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# COMMENTS

## COMPENSATION FOR VICTIMS OF CRIME—THE TEXAS APPROACH

by Paul M. Koning

During the 1979 session, the Texas Legislature enacted Senate Bill 21,<sup>1</sup> the Crime Victims Compensation Act (the Act),<sup>2</sup> placing Texas in the forefront of the rapidly growing trend to provide state administered programs for the financial compensation of individuals injured by violent crimes. Increased crime rates and welfare costs have focused concern on victims' rights.<sup>3</sup> In response, the Act establishes a compensation program that has the potential to equal or exceed the effectiveness of programs existing in other states.

Victim compensation is not a novel concept; the theory of state compensation to victims of crimes occurring within the state can be traced back at least 4,300 years to the Code of Hammurabi.<sup>4</sup> In modern times, however, the crime victim has been afforded relatively little aid. Apart from recovery under one of the recently formed state victim compensation programs, the victim is limited to three basic alternatives to the absorption of the loss.<sup>5</sup> The first alternative is a civil action brought against the offender. Since civil recovery requires both the apprehension of the criminal and his financial solvency, this device has been accurately described as impotent.<sup>6</sup> A victim may also recover his crime-related losses from his insurer, pro-

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1. 1979 Tex. Sess. Law Serv., ch. 189, §§ 1-19, at 402-10 (Vernon).

2. TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 1-18 (Vernon Supp. 1980).

3. A study of the diffusion pattern of state victim compensation programs has shown that the states most likely to enact victim compensation programs are those that experience the greatest increases in per capita welfare expenditures, violent crime rates, and median family income. Doerner, *The Diffusion of Victim Compensation Laws in the United States*, 4 VICTIMOLOGY 119 (1979).

4. Sections 22-24 of the Code of Hammurabi state:

[§ 22] If a man has committed robbery and is caught, that man shall be put to death.

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

[§ 24] If (it is) the life (of the owner that is lost), the city or the mayor shall pay one mana of silver to his kinsfolk.

5 THE BABYLONIAN LAWS 21 (G. Driver & J. Miles eds. 1955). For a comprehensive treatment of victim compensation and victim's rights throughout history, see S. SCHAFER, VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL 5-32 (1977).

5. See Lamborn, *Remedies for the Victims of Crime*, 43 S. CAL. L. REV. 22 (1970); McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URB. LAW. 346 (1976).

6. McAdam, *supra* note 5, at 348.

vided that he has adequate coverage.<sup>7</sup> The most frequent victims of crime, however, are those who can least afford insurance, both because they are poor and because they live within the highest premium areas.<sup>8</sup> For this reason, insurance is hardly a choice for the average victim. The third alternative is restitution. Restitution programs allow criminal justice agencies to establish direct obligatory relationships between the offender and his victim, often as a condition of sentence modification.<sup>9</sup> Typically, a state restitution program encourages courts to condition probation on the repayment of the victim's losses by the performance of services or by cash payments.<sup>10</sup> Restitution forces the criminal to confront the problems caused by his actions; theoretically, this confrontation is rehabilitative.<sup>11</sup> Pragmatically, however, restitution is no more an alternative to the victim than a civil suit, because the majority of criminals are never convicted.<sup>12</sup> Victim compensation programs, on the other hand, offer hope to the victim because they are not linked to the apprehension of the criminal. Instead, these programs are generally based on one or more theories of state obligation<sup>13</sup> and are funded either from the general revenues or, as in Texas, from a pool of small fines collected from criminals upon conviction.<sup>14</sup>

New Zealand established the first modern victim compensation program in 1963,<sup>15</sup> immediately followed by Great Britain.<sup>16</sup> California initiated

7. For an analysis of the crime exclusions in certain policies, see Starrs, *A Modest Proposal to Insure Justice for Victims of Crime*, 50 MINN. L. REV. 285, 301-05 (1965).

8. Haas, *An Argument for the Enactment of Criminal Victim Compensation Legislation in Oregon*, 10 WILLAMETTE L.J. 185, 196 (1974); McAdam, *supra* note 5, at 348.

9. See generally Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. RICH. L. REV. 80 (1970); Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243 (1965).

10. See Cohen, *The Integration of Restitution in the Probation Services*, in *CONSIDERING THE VICTIM* 332-33 (J. Hudson & B. Galaway eds. 1975). TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6(m) (Vernon Supp. 1980) authorizes a court to order that, as a condition of probation, the offender "pay a percentage of his income to the victim of the offense, if any, to compensate the victim for any property damage or medical expenses sustained by the victim as a direct result of the commission of the offense."

11. Schafer, *The Proper Role of a Victim-Compensation System*, 21 CRIME & DELINQUENCY 45 (1975).

12. The United States Department of Justice has reported that for every 100 offenses known to police, only 5.5 persons are apprehended and found guilty as charged. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1977, at 512 (1978) [hereinafter cited as SOURCEBOOK]. "The President's Commission on the Causes and Prevention of Violence reported that only 1.8 percent of victims of crime ever collect damages from the perpetrator." 2 BROWN & DANA, STATE LEGISLATURES 7 (1976), cited in Gross, *Crime Victim Compensation in North Dakota: A Year of Trial and Error*, 53 N.D.L. REV. 7, 7 n.1 (1976).

13. For a discussion of the theoretical justifications underlying state victim compensation legislation, see notes 63-80 *infra* and accompanying text.

14. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 14 (Vernon Supp. 1980) establishes a fund for the payment of compensation under the Act, which is to be made up of \$10 and \$15 court costs exacted from convicted felons and certain misdemeanants. See note 59 *infra*.

15. Criminal Injuries Compensation Act, STAT. N.Z. No. 134 (1963), reprinted in 43 S. CAL. L. REV. 240 (1970); see Weeks, *The New Zealand Criminal Injuries Compensation Scheme*, 43 S. CAL. L. REV. 107 (1970).

16. COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, CMND. No. 2323 (1964), reprinted in Samuels, *Compensation for Criminal Injuries in Britain*, 17 U. TORONTO L. REV. 20, 46-49 (1967).

the first program in the United States in 1965.<sup>17</sup> By the mid-seventies a definite trend had been established toward state victim compensation programs, a trend partially attributable to a series of federal bills aimed at subsidizing state programs.<sup>18</sup> At the present time, twenty-nine states have some form of victim compensation program.<sup>19</sup>

This Comment explores the significant provisions of the Texas Act and analyzes in greater depth two controversial restrictions: the financial stress requirement and the household exclusion. Finally, this Comment stresses the need for effective implementation of the Act's publicity provisions and discusses the intriguing "Son of Sam" sections in light of the constitutional problems that they present.

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17. CAL. GOV'T CODE §§ 13959-13974 (West Supp. 1980).

18. Since the mid-sixties, a number of bills aimed at providing federal compensation to victims of violent crimes have been introduced before Congress, but as yet none has passed both houses. The earlier bills were intended to establish a federally financed national crime victim compensation program. S. 2155, 89th Cong., 1st Sess. (1965); H.R. 11818, 89th Cong., 1st Sess. (1965). Since 1972, however, the most significant federal crime victim compensation bills have taken a two-pronged approach; these bills would provide for 100% compensation to victims of crimes subject to exclusive federal jurisdiction and a partial subsidization of state programs that qualify. *E.g.*, S. 2994, 92d Cong., 1st Sess. (1971). For a detailed history of the federal legislative attempts, see H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 191-209 (1974).

One of the bills currently before the Judiciary Committee, H.R. 957, 96th Cong., 1st Sess. (1979), shows promise because it is a result of a conference committee compromise of the 1977 bill, H.R. 7010, 95th Cong., 1st Sess. (1977). If passed, H.R. 957 would authorize federal subsidization of 25% of the current cost of state programs that qualify. The Texas Act, TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 1-18 (Vernon Supp. 1980), meets all the criteria of H.R. 957, which include a right to judicial or administrative review, a requirement for cooperation with local law enforcement agencies, and state rights of subrogation. Several similar bills are before the Judiciary Committee. *See* S. 190, 96th Cong., 1st Sess. (1979); H.R. 4257, 96th Cong., 1st Sess. (1979); H.R. 1961, 96th Cong., 1st Sess. (1979); H.R. 1899, 96th Cong., 1st Sess. (1979); H.R. 99, 96th Cong., 1st Sess. (1979). It is probable that the pendency of federal legislation not only encourages states to adopt victim compensation programs, but influences the nature of state programs by establishing minimum criteria for subsidization.

19. ALASKA STAT. §§ 18.67.010-.180 (1974 & Supp. 1979); CAL. GOV'T CODE §§ 13959-13974 (West Supp. 1980); CONN. GEN. STAT. §§ 54-201 to -215 (1979); DEL. CODE ANN. tit. 11, §§ 9001-9017 (1979); FLA. STAT. ANN. §§ 960.01-.25 (West Supp. 1979); GA. CODE ANN. §§ 47-518 to -526 (1979); HAWAII REV. STAT. §§ 351-1 to -70 (1976 & Supp. 1979); ILL. ANN. STAT. ch. 70, §§ 71-84 (Smith-Hurd Supp. 1979); IND. CODE ANN. §§ 16-7-3.6-1 to -17 (Burns Supp. 1979); KAN. STAT. ANN. §§ 74-7301 to -7318 (Supp. 1979); KY. REV. STAT. §§ 346.010-.180 (1977 & Supp. 1978); MD. ANN. CODE art. 26A, §§ 1-17 (1973 & Supp. 1979); MASS. ANN. LAWS ch. 258A, §§ 1-8 (Michie/Law. Co-op 1968 & Supp. 1980); MICH. COMP. LAWS ANN. §§ 18.351-.368 (West Supp. 1967-1979); MINN. STAT. ANN. §§ 299B.01-.17 (West Supp. 1980); MONT. REV. CODES ANN. §§ 53-9-101 to -133 (1979); NEV. REV. STAT. §§ 217.010-.270 (1977); N.J. STAT. ANN. §§ 52:4B-1 to -21 (West Supp. 1979-1980); N.Y. EXEC. LAW §§ 620-635 (McKinney 1972 & Supp. 1972-1979); N.D. CENT. CODE §§ 65-13-01 to -20 (Supp. 1979); OHIO REV. CODE ANN. §§ 2743.51-.72 (Page Supp. 1979); OR. REV. STAT. §§ 147.005-.365 (1977); PA. STAT. ANN. tit. 71, §§ 180-7 to -7.16 (Purdon Supp. 1979-1980); R.I. GEN. LAWS §§ 12-25-1 to -14 (Supp. 1979); TENN. CODE ANN. §§ 23-35-101 to -117 (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 1-18 (Vernon Supp. 1980); VA. CODE §§ 19.2-368.1 to .18 (Supp. 1979); WASH. REV. CODE ANN. §§ 7.68.010-.910 (Supp. 1978); WIS. STAT. ANN. §§ 949.01-.18 (West Supp. 1979-1980). The Rhode Island statute does not become active until the enactment of federal crime victim legislation. The Nevada and Georgia statutes are limited to "good Samaritan" victims, those who are injured in an attempt to stop an ongoing crime or while aiding police officers.

## I. THE TEXAS CRIME VICTIMS COMPENSATION ACT

The Act is a hybrid of provisions culled from various existing statutes as well as from the Uniform Crime Victims Reparations Act.<sup>20</sup> The purpose of the program,<sup>21</sup> like that of almost every compensation program in existence, is to compensate victims of violent crimes for the pecuniary losses<sup>22</sup> incurred as a result of their physical injuries. Neither property loss<sup>23</sup> nor pain and suffering<sup>24</sup> are compensable under the Act. Furthermore, a

20. This Act has been adopted in North Dakota and Ohio and represents an effort of the commissioners on Uniform State Laws to come to grips with the difficult issues involved in victim compensation legislation.

21. The formal purpose of the Act is declared in § 2:

The legislature recognizes that many innocent persons suffer personal injury or death as a result of criminal acts. Crime victims and persons who intervene in crimes on behalf of peace officers may suffer disabilities, incur financial burdens, or become dependent on public assistance. The legislature finds and determines that there is a need for indemnification of victims of crime and citizens who suffer personal injury or death in the prevention of crime or the apprehension of criminals.

TEX. REV. CIV. STAT. ANN. art. 8309—1, § 2 (Vernon Supp. 1980).

22. The Act includes a typical definition of pecuniary loss, which defines the limits of financial compensation for each individual:

(7) "Pecuniary loss" means the amount of expense reasonably and necessarily incurred:

(A) regarding personal injury for:

(i) medical, hospital, nursing, or psychiatric care or counseling, and physical therapy;

(ii) actual loss of past earnings and anticipated loss of future earnings because of a disability resulting from the personal injury at a rate not to exceed \$150 per week; and

(iii) care of minor children enabling a victim or his or her spouse, but not both of them, to continue gainful employment at a rate not to exceed \$30 per child per week up to a maximum of \$75 per week for any number of children; and

(B) as a consequence of death for:

(i) funeral and burial expenses;

(ii) loss of support to a dependent or dependents not otherwise compensated for as a pecuniary loss for personal injury, for as long as the dependence would have existed had the victim survived, at a rate of not more than a total of \$150 per week for all dependents; and

(iii) care of minor children enabling the surviving spouse of a victim to engage in lawful employment, where that expense is not otherwise compensated for as a pecuniary loss for personal injury, at a rate not to exceed \$30 per week per child, up to a maximum of \$75 per week for any number of children.

(C) Pecuniary loss does not include loss attributable to pain and suffering.

*Id.* § 3(7).

23. No compensation program in existence today allows recovery for the loss of property, although some, such as Tennessee, expressly exclude hearing aids and eyeglasses from the definition of property. TENN. CODE ANN. § 23-35-106(5)(b) (Supp. 1979). The exclusion of property loss may be justified on three grounds: first, the economic infeasibility of such a program; secondly, the opportunity for fraud that such a program would present; and thirdly, "property damage does not destroy a person's only indispensable asset, that is, the ability to earn a living." Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U. L. REV. 444, 460 (1964); see Fry, *Justice for Victims*, 8 J. PUB. L. 191, 193 (1959).

24. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 3(7)(C) (Vernon Supp. 1980). Only one state, Hawaii, allows compensation for pain and suffering. HAWAII REV. STAT. § 351-33(4) (1976). The lack of criteria upon which to base awards is a difficulty faced by the Hawaii program, and other states have chosen to avoid this problem. Tennessee makes one exception, and allows recovery for pain and suffering in cases involving rape or sexual deviancy. TENN. CODE ANN. § 23-35-106(5)(C) (Supp. 1979).

number of restrictions and qualifications limit the class of eligible claimants and the recovery available to each. The Act directs the Industrial Accident Board (the Board), the agency normally in charge of workers' compensation, to administer the program.<sup>25</sup>

#### A. Eligibility

Before an individual can recover under the Act, the Board must be satisfied by a preponderance of the evidence<sup>26</sup> that the requirements of the Act have been met. The threshold requirement is that the individual is a "victim" within the meaning of the Act. Victims include Texas residents<sup>27</sup> who suffer personal injury<sup>28</sup> or death as a result of criminally injurious conduct,<sup>29</sup> intervenors,<sup>30</sup> dependents of deceased victims,<sup>31</sup> and those who, in

25. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 10 (Vernon Supp. 1980). States have varied widely in their choice of administrative agencies. Many, such as New York and Connecticut, have established a compensation board unaffiliated with any existing agency. The Massachusetts and Tennessee programs are administered by state courts. Other states have allowed compensation programs to be subsumed by existing agencies in charge of workers' compensation (Texas, Washington), or public safety (Alaska). California had originally delegated control of its compensation program to the Department of Social Welfare, but transferred authority to the State Board of Control upon the realization that the compensation program had taken on the undesirable aura of welfare. See H. EDELHERTZ & G. GEIS, *supra* note 18, at 82-85.

26. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(a) (Vernon Supp. 1980).

27. *Id.* § 3(9)(A). Not only must the victim be a Texas resident, but the criminally injurious conduct must have occurred in Texas as well. *Id.* § 3(4)(A). Other states that limit recovery to residents include California, Delaware, and Washington. States that do not limit recovery to residents include Illinois, Maryland, and Minnesota.

28. *Id.* § 3(9)(A). While the definition of "victim" requires *personal injury*, the Act requires that the victim suffer *physical injury* in order to recover. *Id.* § 6(b). The § 6(b) requirement of physical injury is the result of a house committee substitute amendment. Under S.B. 21, 1979 Tex. Sess. Law Serv., ch. 189, §§ 1-19, at 402-10 (Vernon), as originally proposed, pecuniary loss incurred as the result of personal injury was compensable, including psychological counseling of rape victims who suffer mental, but not physical, injury. It is estimated that 25% of all rape victims seek no medical attention. SOURCEBOOK, *supra* note 12, at 346.

29. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 3(9)(A) (Vernon Supp. 1980). *Id.* § 3(4) defines criminally injurious conduct:

(4) "Criminally injurious conduct" means conduct that:

- (A) occurs or is attempted in this state;
- (B) poses a substantial threat of personal injury or death;
- (C) 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; and
- (D) is not conduct arising out of the ownership, maintenance, or use of a motor vehicle, aircraft, or water vehicle except when intended to cause personal injury or death in violation of Section 38, Uniform Act Regulating Traffic on Highways, as amended (Article 6701d, Vernon's Texas Civil Statutes), or Article 67011—1 or 67011—2, Revised Civil Statutes of Texas, 1925, as amended.

The words "criminally injurious conduct" are used to avoid giving an artificial meaning to the word "crime." Not all crimes will give rise to compensation under the Act. See UNIFORM CRIME VICTIMS REPARATIONS ACT § 1, Comment. Some states, such as Hawaii, instead of using the broad brush approach chosen by Texas, use a list of crimes to describe the conduct that can lead to compensation. HAWAII REV. STAT. § 351-32 (1976). The Hawaiian practice risks penalizing innocent victims of crimes omitted by oversight.

30. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 3(9)(B) (Vernon Supp. 1980) incorporates a "good Samaritan" statute within the Act. *Id.* § 3(8) provides:

the case of a deceased victim, legally or voluntarily assume the medical or burial expenses of the victim.<sup>32</sup> Once the Board determines that a claimant<sup>33</sup> is a victim, it must be satisfied that as a result of criminally injurious conduct, the victim suffered physical injury<sup>34</sup> or death, which in turn resulted in pecuniary loss.<sup>35</sup> The Board must be convinced that the victim is unable to recoup this pecuniary loss without suffering financial stress.<sup>36</sup> In addition, the victim's recovery may be denied or reduced to the extent that the victim's pecuniary loss is compensated from collateral sources.<sup>37</sup>

Three restrictions further narrow the eligible class. First, victims failing to file applications with the Board within 180 days after the crime,<sup>38</sup> or victims failing to report the crime to the appropriate local law enforcement agency within seventy-two hours,<sup>39</sup> must be denied recovery. Secondly,

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(8) "Intervenor" means a person who goes to the aid of another and is killed or injured in the good faith effort to prevent criminally injurious conduct, to apprehend a person reasonably suspected of having engaged in such conduct, or to aid a police officer. Intervenor does not include a peace officer, fireman, lifeguard, or person whose employment includes the duty to protect the public safety acting within the course and scope of his or her employment.

31. *Id.* § 3(9)(C). Section 3(5) defines dependent by reference to I.R.C. § 152, with the addition of surviving spouses and posthumous children of deceased victims.

32. *Id.* § 3(9)(D).

33. *Id.* § 3(2) defines claimant as "a victim or an authorized person acting on behalf of any victim."

34. *Id.* § 6(b); see note 28 *supra*.

35. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(b) (Vernon Supp. 1980); see note 22 *supra*.

36. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(b) (Vernon Supp. 1980). For a discussion of the financial stress requirement, one of the major issues in victim compensation legislation, see notes 83-109 *infra* and accompanying text. For the statutory definition of financial stress, see note 88 *infra*.

37. TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 6(b), 6(d)(4) (Vernon Supp. 1980) both preclude recovery to the extent of compensation from a collateral source, which is defined in *id.* § 3(3):

(3) "Collateral source" means a source of benefits or advantages for pecuniary loss awardable other than under this Act which the victim has received, or which is readily available to him or her from:

(A) the offender under an order of restitution to the claimant imposed by a court as a condition of probation;

(B) the United States or a federal agency, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them in excess of or secondary to benefits under this Act;

(C) Social Security, Medicare and Medicaid;

(D) state-required temporary nonoccupational disability insurance;

(E) workers' compensation;

(F) wage continuation programs of any employer;

(G) proceeds of a contract of insurance payable to the victim for loss which he or she sustained because of the criminally injurious conduct; or

(H) a contract providing prepaid hospital and other health care services, or benefits for disability.

38. *Id.* § 6(c)(1). The 180-day period may be extended by the Board "for good cause shown." *Id.* § 4(c). States vary as to the time limit for filing a claim. MICH. COMP. LAWS ANN. § 18.355(2) (West Supp. 1967-1979), allows the shortest period, 30 days, while ALASKA STAT. § 18.67.130(a) (1974 & Supp. 1979); CONN. GEN. STAT. § 54-211(a) (1979); ILL. ANN. STAT. ch. 70, § 73(q) (Smith-Hurd Supp. 1979); and WIS. STAT. ANN. § 949.08(1) (West Supp. 1979-1980) allow two years in which to file a claim.

39. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(c)(1) (Vernon Supp. 1980). The re-

recovery will be denied if the victim knowingly and willingly participated in the criminally injurious conduct.<sup>40</sup> Thirdly, if the criminal offender or his accomplice resided in the same household as the victim, no compensation may be awarded to the victim.<sup>41</sup> If, after consideration of the foregoing restrictions and requirements, the Board considers the victim eligible for compensation, recovery may still be denied or reduced if the victim has not "substantially cooperated" with law enforcement authorities,<sup>42</sup> or if the victim's behavior at the time of the incident giving rise to the claim was such that he or she bears responsibility for the criminal act or omission.<sup>43</sup>

Once the Board approves the victim's application, it may compensate the victim for his pecuniary loss by means of a lump-sum cash payment or by a series of payments,<sup>44</sup> which awards may not exceed \$50,000 in the aggregate.<sup>45</sup> Alternatively, the Board may refer the claimant to state voca-

quirement for reporting the crime to police is intended to encourage aid and cooperation in law enforcement efforts. Section 4(b) allows the 72-hour period to be extended if the extension "is justified by extraordinary circumstances as determined by the board." Most states have either a 72- or 48-hour requirement, although New Jersey allows three months. N.J. STAT. ANN. § 52:4B-18 (West Supp. 1979-1980). Hawaii and Delaware have no police reporting requirement.

40. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(c)(2) (Vernon Supp. 1980). All state compensation statutes contain a similar provision; it seems natural to prevent the criminal or his accomplice from benefiting from his crime. The statute denies recovery if the person whose injury or death gave rise to the application participated in the crime, thus disallowing recovery to the child or spouse of a slain criminal. *Id.*

41. *Id.* § 6(c)(4). For a discussion of the household exclusion, see notes 110-46 *infra* and accompanying text.

42. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(d)(1) (Vernon Supp. 1980). Section 5(e)(1) authorizes the Board to request information from prosecuting attorneys and law enforcement agencies for the purpose of determining claimant cooperation. One of the anticipated benefits of the program is an increase in police cooperation engendered by § 6(d)(1). See Edelhertz, Geis, Chappell & Sutton, *Part II—Public Compensation of Victims of Crime: A Survey of the New York Experience*, 9 CRIM. L. BULL. 101, 103-05 (1973).

43. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(d)(3) (Vernon Supp. 1980). The question of victim precipitation or responsibility plays a large role not only in victim compensation legislation, but in the nascent field of victimology. See, e.g., Silverman, *Victim Precipitation: An Examination of the Concept*, in VICTIMOLOGY: A NEW FOCUS (I. Drapkin & E. Viano eds. 1974). Most state programs include such a provision, which is understandably difficult to administer. One of the most common applications of this provision occurs when the victim is criminally injured a short time after soliciting a prostitute. See COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, LEGAL ISSUES IN COMPENSATING VICTIMS OF VIOLENT CRIME 24-25 (1976) [hereinafter cited as ISSUES]. Other situations in which compensation may possibly be denied include illegal hitchhiking or wearing furs or jewelry in areas well-known for high crime rates.

44. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 7(c) (Vernon Supp. 1980). Pecuniary loss accrued to the date of the award shall be paid in a lump sum, and future expenses are to be paid in installments unless the Board finds a lump sum payment will promote the interest of the claimant, or the present value of all future pecuniary loss does not exceed \$1,000. *Id.* §§ 7(c)-(d).

45. *Id.* § 7(b). The \$50,000 maximum is a limit on the aggregate compensation awarded to all claimants whose claim arises out of the injury or death of the same victim. *Id.* The Act establishes the highest maximum award of all the state programs, except for Ohio, which also allows \$50,000. OHIO REV. CODE ANN. § 2743.60(E) (Page Supp. 1979). The lowest of the state limits is \$10,000, shared by California, Connecticut, Delaware, Florida, Hawaii, Illinois, Massachusetts, New Jersey, Tennessee, Virginia, and Wisconsin. The



tional facilities or provide counseling services.<sup>46</sup> Upon the awarding of compensation, the state becomes subrogated to all the claimant's rights to receive or recover benefits from collateral sources to the extent that the state has awarded compensation.<sup>47</sup> The Act also provides that the Board shall award reasonable attorneys' fees to attorneys representing successful claimants.<sup>48</sup>

### B. Procedure

After a victim submits an application to the Board, a clerk appointed by the Board reviews the application for completeness.<sup>49</sup> A complete application is then reviewed by one Board member who determines whether a hearing is necessary.<sup>50</sup> A hearing on the application must be held if the Board member deems it necessary or if either the attorney general or the claimant requests a hearing.<sup>51</sup> The Act gives the Board the special power to order the victim to submit to a mental or physical examination or to order an autopsy of a deceased victim "if the mental, physical, or emotional condition of a victim is material to a claim"<sup>52</sup> and if the order is "for

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Texas maximum is commendable, for in many instances criminal injuries are permanently debilitating, and \$10,000 is quickly exhausted.

Many states also have a minimum claim amount. These states include Connecticut and Delaware (\$25), Illinois (\$200), Kansas, Kentucky, Maryland, Michigan, Minnesota, New Jersey, New York, North Dakota, Tennessee, and Virginia (all \$100). Commentators tend to view a minimum claim requirement with disfavor. *See, e.g.*, H. EDELHERTZ & G. GEIS, *supra* note 18, at 47.

46. TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 7(a)(2)-(3) (Vernon Supp. 1980). In addition to providing public counseling services, the Board may contract with private entities to provide these services. *Id.*

47. *Id.* § 11(a). Section 11(a) is an unfortunately drafted section that is susceptible to the extreme interpretation that once a claimant has received any award from the Board, the state becomes subrogated to the *total* amount of collateral recovery available to the claimant, even if that amount is much greater than the compensation awarded by the Board. Section 11(a) provides: "If compensation is awarded, the state is subrogated to all the claimant's rights to receive or recover benefits for pecuniary loss to the extent compensation is awarded from a source which is or if readily available to the claimant would be a collateral source." *Id.*

Naturally, the state's right of subrogation should be limited to the amount awarded by the state to the claimant. The ambiguity of § 11(a) could be simply remedied by an amendment that moves the phrase "to the extent compensation is awarded" to a position immediately preceding "the state is subrogated."

48. *Id.* § 12 provides:

As part of an order, the board shall determine and award reasonable attorney's fees, commensurate with services rendered, to be paid by the state to the attorney representing the claimant. Additional attorney's fees may be awarded by a court in the event of review. Attorney's fees may be denied on a finding that the claim or appeal is frivolous. Awards of attorney's fees shall be in addition to awards of compensation. It is unlawful for an attorney to contract for or receive any larger sum than the amount allowed. Attorney's fees may not be paid to an attorney of a claimant unless an award is made to the claimant.

49. *Id.* § 5(a).

50. *Id.* § 5(c).

51. *Id.* The attorney general shall be sent a copy of every application received by the Board, and may appear at hearings and present evidence either supporting or opposing approval of the application. *Id.* § 5(b).

52. *Id.* § 5(e)(3). Upon request the Board must give the person examined, or the claim-

good cause shown."<sup>53</sup>

At any time after the denial or award of compensation, the Board may, on its own motion or at the request of the claimant, reconsider its decision.<sup>54</sup> In addition, a claimant has the right to judicial review of a final ruling.<sup>55</sup> To preserve this right, the claimant must file a "notice of dissatisfaction" with the Board within twenty days of the ruling and bring suit in district court within twenty days of the filing of notice.<sup>56</sup> The district court will then determine the issues de novo.<sup>57</sup>

The costs of awards and administration are to be paid exclusively from the Compensation to Victims of Crime Fund, established in the state treasury.<sup>58</sup> This fund is solely comprised of additional court costs imposed on convicted criminals:<sup>59</sup> \$15 in the case of a felony and \$10 in the case of a

ant in the case of a deceased victim, a copy of the physician's or psychologist's report. *Id.* § 5(f).

53. *Id.*

54. *Id.* § 9(a).

55. *Id.* § 9(c). The right to judicial review has been a perennial qualification for federal subsidization in the series of federal victim compensation bills. *See, e.g.*, H.R. 957, 96th Cong., 1st Sess. § 4(a)(2) (1979).

56. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 9(c) (Vernon Supp. 1980).

57. *Id.*

58. *Id.* § 14(a).

59. The funding of compensation programs through fining or imposing court costs on convicted criminals is a relatively recent development. California, Connecticut, Delaware, Florida, Maryland, and Washington also use this method of funding, although program appropriations are not limited to this source. One commentator has suggested that "[i]t is . . . an illusion to look to criminal fines, or subrogation, as a substantial source for financing reparations to crime victims." H. EDELHERTZ & G. GEIS, *supra* note 18, at 290. The Texas program will test the accuracy of this prediction.

The method of funding may give rise to a constitutional challenge. One problem arises from the fact that all convicted criminals, except those convicted of misdemeanors with fines less than \$200, must pay the court costs irrespective of whether their offense was violent or nonviolent. Arguably, since the court costs are to be used solely for the purpose of compensating victims of violent crime, the statutory classification of those individuals who will pay the court costs is not reasonably related to the purpose of the legislation and contravenes the equal protection clause of the fourteenth amendment. *See, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 190-91 (1964).

This equal protection argument was made before the Supreme Court of Florida in *State v. Champe*, No. 53,811 (Fla. Dec. 14, 1978). In *Champe*, the supreme court overruled the lower court's finding that the funding provisions of the statute were unconstitutional. Chief Justice England stated:

Laws which classify violent and non-violent offenders together for purposes related solely to the prevention of violent crimes have consistently been upheld against equal protection attacks. *See United States v. Brown*, 484 F.2d 418, 423 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). . . . It is not irrational for the legislature similarly to combine all lawbreakers for the purpose of remedying the consequences of violent crime.

*Id.*, slip op. at 7. *Brown*, however, dealt with the constitutionality of a law proscribing the interstate transportation of firearms by convicted felons, regardless of the violent nature of the felony. The broad brush classification in *Brown* bears a far more rational relation to the purpose of the statute than does the *Champe* classification. The *Brown* classification can be viewed as based not only on the criminal offense, but on post-crime experience in prison, and can be justified by the high rate of crimes committed by ex-convicts. In *Champe* a shoplifter was fined to help pay for injuries suffered at the hands of rapists, murderers, and armed robbers. Unlike *Brown*, the statutory classification in *Champe* was not based on a reasonable attempt to protect the public, nor was it based on any harm directly caused by

misdeemeanor punishable by imprisonment or by a fine greater than \$200.<sup>60</sup> The legislature deleted a proposed provision that would have allowed courts to impose fines up to \$10,000 on individuals convicted of violent crimes.<sup>61</sup> Legislative estimates project that under the current Act, the collection of additional court costs should yield approximately two million dollars annually.<sup>62</sup>

## II. THE THEORETICAL JUSTIFICATION FOR VICTIM COMPENSATION

Commentators traditionally have advanced two theories to justify the state's assumption of the duty to compensate crime victims.<sup>63</sup> An examination of these theoretical justifications is essential to an analysis of the restrictions and qualifications embodied in the Act. The first theory is that of "state obligation."<sup>64</sup> The state obligation theory postulates that the state is under a duty to protect the citizenry and that when a person is criminally injured the state has failed in this duty; consequently, the state is obligated to compensate the victim.<sup>65</sup> The state's obligation further arises from the fact that the laws of the state prevent the victim from seeking personal retribution against the criminal and impede the victims' civil recovery by incarcerating the criminal.<sup>66</sup> The second theory, the social welfare theory,<sup>67</sup> is predicated upon moral considerations. This theory postulates that "an innocent victim ought to be entitled to aid, to maintain that degree of dignity, security, and comfort which he seeks to earn for himself and his family,"<sup>68</sup> and that the state should provide this aid.

At least one author has recognized that the provision for the general welfare is merely a motive behind victim compensation legislation, not a justification for it.<sup>69</sup> The social welfare theory begs the question; the state's power to provide for the general welfare offers no explanation for the state's exercise of the power in this particular instance. Yet for some, the state's moral obligation is sufficient reason for victim compensation pro-

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the offender. Since the funding provisions of the Texas Act are similar to those of Florida, Texas should expect a challenge similar to that in *Champe*.

60. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 14b (Vernon Supp. 1980).

61. Proposed S.B. 21 was amended Apr. 26, 1979, to delete § 15. House Floor Amendments to S.B. 21, TEX. H.R.J. 1903 (1979). A remnant of old § 15 may be seen in § 3(10), which defines crimes of violence although there is no longer any reference to crimes of violence in the Act. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 3(10) (Vernon Supp. 1980).

62. Fiscal Note accompanying S.B. 21, Apr. 10, 1979.

63. See Galaway & Rutman, *Victim Compensation: An Analysis of Substantive Issues*, in CONSIDERING THE VICTIM, *supra* note 10, at 421-22; Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55, 58-59 (1970).

64. Schafer, *supra* note 63, at 58.

65. See McAdam, *supra* note 5, at 351.

66. The argument that the state impedes the victim's civil recovery by incarcerating the criminal is somewhat incongruous with the argument that the state is at fault for not apprehending the criminal; nevertheless, both are often advanced together. See, e.g., Galaway & Rutman, *supra* note 63, at 421-22.

67. See Schafer, *supra* note 11, at 48.

68. Note, *The New Jersey Criminal Injuries Compensation Act*, 27 RUTGERS L. REV. 727, 728-29 (1974) (quoting N.J. VIOLENT CRIMES COMPENSATION BOARD, FIRST ANNUAL REPORT 5 (1973)).

69. McAdam, *supra* note 5, at 351.

grams. The distinguished English jurist Rupert Cross stated, "If there is a widely recognized hardship, and if that hardship can be cheaply remedied by state compensation, I should have thought that the case for such a remedy was made out, provided the practical difficulties are not too great."<sup>70</sup>

The state obligation theory appears to provide a sounder basis for victim compensation programs than does the social welfare theory, but its premises are rather questionable. The state obligation theory is predicated upon the failure of the state to protect the victim; however, ascribing fault to the state is erroneous.<sup>71</sup> The criminal is at fault, and to place blame on the state is to engage in a fiction and to ignore the individual will of the criminal.<sup>72</sup> A state cannot protect all people at all times, and it is debatable whether a state should attempt to do so.

Other theories advanced in justification of compensation programs are often merely additional benefits of such legislation, not underlying justifications. Among these prospective benefits are the increased cooperation with law enforcement agencies engendered by eligibility requirements,<sup>73</sup> anti-alienation of the victim,<sup>74</sup> and even the political benefit accruing to sponsors of victim compensation who act because "this . . . is what the people want."<sup>75</sup>

If a primary justification for the state's assumption of the duty to compensate victims must be identified, perhaps it is that the state is in the best position to spread the severe losses incurred by a relatively small group of victims. The loss-spreading function of victim compensation programs has long been recognized,<sup>76</sup> but rarely suggested as a justification for state compensation.<sup>77</sup> A state's unique ability to spread these losses efficiently, combined with a state's general duty to provide for the public welfare, implicates a state duty to establish these programs. In a sense, victim compensation may be viewed as the statutory analogue of the common law doctrine of vicarious liability. In both cases, liability is not based on fault but is imposed with the belief that it is better to subject all of society to

70. Cross, *Compensating Victims of Violence*, THE LISTENER 815, 816 (May 16, 1963), quoted in Childres, *supra* note 23, at 448.

71. Childres, *supra* note 23, at 455.

72. *Id.*

73. See McAdam, *supra* note 5, at 353.

74. For a discussion of the theory of victim anti-alienation, see text accompanying note 100 *infra*.

75. See McADAM, *supra* note 5, at 353.

76. Margery Fry, the English penal reformer who is frequently given credit for the birth of victim compensation, spoke of the loss-spreading aspects of victim compensation in her seminal article. Fry, *Justice for Victims*, 8 J. PUB. L. 191, 192-93 (1959).

77. Robert Childres, an influential commentator during the nascent stages of state victim compensation stated:

[A] sufficient, independent basis for compensation rests on common sense rather than the metaphysics of causation and responsibility. Endemic losses ought to be spread. That violence and damage criminally inflicted are endemic to American society cannot be disputed. This premise alone is a sufficient basis for the conclusion that the damage ought to be spread among all potential victims.

Childres, *supra* note 23, at 457.

small increments of loss rather than to allow individuals to suffer radical shifts in their economic status.<sup>78</sup> Under the doctrine of vicarious liability, society must eventually shoulder the loss incurred by an individual injured by a negligent employee; the loss is reflected in the goods purchased from the employer, and thereby society pays the true cost of the goods.<sup>79</sup> Likewise, victim compensation programs allow the loss suffered by a crime victim to be reflected as a true cost of living in society, either directly, through the imposition of taxes, or indirectly, by the assessment of criminal fines.<sup>80</sup>

### III. CONTROVERSIAL RESTRICTIONS IN THE TEXAS ACT

The assumption that loss-spreading is the primary justification of the state's duty to compensate victims of crime raises questions concerning the validity of some of the major restrictions on recovery included in the Texas Act. Certain provisions bear no relation to either the loss-spreading or the state obligation theories. These provisions include the exclusion of victims who live in the same household with the criminal,<sup>81</sup> and the requirement that the victim, regardless of the size of his loss, show that he will suffer financial stress as a result of his injury.<sup>82</sup> These two requirements are particularly important because of the breadth of their application. This Comment, therefore, examines these restrictions in light of the reasons offered for their support and the detrimental effects they may cause.

#### A. *Financial Stress*

Perhaps the most contentious issue concerning victim compensation legislation today is whether recovery should be contingent upon a showing of financial need or stress. Those in favor of such a requirement claim that fiscal limitations demand a restriction on program outlays because a needs requirement will cut back on the total amount awarded and thereby ensure compensation for the neediest individuals.<sup>83</sup> The proponents of need requirements are invariably the legislators, perhaps because legislators are naturally most sensitive to the potential budgetary ramifications of proposed legislation.<sup>84</sup> Objective commentators and experienced victim compensation program administrators,<sup>85</sup> however, have rarely favored

78. See F. HARPER & F. JAMES, *THE LAW OF TORTS* 759-64 (1956).

79. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961).

80. The method of funding adopted by Texas, the imposition of additional fines upon criminal offenders, TEX. REV. CIV. STAT. ANN. art. 8309-1, § 14(c) (Vernon Supp. 1980), may be seen as a partial recapture by society of the loss suffered as a result of the crimes. In a sense, under the Texas method, society pays the cost of victim compensation in advance.

81. *Id.* § 6(c)(4).

82. *Id.* § 6(c)(3).

83. See Note, *Virginia Adopts Statute to Compensate the Victims of Crime*, 11 *U. RICH. L. REV.* 679, 682 (1977).

84. See H. EDELHERTZ & G. GEIS, *supra* note 18, at 31-35.

85. In an opinion survey taken of 20 victim compensation program administrators, only three felt that the victim's need should be a prerequisite in making an award. Brooks, *Crime Compensation Programs: An Opinion Survey of Program Administrators*, 11 *CRIMINOLOGY* 258, 269-70 (1973).

requirements of financial need or stress; in fact, many ardently oppose such provisions.<sup>86</sup> Nevertheless, approximately half of the states with victim compensation plans use some sort of financial means test.<sup>87</sup> The Texas Act includes a typical provision: "The board shall deny the application if: . . . the claimant will not suffer financial stress as a result of the pecuniary loss arising out of the criminally injurious conduct."<sup>88</sup> The generally accepted reason for the inclusion of such a provision is the anticipated reduction in expenditures.<sup>89</sup> Whether it is reasonable to anticipate a substantial reduction in expenditures is a question that this Comment addresses later in this section, after the general undesirability of financial stress tests is examined.

*General Undesirability of a Financial Stress Test.* A financial stress test is undesirable for a number of philosophical and practical reasons. The requirement that a claimant show financial need essentially changes the focus of the program from the compensation of crime victims to the provision of welfare.<sup>90</sup> As mentioned earlier, one of the primary goals of a victim compensation program should be to spread effectively the losses resulting from crime related injuries,<sup>91</sup> and this goal can only be achieved by adopting a restitutionary approach that ignores the economic status of the victim. Instead of functioning as a loss-spreading device, an act including a financial stress test serves to reallocate wealth by limiting eligibility for recovery to those who meet a certain standard of need. While compensation programs are admittedly enacted to benefit the general welfare, they should not be transformed into welfare programs because victims of crime are not limited to any one income group.<sup>92</sup> The drafters of the Uniform

86. See, e.g., Childres, *supra* note 23, at 462; H. EDELHERTZ & G. GEIS, *supra* note 18, at 83-85.

87. CAL. GOV'T CODE § 13964(2) (West Supp. 1980); FLA. STAT. ANN. § 960.13(7) (West Supp. 1979); KAN. STAT. ANN. § 74-7305(d) (Supp. 1979); KY. REV. STAT. § 346.140(3) (1977); MD. ANN. CODE art. 26A, § 12(f)(1) (1973 & Supp. 1979); MICH. COMP. LAWS ANN. § 18.361(5) (West Supp. 1967-1979); N.Y. EXEC. LAW § 631.6 (McKinney 1972); TEX. REV. CIV. STAT. ANN. art. 8309-1, § 6(c)(3) (Vernon Supp. 1980); VA. CODE § 19.2-368.13 (Supp. 1979); WIS. STAT. ANN. § 949.06(b) (West Supp. 1979-1980) use financial means tests. ALASKA STAT. § 18.67.080(3)(c) (1974 & Supp. 1979), allows consideration of financial need, but does not require a showing of need.

88. TEX. REV. CIV. STAT. ANN. art. 8309-1, § 6(c)(3) (Vernon Supp. 1980). Financial stress is defined in *id.* § 3(6):

(6) "Financial stress" means financial hardship experienced by a claimant as a result of pecuniary loss from criminally injurious conduct giving rise to a claim under this Act. A claimant suffers financial stress only if he or she cannot maintain his or her customary level of health, safety, and education for himself or herself and his or her dependents without undue financial hardship. In making its finding, the board shall consider all relevant factors, including:

- (A) the number of the claimant's dependents;
- (B) the usual living expenses of the claimant and his or her family;
- (C) the special needs of the claimant and his or her dependents;
- (D) the claimant's income and potential earning capacity; and
- (E) the claimant's resources.

89. See H. EDELHERTZ & G. GEIS, *supra* note 18, at 32.

90. *Id.* at 91-92.

91. See notes 76-80 *supra* and accompanying text.

92. See SOURCEBOOK, *supra* note 12, at 318.

Crime Victims Reparations Act recognized the danger of this transformation: "If the test is included, however, a real threat to the integrity of the program is posed because a strict 'needs' requirement will limit benefits of the program to persons already on welfare and thus be merely an exercise in bookkeeping."<sup>93</sup>

In addition to these problems, the financial stress test creates substantial practical difficulties. Instead of focusing on the claimant's injury, the Board will spend a great deal of time investigating the claimant's wealth. The amount of administrative effort directed at the determination of financial need should not be underestimated. The New York Crime Victims Compensation Board consistently reported that the most difficult problem faced was the determination of serious financial hardship.<sup>94</sup> Thus, the financial stress test certainly will substantially increase the time required to process each claim, as well as distract the administrators from other investigatory tasks. Perhaps more importantly, the procedure for determining financial stress is necessarily demeaning.<sup>95</sup> Each applicant will be forced to divulge whatever private financial information the Board considers necessary for its decision.<sup>96</sup> The victim cannot help feeling that he is on trial when he is put in the uncomfortable position of proving he is poor enough to deserve recovery.<sup>97</sup> A California Board official charged with coordinating the determination of need stated:

[I]t's making the program exceedingly unpopular because the people come in again and again and say because I was frugal, because I saved a dollar, I'm being deprived of my compensation, whereas the man who threw the money away, or the woman who threw it away, is going to get money from you. This story you hear over and over again, and the Board is getting sick of it.<sup>98</sup>

The public sentiment expressed against the programs using a need requirement bears on another issue. One of the recognized benefits of victim compensation programs is the anti-alienating effect on individual victims.<sup>99</sup> Theoretically, state-provided compensation for victims should help dissipate the disillusionment of individuals who, having suffered criminal injuries, suffer additionally through losses of time and income incurred as a result of their attempts to cooperate in prosecution efforts.<sup>100</sup> If victims who innocently suffered are denied compensation because their income level is not low enough, this achievement is likely to go unrealized. In fact, the experience of other states suggests that, if anything, the programs that use a financial stress test increase alienation.<sup>101</sup>

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93. UNIFORM CRIME VICTIMS REPARATIONS ACT § 5(g), Comment.

94. H. EDELHERTZ & G. GEIS, *supra* note 18, at 58-59.

95. *Id.* at 272.

96. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 4(d)(5) (Vernon Supp. 1980) allows the Board to require that an application contain whatever information it considers necessary.

97. See H. EDELHERTZ & G. GEIS, *supra* note 18, at 62-63 (applicant stated upon leaving hearing: "I feel like a criminal").

98. *Id.* at 92.

99. Schafer, *supra* note 11, at 48.

100. *Id.*

101. The chairman of the New York Board has been quoted as remarking at a confer-

*The Fiscal Benefit.* Although the detrimental effects of the financial stress requirement are widely recognized, Texas and a large number of other states have included such provisions in their victim compensation statutes. As previously mentioned, the popularity of the stress requirements can be attributed to the legislative perception that such restrictions will result in substantial fiscal savings. On the whole, however, the savings to be achieved from these provisions have been greatly overestimated. First, the administrative costs associated with the financial stress test are perhaps the highest of any one phase of the investigatory procedure.<sup>102</sup> In addition to the time spent analyzing financial data submitted by the claimant, officials will necessarily spend a great deal of time cross-checking this information with employers, banks, and other sources.<sup>103</sup> The Board will have to make an individual judgment in each case, weighing the factors specified in the Act as well as any additional standards it may choose to adopt.<sup>104</sup> Secondly, those individuals who would be excluded by a financial stress test are very likely to be compensated by some collateral source, such as insurance, medicare, or workers' compensation.<sup>105</sup> Thus, to the extent of the collateral compensation, these victims would be precluded from recovery irrespective of the financial stress test.<sup>106</sup> Furthermore, wealthier victims are less likely to be willing to go through the compensation process to recover a relatively small loss.<sup>107</sup>

The combination of the substantial increase in administrative cost and the fact that a large number of those who would be excluded by the financial stress test would also be excluded by other restrictions indicates that the fiscal benefits of the test are not likely to be very large. The New York Board has estimated that the elimination of the stress test from the New York program would result in only an additional \$150,000 in overall expenditures, an increase of ten percent.<sup>108</sup>

The decision to adopt or retain a financial stress test involves a comparison of the fiscal benefits of the provision with the potential detrimental effects. Considering the probability that a relatively small increase in costs would result from an abandonment of the test, the victim alienation and the inequitable denials of recovery that will accompany the test should compel the abandonment of the financial stress requirement. The majority

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ence of compensation board administrators, "I don't know about you, but the letters we get no newspaper would publish, believe you me, when we turn down someone on serious financial hardship." H. EDELHERTZ & G. GEIS, *supra* note 18, at 59.

102. *Id.* at 272.

103. See Comment, *New York Crime Victims Compensation Act: Four Years Later*, 7 COLUM. J.L. & SOC. PROB. 25, 31 (1971).

104. In determining financial stress, the Board is to "consider all relevant factors," including those listed in §§ 3(6)(A)-(E). TEX. REV. CIV. STAT. ANN. art. 8309—1, § 3(6) (Vernon Supp. 1980).

105. See Geis, *California's New Crime Victim Compensation Statute*, 11 SAN DIEGO L. REV. 880, 904 (1974).

106. See note 37 *supra*.

107. See Geis, *supra* note 105, at 904.

108. H. EDELHERTZ & G. GEIS, *supra* note 18, at 59. This figure is based on the expected increase in awards minus the expected administrative savings.



of administrators of existing programs, as well as most commentators, oppose basing victim compensation programs on need and recognize that it is preferable that administrators spend their limited time processing claims instead of prying into innocent victims' private affairs.<sup>109</sup> This Comment, therefore, proposes that the financial stress provision of the Texas Act be deleted.

### B. *The Relational Exclusion*

Almost every compensation program in existence contains some type of relational<sup>110</sup> exclusion provision.<sup>111</sup> These provisions establish a class of victims who, regardless of the severity of their need, are denied compensation solely because a statutorily prescribed relationship exists between them and the criminal responsible for their injury. In some states this relationship is defined by degrees of consanguinity.<sup>112</sup> A number of states deny recovery to victims involved in sexual relationships with the criminal,<sup>113</sup> while others limit the exclusion to those victims residing in the same household as the criminal.<sup>114</sup> These three provisions are sometimes combined within a single statute.<sup>115</sup> The Texas Act uses the household exclusion: "The board shall deny the application if . . . the victim resided in the same household as the offender or his or her accomplice."<sup>116</sup> Unfortunately, the Act does not define "household,"<sup>117</sup> nor does it specify whether

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109. Texas narrowly missed disqualification for federal subsidization under the 1979 Victims of Crime Act bill, H.R. 957, 96th Cong., 1st Sess. (1979). H.R. 957 is the result of conference committee compromises of the 1977 bill, H.R. 7010, 95th Cong., 1st Sess. (1977). The Senate had proposed an amendment to H.R. 7010 that would exclude from federal subsidization states using means tests.

The conferees note that Senator Kennedy, one of the managers on the part of the Senate, believes quite strongly that States receiving funds under this Act should not impose financial means tests when determining eligibility. He believes that no innocent victim of a crime should be required to bear the economic burden of a crime, that a uniform standard of eligibility should be used nationwide, that means tests are not only arbitrary but also demeaning, that such tests may have the effect of discouraging claimants from applying for compensation, and that there has been no conclusive showing that such tests are cost effective.

H.R. REP. NO. 1762, 95th Cong., 2d Sess. 11 (1978). The conference committee decided not to adopt the Senate amendment, however, reasoning that in light of the relatively small (25%) federal contribution to the state programs, the states should be free to make their own determinations concerning the desirability of a means test. *Id.*

110. The term "relational" is used in this Comment to describe exclusions based on some relationship between the victim and the criminal. These exclusions are sometimes referred to as familial, but this term fails to describe the variety of relationships that may give rise to exclusion.

111. Only California and Delaware do not have relational exclusions.

112. *E.g.*, MD. ANN. CODE art. 26A, § 2(d) (1973).

113. *E.g.*, ALASKA STAT. § 18.67.130(b)(2) (Supp. 1979).

114. *E.g.*, MICH. COMP. LAWS ANN. § 18.354(4)(2)(c) (West Supp. 1967-1979).

115. *E.g.*, CONN. GEN. STAT. § 54-211(b) (1979); FLA. STAT. ANN. § 960.04(2) (West Supp. 1979); KY. REV. STAT. § 346.050(2) (1977).

116. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(c)(4) (Vernon Supp. 1980).

117. The statutory appearance of the word "household" has previously caused disagreement. *Cf.* *Gaston v. Gardner*, 247 F. Supp. 441 (D.S.C. 1965) (interpretation of "household" determinative of child's right to social security benefits). The Michigan Act expressly

the exclusion applies only to those residing together at the time of the incident or to those who have resided together at any time in the past.<sup>118</sup> For example, whether the exclusion would apply to a wife assaulted by her husband when the couple had separated one week before the incident is unclear.

The household exclusion may yield a harsh result. The most obvious example occurs in the case of interspousal murder. When a husband murders his wife, the children suddenly find themselves alone, their mother dead and their father in jail. No victims are more innocent nor more deserving of society's aid than such children. Yet because these victims of crime resided with their parents, they are denied funds that the state distributes to others in far less need.<sup>119</sup>

The household exclusion does not contribute to the program's goal of loss-spreading because there is no reason to assume that pecuniary loss suffered as a result of a crime committed by a co-resident should be less severe than a loss accompanying an injury suffered at the hands of a stranger. Commentators, however, generally advance four justifications to support the policy of relational exclusion: (1) prevention of fraud and collusion;<sup>120</sup> (2) prevention of the criminal from benefiting from his crime;<sup>121</sup> (3) limitation of expenditures;<sup>122</sup> and (4) avoidance of grants to victims who are partially responsible for the crime.<sup>123</sup> While these arguments all involve valid considerations, they either are based on assumptions that have proven invalid in light of experience, or focus on problems that can adequately be solved through more equitable alternative methods.

*Fraud, Collusion, and Indirect Benefit.* The first two arguments in favor of relational exclusions are conceptually linked. Those who favor a relational exclusion fear that the relative or co-resident responsible for the injury will ultimately benefit from his or her act through the compensation allowed the victim. Similarly, when the victim and the offender are acquainted, the proponents of relational exclusions perceive a greater opportunity for fraud and collusion. Little if any merit attaches to either of these arguments, however, especially since the problems of fraud and indirect benefit are adequately prevented by other provisions of the Act.

In the first place, the victim must suffer physical injury in order to be eligible,<sup>124</sup> and then he can recover only for documented pecuniary loss

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excludes domestic employees from the household exclusion. MICH. COMP. LAWS ANN. § 18.354(2)(c) (West Supp. 1979).

118. The statutes of other states are generally quite clear as to the time of cohabitation that will cause an exclusion. See, e.g., ALASKA STAT. § 18.67.130(b)(2) (1974 & Supp. 1979) (cohabitation at time of incident).

119. See Note, *Illinois' Crime Victims Compensation Act*, 7 LOY. CHI. L.J. 351, 359-61 (1976).

120. See McAdam, *supra* note 5, at 361-63.

121. See Brooks, *How Well Are Criminal Injury Compensation Programs Performing?*, 21 CRIME & DELINQUENCY 50, 54 (1975).

122. See H. EDELHERTZ & G. GEIS, *supra* note 18, at 269.

123. *Id.*

124. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(b) (Vernon Supp. 1980).

such as medical expenses.<sup>125</sup> The number of people willing to injure themselves seriously enough to require medical attention in order to defraud the program is likely to be negligible. If an individual wanted to defraud the program by seeking recovery for an accidental injury, he could blame an imaginary stranger instead of a relative.<sup>126</sup>

The Act's requirement for cooperation with the local law enforcement agency,<sup>127</sup> however, most strongly rebuts both the indirect benefit and fraud arguments. In order to be eligible for compensation, a claimant must report the crime within seventy-two hours<sup>128</sup> and fully cooperate with the police.<sup>129</sup> Presumably, this cooperation involves filing a complaint and aiding in all prosecutorial efforts. In order to benefit from his crime, therefore, the criminal would first sacrifice his freedom. Furthermore, the victim's willingness to prosecute should operate to create a rebuttable presumption of a lack of collusion.<sup>130</sup>

Finally, those who cling to the indirect benefit theory can be satisfied by an alternative to relational exclusions that does not result in the exclusion of a large class of innocent and needy victims. The drafters of the Uniform Crime Victims Reparations Act have abandoned the relational exclusion in favor of a more equitable test: "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."<sup>131</sup> In addition to the unjust benefit clause, the Uniform Crime Victims Reparations Act includes an optional addendum that creates a presumption of unjust benefit in certain relational situations. This section is to be used or omitted "according to the legislative appraisal of the options involved."<sup>132</sup> Although this addendum could cause a hardship in certain circumstances,<sup>133</sup> it is preferable to the absolute exclusions in common usage, for it gives the Board an option:

[Unless the Board determines that the interests of justice otherwise require in a particular case, reparations may not be awarded to the spouse of, or a person living in the same household with, the offender or his accomplice or to the parent, child, brother, or sister of the offender or his accomplice.]<sup>134</sup>

North Dakota<sup>135</sup> and Ohio<sup>136</sup> have both adopted the Uniform Crime

125. *Id.* § 7(a)(1).

126. Program reports from various states have revealed that the fraud that was expected to accompany the programs has simply not materialized. See H. EDELHERTZ & G. GEIS, *supra* note 18, at 279-81.

127. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(d)(1) (Vernon Supp. 1980).

128. *Id.* § 6(c)(1).

129. *Id.* § 6(d)(1).

130. See Note, *supra* note 119, at 359.

131. UNIFORM CRIME VICTIMS REPARATIONS ACT § 5(c).

132. *Id.* § 5(c), Comment.

133. One author has suggested that a rebuttable presumption of unjust benefit might cause a hardship on children seeking recovery. McAdam, *supra* note 5, at 362.

134. UNIFORM CRIME VICTIMS REPARATIONS ACT § 5(c) (brackets in original).

135. N.D. CENT. CODE § 65-13-06(3) (Supp. 1979).

136. OHIO REV. CODE ANN. § 2743.60(B) (Page Supp. 1979).

Victims Reparations Act exclusions, and the head of the North Dakota program has evaluated the provision as valuable and equitable.<sup>137</sup>

*Fiscal Considerations and the Participatory Theory.* Members of society generally perceive that a high proportion of violent crimes occur in domestic settings.<sup>138</sup> Garnering additional support from the indirect benefit theory, legislators have included relational exclusions with the view that the elimination of this large class of claimants will ease the constraints of a limited budget. Yet the experience of the New York program, which employs a familial exclusion,<sup>139</sup> suggests that such financial benefits have been overestimated. In the first four years of the program, of 3,238 claims filed, 1,380 were denied.<sup>140</sup> Only seventeen of these 1,380 denials were based on the relationship between the offender and the victim.<sup>141</sup>

Nevertheless, the emendation of the household exclusion undeniably would result in an increase in administrative costs, even though the actual increase in claims may be negligible. An increase in administrative costs is likely because it is probable that more administrative time will be spent in examining the possibility of victim participation in an interfamilial crime than in a crime committed by a stranger.<sup>142</sup> In fact, the idea that the victim of an interfamilial crime is usually partially responsible for the crime is a multifarious concept underlying the exclusions.<sup>143</sup> When a wife has been severely beaten by her husband, the police, the courts, and the community too often believe that "she must have done something terrible to provoke such a response."<sup>144</sup> The public perception of victim participation in interfamilial crimes, however, cannot justify the relational exclusion because the Act already includes a provision for reducing recovery to the extent that the victim precipitated the crime, and every claim will be examined in this light.<sup>145</sup> Although the Board possibly might choose to devote more time to the determination of victim precipitation in interfamilial crimes, precluding a sizeable class of victims from recovery on the mere suspicion

137. Gross, *supra* note 12, at 35. Indiana has responded directly to the inequitable potential of the relational exclusion by limiting exceptions to the exclusion of legal non-spousal dependents of the criminal:

A person who commits a violent crime upon which an application is based, or an accomplice of that person or a member of the family of that person, is not eligible for assistance under this chapter. However, if the victim is a legal non-spousal dependent of the person who commits a violent crime, compensation may be awarded where justice requires.

IND. CODE ANN. § 16-7-3.6-5(b) (Burns Supp. 1979).

138. See H. EDELHERTZ & G. GEIS, *supra* note 18, at 269. This perception is somewhat distorted because the Department of Justice estimates that less than 10% of all aggravated assaults are inflicted upon relatives. SOURCEBOOK, *supra* note 12, at 334-35. The public perception finds justification in the statistics of murder, however, for approximately 30% of all murders are either interfamilial (22%) or romantically related (7%). *Id.* at 457.

139. N.Y. EXEC. LAW § 624(2) (McKinney Supp. 1972-1979).

140. H. EDELHERTZ & G. GEIS, *supra* note 18, at 43.

141. *Id.* at 53.

142. *Id.* at 269.

143. *Id.*

144. T. DAVIDSON, CONJUGAL CRIME 74 (1978).

145. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 6(d)(2) (Vernon Supp. 1980).

that the investigation of their claims will prove more costly than another group of claimants is unjust.

In summary, no valid reason exists for the exclusion of the broad classes of victims affected by the relational exclusion provisions. The fears of fraud and collusion are rendered nugatory by the requirement for cooperation in the apprehension and prosecution of the victim. The possibility of indirect benefit to the criminal is also lessened by the cooperation requirement and may be eliminated completely by the adoption of the Uniform Crime Victims Reparations Act proposal.<sup>146</sup> The fiscal benefits accruing to a program from relational exclusions are minimal, and neither the slight decrease in claims nor the reduction of administrative costs associated with an undocumented perception of victim precipitation justifies the exclusion of a large class of innocent victims.

#### IV. THE NEED FOR ADEQUATE PUBLICITY AND EFFECTIVE CLAIM FORMS

While the need for adequate publicity cannot be termed a legal issue, the extent of public education and information largely determines the effectiveness of any compensation statute. How the public is informed, the ease of access to the application forms, and the nature of the forms themselves can have a substantial impact on the number of claims filed and the amount of administrative effort spent in processing claims.

The experience of the New York program demonstrates the relation between public awareness and the number of victims aided. The New York program was underpublicized; after four years some prosecutors were unaware of its existence.<sup>147</sup> Even today, there is no statutory provision for publicity and, although initially several short-lived media "blitzes" were attempted,<sup>148</sup> the chairman of the compensation board has admitted that the largest number of claims arise from knowledge of the program obtained by word of mouth.<sup>149</sup> In 1969, the third year of the program's operation, only 929 claims were filed.<sup>150</sup> In that same year, New York law enforcement agencies received 40,049 reports of murder, manslaughter, rape, and aggravated assault.<sup>151</sup> Despite the benevolent intent underlying compensation programs, if the victims themselves are not informed of the availability of state compensation, the programs will be "nothing more than public placebos, tranquilizing showpieces aimed at placating the public and protecting the politician, all for a negligible price."<sup>152</sup>

Fortunately, Texas has taken steps to avoid this problem. Sections 10(e) and (f) of the Texas Act provide:

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146. See note 131 *supra* and accompanying text.

147. King, *If You Are Maimed by a Criminal You Can Be Compensated (Maybe)*, N.Y. Times, Mar. 26, 1972, § 6 (Magazine), at 31.

148. H. EDELHERTZ & G. GEIS, *supra* note 18, at 46.

149. *Id.*

150. Comment, *supra* note 103, at 35.

151. *Id.* at 34.

152. H. EDELHERTZ & G. GEIS, *supra* note 18, at 238.

(e) Every hospital licensed under the laws of this state shall display prominently in its emergency room posters giving notification of the existence and general provisions of this Act. The board shall set standards for the location of the display and shall provide posters, application forms, and general information regarding this Act to each hospital and physician licensed to practice in the State of Texas.

(f) Every local law enforcement agency shall inform victims of criminally injurious conduct of the provisions of this Act and provide application forms to victims who desire to seek assistance. The board shall provide application forms and all other documents that local law enforcement agencies may require to comply with this section. The attorney general shall set standards to be followed by local law enforcement agencies for this purpose and may require them to file with him or her a description of the procedures adopted by each agency to comply.

These provisions closely resemble those adopted by California after that state experienced difficulties similar to those of New York.<sup>153</sup>

While the Texas Act is admirable for its inclusion of such a provision, it is crucial that the provisions be vigorously applied. Furthermore, law enforcement agencies must develop an efficient procedure for the dissemination of information. Finally, in addition to the statutorily prescribed publicity, the Board should use mass media to publicize the Act and develop adequate screening procedures to cope with the number of claims generated from such publicity.

Apart from the lesson learned from the New York experience, two other factors demonstrate that publicity requires particular attention. First, although the statute speaks in unequivocal language, directing that "[e]very hospital . . . shall display . . . [and] [e]very local law enforcement agency shall inform . . .,"<sup>154</sup> it provides no sanction for noncompliance with these duties. The absence of a statutory sanction requires the close monitoring of the compliance of hospitals and law enforcement agencies. If cooperation is not received, perhaps a penalty for noncompliance should be added to the statute. Secondly, the Act divides the control of publicity between the Board and the attorney general. Although the Board is in charge of providing application forms to the law enforcement agencies,<sup>155</sup> the attorney general is responsible for setting the standards for the distribution of these forms.<sup>156</sup> Since the manner of distribution and procedural organization has a substantial impact on the choice of the claim form,<sup>157</sup> the attorney general and the Board must work closely together to assure a smooth operation. At one time the California program involved the same division of authority.<sup>158</sup> Apparently, the split proved unwieldy in practice,

153. CAL. GOV'T CODE §§ 13968(b)-(c) (West Supp. 1980); see Geis, *supra* note 105, at 885.

154. TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 10(e)-(f) (Vernon Supp. 1980) (emphasis added).

155. *Id.* § 10(f).

156. *Id.*

157. See Gross, *supra* note 12, at 20.

158. CAL. GOV'T CODE § 13968(c) (1974) (amended by 1977 Cal. Stats. ch. 636, § 4).

for California amended its act in 1977 by placing all authority for law enforcement publicity procedures in the hands of the administrative agency in charge of the compensation program.<sup>159</sup>

For the present, the Texas attorney general controls the procedure by which Texas law enforcement agencies distribute information.<sup>160</sup> Since the Act places a duty upon every local law enforcement agency to provide information and application forms to every victim of criminally injurious conduct, the police are essentially the public representatives of the Board, and their efforts are likely to account for the majority of claims filed. The procedures adopted for the distribution of this information will influence the effectiveness of the program, but the limited manpower and budget of law enforcement agencies conflict with the need for widespread distribution of information and applications. Faced with this conflict, California has developed a system for the dissemination of information that promises to be effective as well as efficient, and Texas should consider the adoption of a similar plan. In a memo sent to all local law enforcement agencies, California Attorney General Younger outlined the standard procedure:

- (1) Law enforcement officers are required to provide to victims of [*sic*] their families a sheet describing the victim program and where to obtain application forms. This sheet shall also identify a Victims of Violent Crime Liaison Officer and his telephone number. Every reporting officer shall indicate in his police report the date when potential claimants were provided with the sheet. Alternatively, a law enforcement agency may devise a system whereby potential claimants are notified by mail of the availability of the program and are advised of the name of the Liaison Officer from whom further information may be obtained;
- (2) All law enforcement agencies shall appoint a Victims of Violent Crime Liaison Officer. This officer will coordinate closely with the State Board of Control and shall obtain from the Board application forms which are to be disseminated to the interested public;
- (3) The program shall be discussed in general agency meetings and new and trainee officers shall be made aware of the program's existence.<sup>161</sup>

The establishment of a liaison officer serves several purposes. The local agency will benefit from this centralization of responsibility because less time will have to be spent on the education of the entire force. The public will benefit because such an officer will become well-versed in the provisions of the Act and, as a result, will be able to respond to specific inquiries with greater accuracy. The Board will benefit because a liaison officer can serve as a watchdog by checking that the information is being distributed in accordance with the statutory mandate.

Although the statutory delegation of publicity duties to law enforcement

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159. *Id.* (West Supp. 1980). The chief administrator of the North Dakota Crime Victims Compensation Board requested that all sections concerning the attorney general's participation be eliminated. See Gross, *supra* note 12, at 29.

160. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 10(f) (Vernon Supp. 1980).

161. ISSUES, *supra* note 43, at 15.

agencies establishes an efficient device for information distribution, the police can only inform those who report a crime. Over fifty percent of all personal victimizations go unreported.<sup>162</sup> The Act attempts to lower this percentage in Texas by conditioning eligibility on a report of the crime to the appropriate agency within seventy-two hours.<sup>163</sup> If this ancillary goal of increased crime reporting is to be reached, information about the Act, and the seventy-two hour provision in particular, should be conveyed by sources other than the police. In all likelihood, the best way to reach those who would otherwise choose to avoid involvement with law enforcement agencies is through extensive media coverage. The wide reach of the media, however, creates additional problems. The New York Board discovered that media "blitzes" resulted in a deluge of claims filed by individuals clearly ineligible for recovery, persons seeking a government handout, or persons looking for lost property.<sup>164</sup> These claims resulted in serious administrative backlogs, and the media efforts were quickly discontinued.<sup>165</sup>

The problems experienced by the New York Board may perhaps be avoided, however, by the adoption of a simple claim procedure. Besides eliminating the increase in applications of ineligible individuals, this procedure generally will reduce the amount of screening that would otherwise be performed by the limited staff of the Board. This procedure, already used in North Dakota and Minnesota,<sup>166</sup> consists of a two-stage claim process. Before a potential claimant is allowed to fill out a claim form, he or she must fill out a "declaration of eligibility."<sup>167</sup> This declaration would

162. SOURCEBOOK, *supra* note 12, at 302.

163. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 4(b) (Vernon Supp. 1980).

164. H. EDELHERTZ & G. GEIS, *supra* note 18, at 46.

165. *Id.* at 46-47.

166. *See* Gross, *supra* note 12, at 20, 26.

167. The following is a proposed declaration of eligibility form for Texas, adapted from the North Dakota form appearing in Gross, *supra* note 12, at 36.

#### DECLARATION OF ELIGIBILITY

NAME \_\_\_\_\_ PHONE \_\_\_\_\_  
ADDRESS \_\_\_\_\_ ZIP \_\_\_\_\_

By completing this form you determine whether you are eligible to apply for compensation under the Texas Crime Victims Compensation Act. Check the statements that apply in your case. If you cannot truthfully check all statements, you are not eligible for compensation through the Act and you will not receive a claim form.

- 1. The incident for which I am declaring my eligibility for compensation occurred on or after January 1, 1980.
- 2. The claimant (and/or victim) suffered bodily injury (or death) as a result of the criminal actions of another.
- 3. This injury (or death) was not the result of an automobile accident.
- 4. The incident occurred in Texas.
- 5. The incident was reported to law enforcement officials within 72 hours or would have been reported except for a valid excuse.
- 6. The claimant (and/or victim) cooperated with law enforcement officials during their investigation of the incident.
- 7. The person whose death or injury gives rise to this claim did not knowingly and willingly participate in the criminal incident.
- 8. The claimant (and/or victim) did not reside in the same household as the criminal offender or his or her accomplice.



consist of a series of statements concerning threshold eligibility, such as "The incident occurred in Texas." The applicant could only receive a claim form after responding affirmatively to each of the statements on the declaration of eligibility form. Each form should also include a warning to the applicant that it is a class A misdemeanor knowingly to respond falsely to the questions posed in the form.<sup>168</sup> The use of the declaration of eligibility form would screen out the obviously ineligible applicants, and thereby facilitate the use of the media by preventing a deluge of frivolous claims from reaching the administrative stage. In addition, this procedure should lower administrative costs and thus increase the availability of funds to victims.

Efforts directed toward publicity are likely to have a direct effect on the success of the Texas program, and the Texas Act reflects recognition of that fact. The publicity provisions of the Act must be administered with a strong hand, however, and the attorney general should consider adopting a procedure for police publicity and application distribution similar to that of California. Moreover, the Board should take advantage of the mass media to assure full exposure and to help increase police cooperation. The adoption of a declaration of eligibility claim form would ease the extra administrative burden that media exposure can cause.

#### V. THE SON OF SAM PROVISION

Immediately prior to the final passage of Senate Bill 21,<sup>169</sup> sections 16 through 18 were added to the Act by a house floor amendment.<sup>170</sup> The

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— 9. This claim is being filed within 180 days of the incident.

—10. The person whose death or injury gives rise to this claim was a Texas resident at the time of the crime.

I hereby swear that all of the above statements to which I have attested are true, and understand that I will be guilty of a class A misdemeanor for any false statement I have made in connection with this declaration of eligibility.

\_\_\_\_\_  
Signature

168. Although the Act does not expressly provide a penal sanction for falsification of application forms, such a falsification would qualify as a violation of TEX. PENAL CODE ANN. § 37.10 (Vernon 1974).

169. 1979 Tex. Sess. Law Serv., ch. 189, §§ 1-19, at 402-10 (Vernon).

170. House Floor Amendments, Apr. 26, 1979, amendment No. 3, added the following sections to the Act:

##### Escrow account

Sec. 16. Every firm, person, corporation, association, or other legal entity contracting with a person or the representative or assignee of any person, accused or convicted of crime in this state, with respect to the reenactment of the crime in a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment, or from the expression of the accused or convicted person's thoughts, feelings, opinions, or emotions regarding the crime shall submit a copy of the contract to the board and pay to the board any money that would otherwise by terms of the contract be owing to the accused or convicted person or his representatives. The board shall deposit the money in an escrow account.

##### Funds available to victim

Sec. 17. Money placed in an escrow account is available to satisfy a judgment against the accused or convicted person in favor of a victim of the crime

enactment of these sections establishes in Texas a modified version of New York's controversial "Son of Sam" law.<sup>171</sup> These sections are inappropriate in a victim compensation statute because they create no new substantive rights or remedies for victims.<sup>172</sup> Instead, the Son of Sam sections prevent the criminal from disposing of assets received from his crime-related literary efforts so that the victim will be able to pursue an ordinary civil remedy with the assurance that the defendant will not be judgment proof. Underlying this practical consideration is the sentiment that criminals should not profit from their misdeeds. Despite the admirable motives behind these sections, the Son of Sam provision presents potential constitutional problems.<sup>173</sup>

Sections 16 through 18 provide that any person contracting with an accused<sup>174</sup> or convicted criminal with respect to the reenactment of the crime in a book, movie, or other medium, or merely with respect to the criminal's thoughts or feelings about the crime, must pay the Board the money that would otherwise be paid to the criminal under the contract.<sup>175</sup> The Board is then to establish an escrow account with that money, which will be available for the satisfaction of any civil judgment awarded to a victim for damages caused by the crime.<sup>176</sup> Unless the money is used to satisfy a judgment for the victim, it will be returned to the criminal after five years.<sup>177</sup>

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if the court in which the judgment is taken finds that the judgment is for damages incurred by the victim caused by the commission of the crime.

Maintenance of escrow account

Sec. 18. The board shall pay money in an escrow account to the accused person if he is acquitted of the crime. The board shall pay the money in the account to the accused or convicted person if five years elapse from the date when the account was established and the money has not been ordered paid to a victim in satisfaction of a judgment.

171. N.Y. EXEC. LAW § 632-a (McKinney Supp. 1972-1979). Section 632-a is commonly referred to as the Son of Sam law because the proposal of the bill was directly motivated by the series of random murders committed by a person calling himself Son of Sam and the willingness of publishers to pay large amounts of money for the murderer's story. See Comment, *Compensating the Victim From the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROB. 93, 94 n.6 (1978) (statement of justification by sponsor of § 632-a).

172. Victim compensation programs distribute funds directly to the victims, thus creating an alternate source of recovery. The Son of Sam sections merely impose upon the criminal's rights by preventing him from disposing of the profits from his crime related literary efforts, thereby ostensibly augmenting the victim's chances for traditional civil recovery.

173. See notes 185-90 *infra* and accompanying text.

174. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 16 (Vernon Supp. 1980). There is no definition of the term "accused" in § 16. The problems of free speech and due process mentioned later in this Comment are aggravated by the inclusion of accused persons in § 16. See Comment, *supra* note 171, at 114.

175. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 16 (Vernon Supp. 1980).

176. *Id.* § 17.

177. *Id.* § 18. The five-year time limit specified in § 18 may be interpreted as establishing not only an escrow period, but a new cause of action, because in most cases the statute of limitations will have expired long before the five-year deadline. The Appellate Division of the New York Supreme Court took this position in *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979). In *Barrett* a bank robber, whose profits from the movie "Dog Day Afternoon" had been put into escrow by the New York Crime Victims Compensation Board, was sued for assault and false imprisonment by one of his hostages. Although the

The New York statute, upon which the Texas provision is based, has been the focus of much controversy.<sup>178</sup> The constitutionality of the statute has been questioned by the Library of Congress' legal research service, a House Judiciary subcommittee staffer, and the New York Civil Liberties Union,<sup>179</sup> but at this date, the New York statute still stands. The adoption of the Texas provision may be attributed to the several victim compensation bills introduced into Congress during the last few years.<sup>180</sup> At one time a strong possibility existed that one of the prerequisites for federal subsidization of state victim compensation programs would be a Son of Sam act in the state.<sup>181</sup> The 1979 bills,<sup>182</sup> however, are based generally on a conference committee compromise of the 1977 bill,<sup>183</sup> in which the conference committee recognized that since the constitutionality of the Son of Sam act was uncertain, a bill conditioning state subsidization on the adoption of such a statute was undesirable.<sup>184</sup>

At least two aspects of the provision present constitutional difficulties. First, sections 16 through 18 contain no provisions for a hearing of any kind. No procedure is provided to determine whether a criminal's efforts come within the scope of the section, and the individual obligated to pay the criminal must decide at his own risk whether to pay the Board instead.<sup>185</sup> Because the Act may effectively deprive the criminal of his property without a hearing, it is in potential contravention of the due process requirements of the fourteenth amendment.<sup>186</sup> The second area of possi-

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suit was brought long after the statute of limitations had run, the court refused to dismiss the suit, holding that N.Y. EXEC. LAW § 632-a (McKinney Supp. 1972-1979) established a new in rem cause of action with a five-year limitation. 414 N.Y.S.2d at 357. The New York statute, however, states that money from the account will be paid provided that the "victim, within five years of the date of the crime, brings a civil action" and recovers a judgment. N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1972-1979). The Texas statute does not link the five-year limit with the victim's civil recovery, but treats each in a separate section. TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 17-18 (Vernon Supp. 1980). This distinction may prove crucial in the interpretation of the effect of the Texas Act on the statute of limitations.

178. See, e.g., Comment, *supra* note 171; Comment, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979).

179. Smith, *Briefs*, in JURIS DOCTOR, Nov. 1977, at 6.

180. See generally note 18 *supra*.

181. See, e.g., H.R. 7010, 95th Cong., 1st Sess. § 4(7) (1977).

182. See, e.g., H.R. 957, 96th Cong., 1st Sess. (1979). For treatment of past and present federal victim compensation legislation, see note 18 *supra*.

183. H.R. 7010, 95th Cong., 1st Sess. (1977).

184. H.R. REP. NO. 1762, 95th Cong., 2d Sess. 10 (1978).

185. TEX. REV. CIV. STAT. ANN. art. 8309—1, § 16 (Vernon Supp. 1980), places the burden on the individual contracting with the criminal to decide if the contract falls within the provisions of the statute.

186. The due process ramifications of prejudgment seizures are still unsettled; the Supreme Court has alternatively expanded and contracted the process that is due a debtor under state prejudgment garnishment or replevin statutes. See *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Although the Supreme Court has shifted its view of the precise requirements of due process in such situations, most notably with regard to the timing of a hearing, the Court has uniformly held that a hearing is essential to due process when property is seized before judgment. E.g., *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975). TEX. REV. CIV. STAT. ANN. art. 8309—1, §§ 16-18 (Vernon Supp. 1980) operates so that the escrow account can be established and dispersed without an op-

ble difficulty involves the first amendment. Although Senator Gold, the sponsor of the New York bill, was technically correct in stating that "[w]e don't stop a prisoner from writing,"<sup>187</sup> a statute authorizing the publisher of a criminal's literary efforts to pay money owed the criminal into a five-year escrow account is a clear disincentive for the criminal.<sup>188</sup> To the extent that the criminal will refrain from seeking publication of his work, or insofar as he attempts to confine his efforts to topics not prescribed by the statute, the public will be deprived of the right to be informed.<sup>189</sup> For example, a criminal's expressions of his thoughts at the time of the commission of a capital crime could be valuable to the study of the deterrent effect of capital punishment.<sup>190</sup> Thus, the statute appears to have a chilling effect both on the criminal's right to free speech and on the public's right to know.

The Texas version of New York's Son of Sam act is likely to cause more problems than it will solve.<sup>191</sup> The provision is certain to encounter strong constitutional challenges, and the litigation of the first and fourteenth amendment issues may devour more state funds than the statute will make available to victims.<sup>192</sup> Because there is no longer a serious threat that federal subsidization will be contingent upon the existence of such a provision, sections 16 through 18 should be repealed.

## VI. CONCLUSION

The Texas Crime Victims Compensation Act creates a practical means of recovery for the victims of violent crimes, supplementing the relatively ineffectual alternatives of civil recovery, insurance, and restitution. The legislature has taken strong action in attempting to alleviate the plight of the victim, and this progressive legislation has the potential to bring about substantial public benefits. By taking a hybrid approach, the drafters of the Act had the opportunity to select the provisions that have proven most desirable in the light of experience. For the most part, they were successful in this selection process; of particular merit are the provisions for distribu-

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portunity for a hearing of *any* kind. For a comprehensive treatment of this issue, see Comment, *supra* note 171, at 99-105.

187. Smith, *supra* note 179, at 6.

188. See Comment, *supra* note 171, at 110-11.

189. The Supreme Court has indicated that it is "the heart of the natural right of members of an organized society . . . to . . . acquire information about their common interests." *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936); see Comment, *supra* note 171, at 105-09.

190. Comment, *supra* note 171, at 109.

191. From a practical standpoint, the statute may even prove to be somewhat self-defeating. To the extent that criminals are discouraged from writing because of their inability to collect profits, there will be *less* money available to satisfy the judgments held by victims. Thus, the opportunities for victim recovery actually may be reduced by the statute, a result that the legislature probably did not consider when it hurriedly enacted §§ 16-18. See Comment, *supra* note 171, at 109.

192. The number of victims whose injuries result from a crime that attracts enough public attention to merit a contract with the criminal is extremely small. Senator Gold, the sponsor of the New York act, estimated that his act might affect one person every two years. Smith, *supra* note 179, at 6.

tion of applications and information, the lack of a minimum claim requirement, and a high maximum award. Several provisions were included, however, despite widespread acknowledgment of their detrimental capacity.

Perhaps the main weakness of the Act is the financial stress requirement. The financial stress test imposes a substantial administrative burden on the Board and involves an unwarranted invasion of the victim's financial privacy. The investigation of financial stress is neither fiscally justified nor related to the primary goal of loss-spreading.

Another flaw in the Act is the household exclusion, because the exclusion of victims living in the same household as the criminal responsible for their injuries results in substantial injustices when applied to innocent children. The arguments advanced to justify the household exclusion are eviscerated by the presence of provisions that prevent fraud and the compensation of victims partially to blame for the crime. The unjust benefit exclusion of the Uniform Crime Victims Reparations Act is an adequate alternative to the household exclusion.

The Son of Sam provision raises constitutional problems that may consume more funds through litigation expenses than the provision will make available to crime victims. Although the provision serves the noble purpose of preserving the criminal's crime-related profits for the victim's civil recovery, the means adopted to serve this purpose may violate the first and fourteenth amendments to the Constitution. While the lack of due process may perhaps be remedied by the provision for a hearing, the Son of Sam provision's chilling effect on speech cannot easily be alleviated.

Notwithstanding these imperfections, the Texas Crime Victims Compensation Act is a laudable effort that ranks among the best of the state victim compensation acts. If the program is sufficiently publicized and adequately staffed, the Act promises to benefit substantially the criminally injured. States that have not yet enacted victim compensation legislation would be well advised to follow the progress of the Texas program and to adopt the most successful provisions for their own acts.\*

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\* Author's Note: At the time this Comment went to print, the Board was able to report the following statistics, covering the period between January 1 and April 10, 1980:

Claims filed	306
Claims finalized	38
Awards made	13
Total amount awarded	\$32,094
Amount collected in Fund	\$151,000
Claims rejected	25
Grounds for Rejection:	
Failure to cooperate with authorities	9
No financial stress	7
Behavior of victim	6
Participation in event	2
Residing in same household	1

The only publicity efforts made by the Board at present are the statutorily required distribution of posters and forms to hospitals and physicians, and responses to media inquiries. Telephone conversation with Bud Donnelly, examiner for Crime Victims Compensation Division of the Board, April 22, 1980.