often proved quite costly.<sup>29</sup> Personal property losses have generally not been covered by existing compensation programs though provisions do exist to compensate the intervenor whose clothing is torn or whose car is damaged.<sup>30</sup> Losses from embezzlement and theft are to be covered, if at all, by private insurance. Though one can imagine a blend of property damage and personal injury, such as that once sustained by an Ohio employee whose only loss was the fracturing of his wooden leg—no apparently critical issues arise from limiting compensation to personal injury and death.

The injury or death must result from an actual or attempted felony or misdemeanor. However, in one particular instance the Washington plan departs from the limitation that only crimes give rise to compensation. That departure relates to acts done by persons deemed incompetent to commit crimes. Even though the offender is not criminally responsible, his victim may be compensated.<sup>31</sup> The result is equitable

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liability will be predicated upon a criminal conviction. However, even if a criminal conviction is not obtained, a victim may successfully prosecute a tort action. If a civil judgment remains unsatisfied and if the tort was a criminal offense, the victim could still seek compensation through the Crime Compensation Act. Presumably, such an award would create liability in the offender to the state, since he was previously a party to a civil proceeding in which he was found to have committed the criminal act.

28. *Id.* § 2(3).

29. See Lamborn, *supra* note 13, at 26. Some states devised schemes to provide insurance at reasonable premiums. See Note, *Riot Insurance*, 77 *YALE L.J.* 541 (1968); Note, *Baltimore City's Liability for Riot Damage: The Mayor as Conservator of the Peace*, 33 *MD. L. REV.* 73 (1973). The federally funded program is authorized by 12 U.S.C. § 1749bb (Supp. II 1972).

30. See Lamborn, *supra* note 13, at 25. Some proposed federal bills have detailed similar compensation. See S. 800, 93d Cong., 1st Sess. (1973).

31. Ch. 122, § 2(2), [1973] Wash. Laws, 1st Ex. Sess. This provision is typical of statutes providing for compensation to crime victims.

The Act refers to "insanity or mental irresponsibility of the perpetrator," and it does not refer specifically to infancy. Infancy seems to be included under "mental

enough, but a mind constrained by logical consistency might well balk at this extension.

Crimes relating solely to the operation of a motor vehicle, boat, airplane, motorcycle or train are excluded unless used to inflict intentional injury or as "part of the commission of another criminal act as defined" in the Act.<sup>32</sup> This exclusion is adopted by all other crime compensation programs, and the explanation is essentially one of cost.<sup>33</sup> A constitutional argument that no valid distinction can be drawn between a victim injured by a carelessly handled gun and car can be expected. However, widespread availability of insurance, no-fault or otherwise, and programs to limit the use of the roads to financially responsible persons seem to be the basic justification for noncompensation of these injuries under crime compensation programs.

The injury or death must be sustained by an "innocent" victim.<sup>34</sup> This requirement of innocence promises to be a source of uncertainty until its parameters are identified. The parallel between industrial insurance and the Act appears to have been abandoned by inserting this requirement, because the fault of a worker has long been excluded as a basis for denying workmen's compensation. Even in industrial insurance, however, compensation is typically denied for willfully self-inflicted injury,<sup>35</sup> so at least some of the outer limits of the innocence requirement can be foreseen. The doctrine that may emerge under the test of "innocent" is contributory negligence.<sup>36</sup> Compensation should not be denied, however, simply for negligent exposure to

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irresponsibility." However, just as not all accidentally inflicted injuries perpetrated by competent adults are criminal, neither are all accidentally inflicted injuries caused by an incompetent necessarily compensable. *Mens rea* required for particular crimes must be present in the case of the competent, and in the case of the incompetent must be said to have been present but for the incompetency. See Rothstein, *State Compensation for Criminally Inflicted Injuries*, 44 TEXAS L. REV. 38, 42 (1965); Lamborn, *supra* note 13, at 40.

32. Ch. 122, § 2(2), [1973] Wash. Laws, 1st Ex. Sess. One can imagine claims by individuals run down by persons fleeing from the scene of arsons, robberies and similar felonies which are aimed primarily at property, and the statute is not definitive as to whether such claims will be valid. Change the facts only slightly, as by putting the loot in the trunk of the car, and the claim becomes more readily recognizable, for the auto is more clearly being employed for "part of the commission of another criminal act." Even though these illustrations demonstrate the lack of precision in this provision, the merits in providing compensation where possible are obvious.

33. For a detailed analysis, see Lamborn, *supra* note 13, at 29.

34. Ch. 122, § 1, [1973] Wash. Laws, 1st Ex. Sess.

35. See, e.g., WASH. REV. CODE § 51.32.020 (Supp. 1972).

36. Alternatively, the theory of comparative negligence might be employed to determine if a victim was innocent within the meaning of the statute. See also note 38 and accompanying text *infra*.

risk, such as when an innocent victim with obvious affluence wanders into an area of a generally recognized high incidence of mugging and robbery.

In addition, the statute specifically excludes compensation where the criminal act was the result of "consent, provocation or incitement by the victim."<sup>37</sup> This exclusion, distinct from the "innocent" victim requirement, may cause difficult interpretive problems. The Department of Labor and Industries appears to have substantial discretion in determining whether the victim's conduct constituted the proscribed "consent, provocation or incitement." The need for such discretion is inherent in any compensation program since the factual determinations will be difficult. Some authorities have suggested that the blameworthiness of the victim ought to be handled on a comparative basis, reducing but not eliminating compensation in appropriate cases.<sup>38</sup> Such an approach aggravates the difficulty of the factual determination, but it does offer an acceptable alternative to the "all or nothing" approach of Washington.

Closely related to the issue of contributive conduct of the victim is the issue of intrafamily crime, because of the difficulty of identifying the offender and the innocent victim in such crimes and the possibility of fraud and collusion. Yet, a flat exclusion of compensation to any victim closely related to the offender is preordained to produce hardship cases which merit compensation. The estranged wife and her children hardly seem fitting objects of exclusion from a compensation scheme when she is shot by a no-good husband who has not been supporting the family. Nevertheless, the Act appears to exclude such victims by providing:<sup>39</sup>

In addition thereto, no person or spouse, child or dependent of such person shall be entitled to benefits under this chapter when the injury for which benefits are sought was the result of . . . an act or acts committed by a person residing with the victim or who is a spouse, child, parent, or sibling of the victim by the half or whole blood, adoption or marriage . . . .

The exclusion of intrafamily crime has political acceptability, but

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37. Ch. 122, § 7(3), [1973] Wash. Laws, 1st Ex. Sess.

38. See UNIFORM CRIME VICTIMS REPARATIONS ACT § 5(f)(2) (Approved Draft 1973) [hereinafter cited as UNIFORM ACT].

39. Ch. 122, § 7(3), [1973] Wash. Laws, 1st Ex. Sess.

one questions whether an absolute prohibition is the best solution. The proposed Uniform Crime Victim Reparations Act would soften the blow:<sup>40</sup>

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

Without the bracketed language (and the presence of the brackets means, in the style of the National Conference of Commissioners on Uniform State Laws, that the language is optional), a near relative of the perpetrator of the crime may be compensated. Yet, temptation to inflict criminal injuries as a means of getting funds from the state is inhibited by the provision against unjust enrichment. Even with the bracketed language, which embodies the basic concept included in the Washington Act, compensation may be awarded to relatives of an offender when the interest of justice so requires. This approach seems preferable to throwing the baby out with the bathwater.<sup>41</sup>

Sexual offenses outside the family relationship were not given specific attention by the draftsmen of the Act. Does a rape victim, for example, sustain personal injury? And, to what extent, if any, is the victim entitled to compensation? The analogy to workmen's compensation fails to provide persuasive guidelines here, but some clues as to a possible solution exist. First, while the Washington scheme does not expressly exclude compensation for pain and suffering, the integration of crime compensation with industrial insurance makes this exclusion fairly certain.<sup>42</sup> Because much of the impact of rape is emotional, similar to pain and suffering, this type of damage presumably will not be

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40. See UNIFORM ACT, *supra* note 38, § 5(c).

41. Professor Paul Rothstein insisted on this need for awareness of the possibility of overbroad exclusions; he served as consultant to the Committee of Commissioners on Uniform State Laws which drafted the UNIFORM ACT. His view, fortunately, prevailed. See Rothstein, *State Compensation for Criminally Inflicted Injuries*, 44 TEXAS L. REV. 38, 48-49 (1965).

42. The limited amounts of compensation, geared to earnings, earning capacity or capacity generally do not reflect pain and suffering. Hawaii's program stands alone in expressly extending coverage to pain and suffering, so it is not surprising that Washington denies such compensation.

compensable. However, neuroses may develop occasionally which would seem to be compensable.<sup>43</sup>

Second, a rape victim does not sustain personal injury in the physical sense that an assault victim does. Whether a resulting pregnancy is within the ambit of that personal injury is not clear. Some states have seen fit to define injury as inclusive of pregnancy resulting from rape which ensures compensation for medical care incident to the pregnancy and delivery of the baby, or perhaps an abortion.<sup>44</sup> Even without such detailed statutory provisions, however, such medical costs ought to be compensable. Indeed, under the Washington Act, loss of earnings due to pregnancy is arguably compensable.<sup>45</sup>

The Act denies compensation to crime victims who are in jail or in institutions maintained and operated by the Department of Social and Health Services.<sup>46</sup> The combined effect of this exclusion and the provisions of the Act which bar civil actions against the state poses an issue of constitutional dimensions. The proposition that the state may insulate itself from liability to this class of persons while denying compensation under the otherwise available program is suspect and could be challenged with an equal protection argument.<sup>47</sup> The exclusion of these victims may not be a significant issue, however, since such victims will already be under the state's care and thus will receive free medical attention and will not suffer impairment of earnings. However, since non-prisoners receive compensation which is not limited to medical attention, the fact that prisoners receive medical attention may not be sufficient to quell the claim of discrimination.<sup>48</sup>

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43. See Lamborn, *supra* note 13, at 33-40.

44. Hawaii and New Jersey are illustrations. See HAW. REV. STAT. § 351-2 (1967); N.J. REV. STAT. § 52:4B-2 (1971).

45. The loss of earnings would be a *sine qua non* and in effect limit this kind of compensation to employed females. The reason is that temporary total disability is expressly limited to persons gainfully employed. See Ch. 122, § 7(7), [1973] Wash. Laws, 1st Ex. Sess.

46. *Id.* § 7(3).

47. Indeed, of all the persons in society who may conceivably have a claim against the state founded on the state's failure to take reasonable efforts to protect against criminal acts, the inmates of institutions appear to have the strongest case. The reason is not that jails harbor criminals, but that inmates are under the control of the state with limited opportunity for self-defense and thus in greatest need of protection.

48. Ch. 122, § 7, [1973] Wash. Laws, 1st Ex. Sess. A housewife who is not gainfully employed is similarly not caused to sustain a loss of earnings when she is injured in a criminal way, and yet she may obtain compensation not limited to medical care.

Further limitations or exclusions from compensation are included in the procedural requirements of the statute. Claims not filed within 180 days after an injury and within 120 days after death are barred.<sup>49</sup> The exception to these limitations is found in Section 16 of the Act, which extends the right to compensation to persons injured on or after January 1, 1972, if they file within 90 days from the effective date of the Act (January 1, 1974).<sup>50</sup>

There may be procedural details in the industrial insurance statute which must be met by claimants under the Act, but only one appears to be express: compensation may be denied to one who refuses to submit to a medical examination.<sup>51</sup>

#### IV. AMOUNT OF COMPENSATION

The integration of Washington's crime victims' compensation into industrial insurance is a significant contribution made by the draftsmen of the Act and has the merit of keeping the two schemes parallel, thus avoiding imbalance of payments.<sup>52</sup> As a result, an employed worker will receive the same amount of compensation whether he is injured during the course of a crime or while on-the-job.

The kinds of compensation available under industrial insurance include medical attention, death benefits, permanent total disability pensions, temporary disability compensation and permanent partial disability payments, plus rehabilitation. The medical care to which an employee is entitled is virtually without monetary limit,<sup>53</sup> and this limitless care will apply to crime victims also.<sup>54</sup> This approach is significantly superior to any program which stipulates an arbitrary max-

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49. *Id.* ch. 122, § 6.

50. *Id.* ch. 122. One Seattle resident in this category was an influential witness during the hearings on the proposal for crime victims' compensation, and the compulsion of her situation supplies the understandable base for this exception. The exception has been called the "Pat Hemenway Amendment." *Seattle Times*, Sept. 30, 1973, at 1, col. 1.

51. WASH. REV. CODE § 51.32.110 is expressly included in the new scheme, Ch. 122, § 10, [1973] Wash. Laws, 1st Ex. Sess.

52. In addition to Washington, only Maryland and three Canadian provinces have tied crime compensation into industrial insurance. *See* Lamborn, *supra* note 13, at 34. Other states mandate that compensation statutes other than criminal victims statutes be used as guidelines. *Id.* at 45.

53. WASH. REV. CODE §§ 51.36.010 *et seq.* (Supp. 1972).

54. Ch. 122, § 8, [1973] Wash. Laws, 1st Ex. Sess.



imum amount of compensation for medical payments to be paid to a victim or his dependents.<sup>55</sup>

Much of the compensation to which employed persons are entitled under industrial insurance is, however, geared to their wages, and this obviously creates special problems for the crime victims' compensation program because it is not limited to working people. In particular, industrial insurance payments for death<sup>56</sup> and for total disability, whether temporary<sup>57</sup> or permanent,<sup>58</sup> are based upon the wages earned by the employee at the time of the industrial accident. Under the new program, different bases are provided for determining the amount of compensation for death and temporary or permanent total disability when the victim is unemployed.

#### A. *Death Benefits.*

The amounts payable for burial will be the same under industrial insurance and the new Act, but the compensation payable to survivors is different. In the case of an on-the-job accident, the surviving spouse is entitled under industrial insurance to receive monthly payments based upon a percentage of the deceased employee's wages and the number of children, but subject to certain established minimum and maximum amounts.<sup>59</sup> The surviving spouse of a crime victim will receive the same amount if that victim was employed. However, if the victim was not employed, the surviving spouse will receive a lump sum payment of \$7,500 "without reference to children."<sup>60</sup> Apparently this means that children who are dependent upon the deceased have no independent claim to compensation so long as a spouse survives. A child receives compensation under the new plan only if there is no surviving spouse, and that compensation is a lump sum payment of \$2,500 to each child.<sup>61</sup> The maximum amount payable under this

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55. Lamborn, *supra* note 13, at 46-53.

56. WASH. REV. CODE § 51.32.050 (Supp. 1972).

57. *Id.* § 51.32.090.

58. *Id.* § 51.32.060.

59. *Id.* The new statute differentiates between employed and non-employed individuals in these terms: "victim who was not gainfully employed at the time of death, and who was not so employed for at least three of the twelve months immediately preceding injury." The proper interpretation is that unless both of these criteria are met, the amount of compensation will be determined by the criteria for non-workmen. Ch. 122, § 7(4), [1973] Wash. Laws, 1st Ex. Sess.

60. Ch. 122, § 7(4), [1973] Wash. Laws, 1st Ex. Sess.

61. *Id.*

provision appears to be limited only by the procreative power of the victim, for unlike the parallel provisions under industrial insurance,<sup>62</sup> there is no stated maximum.

Arbitrarily established monetary awards are often difficult to justify. The payments to non-workers' survivors for criminally caused death under the Washington Act seem particularly questionable because they were not established with any view toward actual monetary loss. For example, the death of a housewife produces the same award regardless of whether that housewife was an active housekeeper and mother or an invalid who provided no household care and only limited motherly attention. In most instances, the amount set by the new Act appears to be unreasonably low, and yet in particular cases the amount may be a windfall.

The Uniform Crime Victims Reparations Act illustrates a different method of awarding compensation. The Uniform Act seeks to provide compensation for actual loss. In the case of the employed worker, that loss is the economic contribution the worker would have provided the dependent but for the death of the worker, less expenses the dependent is saved by the death. In addition, the dependents of both employed and unemployed victims are compensated for the losses caused by replacing the services the dependents would have received from the deceased victim.<sup>63</sup> While the Uniform Act fails to provide complete reparations for actual loss, due to a suggested over-all maximum limit of \$50,000 on compensation, its method of determining awards by the facts of each case rather than by an arbitrary lump sum nevertheless seems preferable.

### *B. Temporary Total Disability.*

The employed person who sustains a work-related accident receives compensation under industrial insurance based on a percentage of his wages with certain maxima and minima for that period during which he is unable to work.<sup>64</sup> Under the Act, the employed person who is injured by a criminal will receive the same compensation, but the victim

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62. WASH. REV. CODE § 51.32.050 (2), (3), (5) (Supp. 1972).

63. See UNIFORM ACT. *supra* note 38, § 1(g).

64. WASH. REV. CODE § 51.32.090 (Supp. 1972).

who is not employed will receive no compensation for temporary incapacity.<sup>65</sup>

Again, the Uniform Crime Victims Reparations Act seems to have a better solution to a very difficult problem. It simply is not true that a housewife and her family sustain no pecuniary loss during the period of her inability to perform her duties; by providing no compensation the Washington statute has left an undesirable gap. Under the Uniform Act, on the other hand, "replacement services loss" would be payable in instances of injuries to wives and mothers. This includes "expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured."<sup>66</sup> This solution seems more equitable than that of denying all compensation to unemployed individuals who incur a temporary loss of capacity.

### C. *Permanent Total Disability.*

The injured worker who is permanently and totally disabled is given a pension under industrial insurance geared to his wages at the time of the industrial accident, but with minimum and maximum limitations.<sup>67</sup> The employed person who is entitled to compensation as a crime victim will receive the same amount. The unemployed person, however, receives compensation based on the average monthly wage paid in the state. The Act provides that in the case of victims who are not gainfully employed and who are permanently totally disabled, "'wages', for the purpose of calculation of benefits, where required, shall be deemed to be the average monthly wage determined pursuant to RCW 51.08.018 . . . ."<sup>68</sup>

The words, "shall be deemed to be," require clarification. They may remove all discretion from the board and create an irrebuttable presumption as to the average monthly wage. A better interpretation is that in any particular case, the board may decide that the set figure is inappropriate. For instance, in the case of criminal injuries to a person already totally disabled, compensation could be denied under

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65. Ch. 122, § 7(7). [1973] Wash. Laws, 1st Ex. Sess.

66. See UNIFORM ACT, *supra* note 38, § 1(g)(3).

67. WASH. REV. CODE § 51.32.060 (Supp. 1972).

68. Ch. 122, § 7(5). [1973] Wash. Laws, 1st Ex. Sess.

this interpretation of the Act on the theory that the deeming of wages to be the average in the state would be inconsistent with the physical condition of the victim. A decision worthy of Solomon is involved, though, where some disablement is caused by the injury but the extent is not certain because the precise evidence needed (if any will do) to establish refutation of the inapplicability of the average state wage is unclear. The solution is not facilitated, incidentally, by the basic industrial insurance statute, because partial disability under that statute is defined in terms of *earning* power, which is obviously neither actual nor general capacity.<sup>69</sup> Again, the solution of the Uniform Act, which attempts to specify the basis for compensation, seems clearer and somewhat easier for an administrative agency to implement.<sup>70</sup>

*D. Permanent Partial Disability.*

For permanent partial disability, there is no need to differentiate the employed from the unemployed victim for both are compensated for impairment of capacity and not actual earnings. The Act specifies compensation for certain losses for example, the loss of an eye), and those losses not amenable to specific scheduling are to be ascertained by a medical determination of impairment.

The impairment of capacity for which compensation is paid need not be related to capacity to perform work, though it is doubtful whether capacity to enjoy life is compensable as such. If there are unsolved problems in this area of compensation, they are unresolved both with respect to the worker and the nonworker, and the creation of the crime compensation program does not inject new elements into the picture.

*E. Awards in general.*

The objections noted by the author in the foregoing discussion ought not be taken to mean that the new Washington Act is not a wise, well drafted effort to meet a pressing social need. If the author has demonstrated an overly partial view of the Uniform Crime Victims Reparations Act, the reason is that he had the honor to serve as

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69. WASH. REV. CODE § 51.32.090 (Supp. 1972).

70. See notes 59 and 62 and accompanying text *supra*.

chairman of the national committee which drafted that Act and, thus, has a certain pride of authorship. However, many details of the Washington Act, not alluded to herein, are excellent. For example, provisions incorporated from the industrial insurance statutes respecting lump sum and serial payments are praiseworthy.<sup>71</sup> While lump sum payments often would tend to encourage prodigality, they may provide an immediate solution to a pressing financial problem which hinders rehabilitation. A disabled person who desires to make an investment in a small venture, such as an in-home manufacturing process, might find a lump sum payment essential to his adjustment to his disability. The Board should enjoy wide discretion in adjusting the type of payments to the needs of the particular claimant.

## V. CONCLUSION

Crime victims' compensation has been described as an idea "whose time has come."<sup>72</sup> There is no doubt that Washington's enactment adds support to the movement, and many of its specific solutions to difficult problems will be emulated elsewhere. The Washington Act concededly has its limitations, yet the program is not merely a piece of window dressing.<sup>73</sup> It will provide protection against losses due to personal injuries inflicted by criminal acts, but it will not, however, be a cost-free undertaking. That some of the costs will be borne by the criminals who inflict the injuries is a hope scarcely amounting to an expectancy.<sup>74</sup> The true meaning of the new enactment is that criminal acts are recognized as producing losses properly chargeable to society as a whole. Washington is to be commended for having taken this forward step.

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71. See, e.g., Ch. 122, § 9, [1973] Wash. Laws, 1st Ex. Sess., incorporating provisions of WASH. REV. CODE § 51.32.130 (1963).

72. United States Senator Mansfield has emphasized this point in a variety of ways. See 117 CONG. REC. 46404 (1971).

73. Senator Tydings once described the California program as "just public relations surface treatment" (quoted by Lamborn, *supra* note 13, at 57).

74. The new Act does have provisions directing that ultimate liability fall on the criminal in Section 12. Edelhertz and Geis will report that there have been few, if any, recoveries under similar statutes in their study cited *supra* at note 25.