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# A Modest Proposal to Insure Justice for Victims of Crime

*[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.<sup>1</sup>*

James E. Starrs\*

## INTRODUCTION

Fish, I am told, will rise to the surface when dynamite is thrown into the water. Unfortunately, the problems of the crime victim cannot be so easily or dramatically resolved. His submergence has been too long unrelieved for any single, quick palliative to redeem him now. Yet proposals are needed and protest too. The combination may be enough to make amends for years of semi-official insouciance to the lot of the crime victim.

Whatever may be the impact of this symposium and the suggestions it elicits upon the development of realistic programs for compensating crime victims, it indicates a professional sensitivity which could have ramifications upon a much larger scene. I refer to those other victims who, in uncompensated dismay, haunt the fringes of the present discussion.<sup>2</sup> Among them are the automobile accident victims,<sup>3</sup> the victims of professional misconduct, including that of members of the legal profession,<sup>4</sup> and the victims, by

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1. Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

2. See EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951).

3. Note, *Saskatchewan Automobile Accident Insurance Act*, 1950 INS. L.J. 702.

4. MD. LAWS 1965, ch. 799 empowers the Maryland Court of Appeals to establish a client's security fund and to finance it by requiring an annual assessment, not in excess of \$20, from all practicing attorneys in the state; Bloom, *The Debt of Honor Our Lawyers Want to Pay*, Reader's Digest, March 1961, p. 202; Voorhees, *Clients' Security Funds: How They Grew in 1962*, 49 A.B.A.J. 251 (1963); Voorhees, *A Client's Security Fund for New York*, 33 N.Y.S.B.J. 129 (1961).

discharge or acquittal, of abortive criminal prosecutions.<sup>5</sup>

I refer also to the desperate paucity of available empirical data on the subject which we pretend to address with some degree of expertise.<sup>6</sup> Who are the victims of crime? To what economic strata do they belong?<sup>7</sup> Do the answers to the preceding questions vary from crime to crime? To what degree do victims facili-

5. The Maryland Legislative Council unsuccessfully introduced a bill in the 1965 legislative session to reimburse a defendant, if found not guilty of the crime charged, for counsel fees, court costs, and investigative and similar expenses incurred in the preparation for trial of the case. Correspondence to author from the Director of the Administrative Office of the Maryland Courts. This proposal gave concrete force to the state's responsibility to compensate the victims of its own processes. This was a considerable advance in both time and policy over the Statute of Westminster II (1285), chapter 12, which made one who brought an unsuccessful appeal of a felony liable to imprisonment and to pay damages for the defamation of the appellee. Cf. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 484 (5th ed. 1956). But, in those early years of the common law, a criminal prosecution was less a state affair than an instrument to redress individual grievances.

6. However, some, often only localized, studies do exist. The Statistical and Records Bureau of the New York City Police Department issues an annual report of its study of homicides committed in New York City which is so detailed that it even tabulates the number of homicides committed by day of the week. Another is WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* (1958). A detailed study of homicides in one urban area is presented in BENSING & SCHROEDER, *HOMICIDE IN AN URBAN COMMUNITY* (1960). Wolfgang's hypotheses were applied to a selected group in St. Louis, Missouri and the results reported in Pittman & Handy, *Patterns in Criminal Aggravated Assault*, 55 J. CRIM. L., C. & P.S. 462 (1964).

See also VON HENTIG, *THE CRIMINAL AND HIS VICTIM* 383-450 (1948); McCLINTOCK, *CRIMES OF VIOLENCE* (Vol. XVIII, Cambridge Studies in Criminology, 1963); McCLINTOCK & GIBSON, *ROBBERY IN LONDON* (Vol. XIV, Cambridge Studies in Criminology, 1961); RADZINOWICZ, *SEXUAL OFFENSES* 89-93 (Vol. IX, Cambridge Studies in Criminology, 1957); REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, Appendix III, Tables 4 and 5, pp. 304-06 (1953) which analyzes the victims of convicted murderers in England and Wales from 1900 to 1949.

It has been said that the present statistical deficiencies prevent us from judging "the gravity of the state of crime" and hinder "effective preventive measures." 1964 CAMB. L.J. 218-20.

7. McClintock's 1963 study reveals that:

the majority of crimes of violence [committed in Metropolitan London during 1950, 1957 and 1960] occur[ed] among working class people living in poor neighborhoods; this was predominantly so in cases of domestic strife and neighborhood quarrels, as well as in attacks and fights in public houses, cafés and in the streets. In spite of the increase in crimes of violence there has been little tendency for such offenses to take place in respectable residential districts.

McCLINTOCK, *op. cit. supra* note 6, at 56. Similar findings as to sex crimes are reported for the United States. See GEBHARD, GAGNON, POMEROY & CHRISTENSON, *SEX OFFENDERS* (1965).

tate the crimes which are committed upon them?<sup>8</sup> How many crime victims are compensated by voluntary or government insurance programs, and to what extent?<sup>9</sup> As to some of these questions we may make rough estimates. Others are more imponderable.

Other questions probe the "after-conduct" of crime victims. Professor Schafer asks if the punishment of the offender by the state satisfies the victim's desire for revenge.<sup>10</sup> How often does the victim institute civil proceedings against the offender to recover his damages?<sup>11</sup> To what extent is he successful, in terms both of judgments returned and satisfactions received? Do the fruits

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8. The part played by the victim in promoting the commission of a crime upon himself may, to some degree, be determined by the nature of his relationship to the offender. Where that relationship is a close family or social one, we might expect to find evidence of greater victim facilitation. McClintock, *op. cit. supra* note 6, at 36. At the very least,

in the matter of enforcement of the law and protection of the public, a robbery resulting in murder or a murderous sexual attack on a stranger involve very different considerations when compared with a murder arising from domestic strife or arguments between two people working together.

*Id.* at 218-19.

McClintock's study of London crimes of violence during 1950, 1957 and 1960 revealed that "the number of homicides and murderous assaults on strangers would be less than 1 in 10 of the total." *Id.* at 219. This data led the authors to conclude that "crimes of violence that occur in the family or between persons who are well-known to each other may almost be regarded as a separate species of violent behaviour. . . ." *Id.* at 248. (Emphasis added.)

Professor Wolfgang has gone further and asserted that "in many cases the victim has most of the major characteristics of an offender." If so, this constitutes a not insignificant objection to crime victim compensation. See Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J. CRIM. L., C. & P.S. 1, 11 (1957).

In the United States, a recent analysis of the F.B.I.'s Uniform Crime Reports reveals that "four out of five homicide victims are killed by someone they know, frequently members of their own family." Sparks, *Terror in the Street?*, Commonweal, June 4, 1965, pp. 345, 346. In fact, 80% of all reported homicides in 1964 involved acquaintances, of which 31% were within the family. 1965 UNIFORM CRIME REPORTS 7.

9. Of all property damage claims for reported fires of known cause against fire insurance companies between 1953 and 1962, 1.2% resulted from incendiarism, vandalism, and other criminal causes. STATISTICAL ABSTRACT OF THE U.S., table 652, p. 482 (1964). However, it remains to be determined how many fires caused by a criminal agency resulted in how much uninsured loss.

10. Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243 (1965).

11. It is not inconceivable that the victim may have recourse to a civil action for damages. Witness the report of the victim of a robbery who brought suit in New Jersey against the alleged offenders for "severe physical and mental injury." N.Y. Times, Nov. 12, 1964, p. 39, col. 8 (city ed.).

of a civil proceeding disincline the victim to cooperate in the criminal proceeding?<sup>12</sup> How is this reluctance manifested? Is lack of cooperation more evident in some crimes than others? Is there any divergence, in this regard, between a judgment which is satisfied by the offender and the receipt of benefits from an insurance company? And from these inquiries, there could easily erupt the specter of victim recidivism.

In spite of the unanswered statistical and relational questions, much can be accomplished here. We can expose those whose concern for the victim is only to aid their primary object to convict, or to diminish the legal protections of the accused.<sup>13</sup> We can attack the citadel by revealing the incongruity of the state's exacting its pound of flesh in the form of costs from the accused<sup>14</sup> or even from one who has been acquitted,<sup>15</sup>

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12. In recognition of the possibility that a compensated claimant will be an uncooperative complainant, a number of mob action statutes condition the municipality's liability upon reasonable diligence by the claimant "to procure the conviction of the offenders." See statutes listed in footnote 16 *infra*.

Anthropologists have long recognized that compensation, in primitive societies, served the necessary function of buying off "the impulse to avenge the wrong." Redfield, *Primitive Law*, 33 U. CHIC. L. REV. 1, 7 (1964).

13. It has been said that child victims of sex crimes "suffer more from society's 'furious pursuit' of the offender than from the crime itself." N.Y. Times, May 26, 1965, p. 32, col. 2 (city ed.). In Washington, D.C., the heartless and insulting treatment of rape victims by the city's officialdom has resulted in a proposal for free medical care for crime victims in the city's hospitals. Washington Post, August 17, 1965, p. B1, cols. 7, 8.

All too often the interests of crime victims are cited by law enforcement officials who are more concerned with the prosecution of the offender than with restitution to the victim. See N.Y. Times, Nov. 25, 1964, p. 39, col. 8 (city ed.).

Paradoxically, the more spirited the battle waged by due process advocates for greater protections in the criminal process for the accused, the greater the likelihood that the crime victim will be uncompensated in that proceeding. This possibility arises from the contentions of the disputants. To answer those who assert their outrage at the release of guilty persons on "technical" constitutional grounds, the criminal process is characterized as a venture in which the interests of society predominate over those of either the victim or the accused. But that argument loses much of its potency if the victim is permitted to join his civil claim for damages in the criminal prosecution.

14. *Jenkins v. State*, 22 Wyo. 34, 84, 135 Pac. 749, 751 (1913); PA. STAT. ANN. tit. 19, § 1222 (1964); VA. CODE ANN. § 14.1-100 (1950). In some states, the prosecuting attorney is exempt from the assessment of costs. VA. CODE ANN. § 14.1-201 (1950). There would not seem to be any constitutional impediment to such an assessment, at least where the prosecution is motivated by malice and lacks probable cause. *Lowe v. Kansas*, 163 U.S. 81 (1896). Other statutes permit levying costs of the issuance of an invalid arrest or search warrant upon the person, other than the prosecuting attorney, on whose complaint it issued. N.M. STAT. ANN. § 41-1-3 (1953).

15. *Commonwealth v. Giaccio*, 202 Pa. Super. 294, 196 A.2d 189 (1963),

while refusing its assistance to the victim. We can challenge our legislators to supplant those rudimentary statutes which compensate the victims of mob action for property damages they have sustained,<sup>16</sup> which penalize the publication of the name of a rape victim,<sup>17</sup> and which propose to reimburse those who have been acquitted for the costs of their defense,<sup>18</sup> with more comprehensive, more deliberative and more direct assistance. And finally we can stir the quiescent conscience of the community to reflect upon the collective responsibility which it may well have for

*aff'd*, 415 Pa. 139, 202 A.2d 55 (1964), 17 STAN. L. REV. 152, *prob. juris. noted* 381 U.S. 923 (1965).

16. Some permit recovery for both property damage and personal injuries sustained from mob action. ILL. REV. STAT. ch. 38, § 25-3 (1963); WIS. STAT. ANN. § 66.091 (1957), as applied and construed in *Febock v. Jefferson County*, 219 Wis. 154, 262 N.W. 588, 101 A.L.R. 95 (1935). Others limit recovery to property damages. CAL. GOV'T CODE § 50140; MASS. ANN. LAWS ch. 269, § 8 (1956) ( $\frac{3}{4}$  of the value of property damaged if of the value of \$50 or more); R.I. GEN. LAWS § 45-15-13 (1956) ( $\frac{3}{4}$  of the value of property destroyed or injured if of the value of \$50 or more, however, no recovery if stolen during a riot, *Goldman v. Forcier*, 68 R.I. 291, 27 A.2d 340 (1942)). Others are vague as to the amount of property damage recoverable. ILL. REV. STAT. ch. 38, § 25-3 (1963) ("material damage to property"). Some condition recovery upon the owner's reasonable diligence "to procure the conviction of the offenders." MASS. ANN. LAWS ch. 269, § 8 (1956); R.I. GEN. LAWS § 45-15-13 (1956). In New York, the mob action statute (N.Y. MUNIC. LAW § 71) has been inoperative during the extended defense emergency period. NEW YORK STATE DEFENCE EMERGENCY ACT, N.Y. UNCONSOL. LAWS § 9193(3) (McKinney 1961); *Finkelstein v. City of New York*, 182 Misc. 271, 47 N.Y.S.2d 156 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 662, 53 N.Y.S.2d 465 (1945). But the recent racial riots in Harlem and Bedford-Stuyvesant have caused one New York City Councilman to urge the passage of a bill to compensate the victims of these riots. Its opponents claim "it would invite a deluge of 'phony claims' against the city." N. Y. Times, Aug. 12, 1964, p. 23, col. 1 (city ed.). See generally Annot., 52 A.L.R. 562 (1928); Annot., 44 A.L.R. 1137 (1926); Annot., 23 A.L.R. 297 (1922); Annot., 13 A.L.R. 751 (1919).

17. In South Carolina, it is a misdemeanor to publish, without a court order, the name of the victim of a rape. S.C. CODE ANN. § 16-81 (1962). The Supreme Court of North Carolina will not publish, in its official opinion, the name of a sodomy victim, even though the victim is identified by name in the indictment. *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961). Clearly, only a macabre curiosity would be satisfied by such publication, although that is not true of the details of other acts, *i.e.*, the execution of criminals, the publication of which is frequently prohibited by statute. VA. CODE ANN. § 19.1-306.1 (1950). One author commented wryly that if capital punishment is to have the deterrent efficacy that some would ascribe to it, the report of an execution should "remind each taxpayer in detail of what he may expect." CAMUS, REFLECTIONS ON THE GUILLOTINE IN RESISTANCE, REBELLION AND DEATH 137 (Modern Library ed. 1960).

18. See note 5 *supra*.

restitution to crime victims as well as the rehabilitation of the criminals themselves.

### THE POSSIBILITIES

The only proposal for alleviating the burdens borne by victims of crime to receive more than token discussion or to be adopted anywhere in recent times is state-administered compensation.<sup>19</sup> Professor Mueller, in an early article on the subject,<sup>20</sup> affirmed that state compensation was the only arguable plan, since anyone can purchase any kind of private insurance. Professor Childres, in a more recent discussion, asserted that "only two alternatives remain: either society compensates the victim, or he suffers the consequences alone."<sup>21</sup> At another place, he answered those who

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19. State compensation has been recommended by Senator Dodd and former Senator Keating. Washington Post, Nov. 29, 1964, p. E6, col. 1. Ambassador Goldberg, a former Supreme Court Justice, includes himself among its supporters. Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 224 (1964). See also RADIN, *THE INNOCENTS* 238 (1964) and *Plaidoyer d'un juge pour le justiciable: sentence, cautionnement et compensation*, 14 THÉMIS 213, 223 (1964) where it is asked, rhetorically: "si une personne est victime d'attentat criminel, est-ce-que l'Etat devrait verser une compensation a ces personnes?"

California has become the first state to inaugurate a plan of victim compensation but, unlike the English and New Zealand prototypes, the California system is tied to the Welfare Code and incorporates a provision for the assessment against the offender of "a fine commensurate in amount with the offense committed (not the injuries inflicted)" to be deposited in the Indemnity Fund in the State Treasury from which fund the payments to victims will be drawn. CAL. STAT. ch. 1549 (1965). This is a strangely incongruous concession of governmental responsibility in a state whose laws were recently amended to declare the government immune from liability for injuries sustained as a result of a failure of the police to arrest or from the failure to provide adequate police protection. CAL. GOV'T CODE §§ 845, 846.

In addition, Senator Yarborough introduced a bill in Congress to establish a federal victim compensation plan. S. 2155, 89th Cong., 1st Sess. (1965).

State compensation has been effectuated in New Zealand, see Cameron, *Compensation for Victims of Crime: The New Zealand Experiment*, 12 J. PUB. L. 367 (1963) and in England, at least experimentally, see *Compensation for Victims of Crimes of Violence*, CMND. No. 2323 (1964). At the January 20, 1965, meeting of the Illinois Academy of Criminology, a panel discussed the subject of restitution to crime victims under the topic title "Should restitution by made by Federal, State, or Local Governments to Victims of Crimes. . .?" The phrasing of the question assumes the inadequacy of other alternatives.

20. Inbau, Miller, Montrose, Mueller, Silving, Williams & Weihofen, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 191, 218, 219 (1959).

21. Childres, *The Victims*, Harper's Magazine, April 1964, p. 159.

might advance other proposals: "to argue that private insurance is the solution is merely to deny that the problem exists."<sup>22</sup>

### PRIVATE INSURANCE

With this background of legislative activity and scholarly commentary, I venture, with some trepidation, into my proposals for a system of private insurance to compensate the victims of crime.

Any assessment of private insurance must begin with a disclaimer. Admittedly, it cannot be the placebo for all crime victims, since not all victims either will or can insure themselves against the possibility of loss or injury from crime. On the other hand, we are so far from public acceptance of state compensation that to denounce private insurance in conclusory or cavalier terms does little justice to the interests of crime victims or to the cause of compensating them. This is particularly so since this country's movement toward the "welfare state" is decades behind that of other countries. The reasons for this "lag" are apparent in our history: of alleged and proved pork barrel legislation; of state plans which have failed, *e.g.*, inadequate state protection of bank deposits during the depression; of stolid independence, which is but the outward manifestation of an inveterate, albeit often compromised, fear of governmental "paternalism"; of a practical reluctance to help those who are able to help themselves or who caused their own distress; and of the phenomenal growth of group insurance which has stunted the need and outcry for state assistance, except among those groups, such as the aged, for whom group insurance is yet inadequate.

With these politically formidable objections to state compensation, the scarcity of major federal interposition is not surprising. This political situation is also largely responsible for the limitation of major state action to workmen's compensation laws. And even as to implemented plans the public is misled by the contributory nature of accumulating the funds necessary to pay claims into thinking that payments do not constitute a gratuity. Social security or workmen's compensation payments could not, however, be made exclusively from tax money without considerable fear of a hostile public reaction, threatening the existence of the programs themselves.

In addition, there are always constitutional difficulties in select-

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<sup>22</sup> Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. REV. 444, 457 n. 64 (1964).



ing certain classes for special statutory protection. Equal protection of the laws precludes unreasonable discriminations among persons who are similarly disadvantaged. On that premise, a statutory plan of compensation for the victims of an aggravated assault, for example, could not exclude the victims of a robbery. But even if a crime classification like kidnapping were included in *eo nomine* in the compensation statute, those whose injuries are compensable would have to be delimited with a wary eye on the rubric of equal protection of the laws. For that reason, the claim of the father of the kidnap victim or the husband of a rape victim to compensation from the state fund might not be constitutionally excludable. But these considerations are irrelevant in the context of private insurance plans which are moved more by the flexibility of the bargaining table than by constitutional restrictions.

In addition to avoiding many of the disadvantages mentioned above, private insurance has advantages of its own. Almost infinite variations in the kinds, amounts and terms of coverage are possible. The individual is left free to decide upon any of these alternatives, depending upon his own situation. Insurance counseling is always available, even for the most modest wage earner. In view of this flexibility, the General Motors executive need not be reduced to the level of a state plan's maximum amount, nor, must the laborer of little means, who seeks insurance protection, raise his sights beyond his own earning capacity. Private insurance aims to fill the needs of everyone, leaving the decision as to which areas are those of gravest and most immediate need to individual judgment. It is this freedom and variation, dependent upon a wide range of available choices, which distinguishes private insurance from state plans, such as that proposed by Professor Childres.

In Childres'<sup>23</sup> estimation, those in greatest need of assistance are the 160,000 persons who in 1962 (214,700 in 1964)<sup>24</sup> fell victim to homicides, forcible rapes and aggravated assaults. To him the victims of robberies, which in 1964 numbered 111,750, the victims of burglaries, which in 1964 were more than 1,100,000 and the victims of unspecified numbers of arsons are not as deserving

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23. *Id.* at 470.

24. All figures for 1964 are taken from 1964 UNIFORM CRIME REPORTS 3. Childres' 160,000 can be broken down as follows: murder—8400; forcible rape—16,310 and aggravated assault—139,700. In 1962, there were also 95,260 robberies and 892,800 burglaries. 1962 UNIFORM CRIME REPORTS 2. Arson is not tabulated in the F.B.I. crime index classification.

of inclusion in a state-sponsored plan since their damages are not as grave as those of victims of personal injury.<sup>25</sup> Apart from the fact that many robberies, burglaries, and arsons do occasion considerable personal injury, at least on a par with aggravated assaults and forcible rapes, his process of selection would be unnecessary in a private insurance system, in which each person's judgment of his own need would rule the day.

Recent statistics indicate that individuals are exercising their judgment in favor of insurance in awe-inspiring numbers. By the end of 1963, more than 145 million persons, or 77 per cent of the nation's civilian population, had some form of protection against hospital or medical expenses.<sup>26</sup> And a substantial, but untabulated, number of others were insured under programs established by local, state and federal governments.<sup>27</sup> Of these 145 million, more than 115 million were covered under group insurance plans.<sup>28</sup> Indeed, almost 135 million had additional coverage for surgical expenses as well.<sup>29</sup>

In addition, 1963 bore witness to the fact that 47 million wage earners were covered under insurance company programs or other similar arrangements to replace income lost during disability periods.<sup>30</sup> This figure constitutes more than two-thirds of the total civilian wage earners in the United States.<sup>31</sup>

Life insurance, with frequent additions for wage loss and other benefits, was also being purchased on a grand scale in 1963. 120 million individuals (nearly two out of every three persons) were covered at the close of 1963 with legal reserve life companies.<sup>32</sup> This represented a gain larger than any in the previous history of life insurance. The average American family had 12,200 dollars of life insurance at the end of 1963.<sup>33</sup> On an analysis of life insurance by economic situation, it has been shown that 71 per cent of all

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25. Childres, *supra* note 22, at 460.

26. HEALTH INSURANCE COUNCIL, 18TH ANNUAL SURVEY, THE EXTENT OF VOLUNTARY HEALTH INSURANCE COVERAGE IN THE UNITED STATES AS OF DECEMBER 31, 1963, at 4 (Aug. 1964).

27. *Id.* at 9.

28. *Id.* at 12.

29. *Id.* at 5.

30. *Id.* at 4.

31. During 1964 the civilian labor force—which comprises both the employed and the unemployed—averaged slightly over 74.2 million. Of these, the unemployed averaged about 3.9 million, of which the largest proportion were among teenagers and women. *Id.* at 25, cols. 7 and 8; N.Y. Times, Jan. 8, 1965, p. 1, col. 8.

32. LIFE INSURANCE FACT BOOK OF 1964, at 5.

33. *Id.* at 6.

husbands with a salary below 3000 dollars a year owned life insurance; of these, one-third had coverage equalling at least two years' income before taxes.<sup>34</sup> At the moderate income level, 5000 to 9000 dollars, the percentage of husbands insured was 96 per cent, at an average amount of 11,616 dollars.<sup>35</sup>

The statistics on insurance upon property are not so readily available, nor need they be for my purposes. I know of no plan which proposes to compensate the victims of crime for the property losses they have suffered. Professor Childres<sup>36</sup> has exempted such losses on the basis of the exigencies of the moment, which demand compensation for those most in need, who, in his appraisal, are the victims of certain aggressive crimes to the person. Miss Margery Fry<sup>37</sup> feared a deluge of fraudulent claims if victims of property crimes were included in any state system. Professor Weihofen<sup>38</sup> surmised that a high percentage of alleged victims of property crimes are not victims at all, but are, in fact, participants in the crime.

With respect to private insurance against property losses, new proposals are unnecessary. Many of those who are constantly exposed to the temptation to embezzle are covered by fidelity bonds, sometimes, as in the case of executors and administrators of decedents' estates, by statutory requirement.<sup>39</sup> All automobiles purchased on installment pay plans are required by the financing agency to be protected by the theft coverage of a comprehensive policy. Homeowners are likely to insure their possessions under homeowners' comprehensive policies. Although fire policies do not insure against thefts,<sup>40</sup> theft policies are in ready supply for those

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34. *Id.* at 8.

35. *Id.* at 10.

36. Childres, *supra* note 22, at 459.

37. Fry, *Justice for Victims*, *The Observer* (London), July 7, 1957, p. 8, col. 2, reprinted 8 J. PUB. L. 191 (1959). In her words:

Clearly, so far as offences against property go, any scheme for State insurance would be wrecked by the ease with which it could be defrauded. But crimes of violence against the person are a different matter. Few people would voluntarily wound themselves to obtain a modest compensation, and the risk of successful deception is negligible.

8 J. PUB. L. at 193. With all deference to Miss Fry, there is a difference, which any insurance company can verify, between fabricating an injury and exaggerating the extent of an injury, an exaggeration which occurs frequently in personal injury claims.

38. See *id.* at 209.

39. TEX. PROB. CODE § 189 (1956); WIS. STAT. §§ 311.04, 310.15 (1963).

40. RIEGEL & MILLER, *INSURANCE PRINCIPLES AND PRACTICE* 435 (4th ed. 1959). Under the terms of the Standard Fire Policy, damages from theft are excluded. WIS. STAT. § 203.01 (1963) (2d page, line 24).

who wish to protect their valuables.<sup>41</sup> Personal property is also protected under the bailment laws of some states, by which the liability of special classes of bailees is elaborately defined.<sup>42</sup> Indeed, the common law rules with respect to the obligations of common carriers often make them insurers of commodities shipped by them.<sup>43</sup> And it seems safe to say that few persons of meager resources will be the victims of property crimes, but even where they are, the tax laws permit one to claim partial compensation by permitting the deduction of theft losses from the income tax return.<sup>44</sup> And where none of these protections exist, the victim may still rely on the police to restore his stolen property, a function which the police are performing with a high degree of proficiency these days.<sup>45</sup> Furthermore, if a state were to compensate property losses, then, where the property is insured, the insurer would be subrogated to the insured's claim for restitution from the state

41. "[T]he relative frequency of offences against property ensures that the bulk of owners insure against the risk." 37 AUSTR. L.J. 201 (1963). Coverage against theft has been expanded with the inclusion of the "mysterious disappearance" clause in such policies. This proviso establishes a presumption of theft upon unexplained disappearance of the property. See Field, "*Mysterious Disappearance*" Under the New Theft Policy, 1945 INS. L.J. 3; Kelly, "*Mysterious Disappearance*" Defined, 28 INS. COUNSEL J. 72 (1961); Opgenorth, *Mysterious Disappearance and Presumption of Theft Clause*, 1952 INS. L.J. 97.

42. N.Y. GEN. OBLIGATIONS LAW § 5-325 (parking lot operators); WASH. REV. CODE § 19.48.030 (1951) (innkeepers).

43. BROWN, LAW OF PERSONAL PROPERTY § 93 (2d ed. 1955).

44. The Internal Revenue Code was amended to limit the deduction of a non-business incurred theft or casualty losses to those where the amount of the loss exceeds \$100. INT. REV. CODE OF 1954, § 165(c)(3). The House and Senate reports on this amendment argue that "it is appropriate in computing taxable income to allow the deduction only of those losses which may be considered extraordinary, non-recurring losses, and which go beyond the average or usual losses incurred by most taxpayers in day-to-day living." 1964 U.S. CODE CONG. & AD. NEWS A50, A420. This amendment does not affect the trade or business expense deduction provisions of § 162. INT. REV. CODE OF 1954, § 162. State income tax laws do not generally impose any minimum amount for casualty or theft losses, but then it may be that the states are not as interested as the federal government in pressing the use of standardized as opposed to itemized deductions. VA. CODE ANN. § 58-81(f) (1959).

The business expense allowance of § 162 of the Internal Revenue Code has recently been read to include attorneys' fees incurred in an unsuccessful, as well as a successful defense, of a criminal charge. *Tellier v. Commissioner*, 342 F.2d 690 (2d Cir. 1965).

45. Although automobile thefts may be atypical, the statistics indicate that the "local law enforcement agencies in which jurisdiction the cars are stolen recover about 64% of all cars stolen within 48 hours [and that] an average of 20% of all cars stolen are recovered by departments outside the jurisdiction where the theft occurred." In all, a total of 89% were recovered in 1964. 1964 UNIFORM CRIME REPORTS 19, 20.

fund.<sup>46</sup> It is unlikely that the public would support such a diversion of tax funds. In view of these considerations, any noticeable inadequacy in compensating the victims of crime occurs only where personal injuries are inflicted upon them.

#### A. WORKING PRINCIPLES

My proposals seek: (1), to encourage subscribers to purchase insurance of their own choice; (2), to remedy present policy language which may exclude victims of crime from benefits; and (3), to raise the level of benefits received by victims to something nearer their actual damages. Certain postulates have largely motivated my thinking on this question. Since much of what follows is predicated upon those postulates, I shall enumerate them.

1. State control over private insurance, although legally permissible, should be kept to a minimum.

2. All persons should be afforded the opportunity to seek indemnity through private insurance for all provable damages.

3. The fundamental procedural and substantive premises of the criminal law should not be impaired in the slightest by legislative or administrative interference on behalf of the victim.

On the procedural side, I fear that a state system of compensation will impose obstacles to the exercise of responsible prosecutorial discretion in bringing criminal proceedings. Prosecutors have long had almost unlimited authority to select the causes they wish to prosecute, to reduce charges and to accept a plea of guilty to a lesser charge. Although this authority has not been unchallenged,<sup>47</sup> it is largely unimpaired by fixed rules.

Under a state compensation scheme, the state will inevitably become more concerned with the prosecution of criminal cases, if only to reduce recidivism, and the number of repeat victims who

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46. Thus, in *Northern Assur. Co. v. City of Milwaukee*, 227 Wis. 124, 277 N.W. 149 (1938), an insurer was permitted to maintain an action against a municipality under the state "mob action" statute upon a claim for property damages which it had paid its insured. In addition, the present probation system often acts for the benefit of an insurance company, as subrogee. The subtle ramifications of this alliance between the insurer, the court, and the probation department upon the administration of probation deserve extensive exploration.

47. *State v. Ashby*, 81 N.J. Super. 350, 195 A.2d 635 (App. Div. 1963), *rev'd*, 43 N.J. 273, 204 A.2d 1 (1964), which considers whether a prosecutor may be compelled to "nol pros" based upon an agreement to downgrade an offense.

may call upon the state fund for compensation. The prosecutor's discretion would thus be complicated and constrained by the introduction of a foreign element.

On the substantive side, I am troubled by those proposals which would refashion the criminal forum into a place suitable for the recovery of civil damages as well as for the prosecution of offenders. Criminal law and tort law have long been more than procedurally distinct, for it is well established that many of the substantive rules of tort law are not those of criminal law. For example, in tort law the defenses of insanity and mistake of fact are given scant obeisance, whereas in criminal law they are often of controlling importance. A merger of these two procedural systems could hardly be accomplished without jeopardizing many substantive rules of the criminal law.<sup>48</sup> Therefore, to the extent that a civil action or a state compensation scheme will upset the balance of the criminal law, it should be approached with caution.

4. Some form of private insurance should be within the reach of all, and this requires that appropriate benefits be offered at moderate cost.

5. Benefits should be payable to the victim expeditiously and without regard to the rehabilitative needs of the offender.

## B. COMPULSORY INSURANCE

Compulsory crime risk insurance is but a nostrum, as well as totally without support in law or policy. The hue and cry of the insurance interests in opposition to a proposal of this nature would surely be deafening, even to the most taciturn legislator. Indeed, their arguments are not without painful precedent in those states where compulsory automobile insurance either is in force or has been defeated by the pressures of their lobbyists.<sup>49</sup> However, the assigned risk plans,<sup>50</sup> resulting from state statutes which make automobile liability insurance compulsory, still stir

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48. On the other hand, tort law is not impervious to change either. A state system of compensation, for example, would all but nullify the last vestiges of sovereign immunity, at least that is if the theory that the state is accountable for crimes committed within its borders is the motivation for the enactment of the state compensation statute. See Fry, *supra* note 37, at 193.

49. See 7 AM. JUR. 2d *Automobile Insurance* §§ 4-7 (1963); EHRENZWEIG, *op. cit. supra* note 2, at 4, 42-43; Loiseaux, *Innocent Victims*, 38 TEXAS L. REV. 154, 155-57 (1959); Risjord & Austin, *The Problem of the Financially Irresponsible Motorist*, 24 U. KAN. CITY L. REV. 82 (1955).

50. The assigned risk "pool" was upheld in *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951). See N.Y. INS. LAW § 63.

occasional flashes of insurance company ire, even though insurers have learned to suffer the handicap of poor risks.

Although the compulsory automobile insurance statutes and their handmaiden, the assigned risk pool, have been upheld in the courts<sup>51</sup> as valid methods of assuaging one evil of the automobile accident menace, it is doubtful that compulsory crime risk insurance would fare so well. From the perspective of the insurance company, it is one thing to require that all persons be insured and wholly another for insurers to be required to accept all applicants. From the viewpoint of the law, too, that which justifies one conclusion may be inapposite in another context. Thus, to say that the state's control over the public ways gives it warrant to require compulsory automobile insurance is not to say that the state's interest in crime control validates compulsory crime risk insurance. Some have even argued<sup>52</sup> that the placating effect of

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51. *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681 (1925).

52. Childres, *supra* note 22, at 458. Conversely, compensation might stimulate community support of police crime control efforts. Some have pointed out that compensation might go so far as to induce private citizens to aid the police in apprehending offenders. Hussey, *Britain Pays the Victim of the Crime*, N.Y. Times, Feb. 21, 1965, § 6 (Magazine), p. 24. But assistance of this kind is never an absolute good since the peril to the private citizen who rushes headlong to the fray may be substantial. "Having a go" at criminals recently resulted in such over-exuberance by the citizenry that Scotland Yard was called upon to retract, or at least limit, its request for the utmost in community cooperation. N.Y. Times, Jan. 8, 1965, p. 62, col. 1. One commentator, however, described the response of the citizenry to the request of the Assistant Commissioner of the London Metropolitan Police to "have a go" at criminals as "exhilarating" and "a happy development in the fight against crime," apparently in blissful unawareness of the dangers involved. 1965 CRIM. L. REV. (Eng.) 67. In Washington, D.C., the police have been reported as asking private citizens not to play the role of the policeman. Washington Post, Feb. 8, 1965, p. C1, col. 8. In some jurisdictions, private citizens are compelled by statutory command or by a moral duty of judicial origin to come to the aid of a police officer. See Note, *Requiring Citizens to Aid a Peace Officer*, 14 DE PAUL L. REV. 159 (1964).

And, in his Message on Crime and Law Enforcement, President Johnson urged his newly-created crime commission to find ways to encourage citizens "to report crimes, summon assistance or cooperate with law enforcement in other ways." Washington Post, March 9, 1965, p. A14, col. 6. However, the good samaritan who jeopardizes his own well-being in an attempt to prevent crime or apprehend criminals is deserving of first claim under any system of compensation. California has recently enacted legislation to that end. CAL. PEN. CODE §§ 13600-02. The New York legislature has been petitioned to do so. N.Y. Times, October 11, 1965, p. 41, col. 1. A conference on the absence of good samaritanism among our citizenry was recently held at the University of Chicago Law School. N.Y. Times, April 10, 1965, p. 31, col. 1.

compensation, through insurance or otherwise, may constitute a substantial impediment to the effective prosecution of offenders.

To avoid arbitrariness, state action must bear a reasonable relation to its objective. To impose upon potential crime victims the obligation of insuring themselves would be as anomalous an allocation of responsibility as would the requirement that automobile accident victims must bear the burden of insurance. The heedless man-at-the-wheel or the criminal might more reasonably be expected to shoulder that cost. Yet, the potential offender is disabled by the policy of the courts<sup>53</sup> or legislatures<sup>54</sup> of many states from insuring himself against the financial risks of his criminal enterprise, unless, as is the case with fidelity bonds, the potential victim's interests are also recognized in the policy. That public policy may derive, in part, from the same logic which suggests that compensated victims make bad witnesses.

Compulsory crime risk insurance is vulnerable to legal challenge on the basis of probabilities. It is reasonably foreseeable that

53. No recovery of the proceeds of a policy is allowed even though there is no explicit exclusion of intentional misconduct by the insured. See *Industrial Sugars, Inc. v. Standard Acc. Ins. Co.*, 338 F.2d 673 (7th Cir. 1964); *J. D'Amico v. City of Boston*, 345 Mass. 218, 186 N.E.2d 716 (1962). But see *Zazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964) (insurer required to pay punitive damages for insured's intentional wrong). Some insurance policies do exclude certain intentional acts of the insured. The double indemnity rider to a life policy commonly excludes death occurring from violations of law by the insured, whereas the life policy in chief generally excepts death by suicide. MEHR & OSLER, *MODERN LIFE INSURANCE* 162, 225 (rev. ed. 1956).

Insurance companies characterize this aspect of insurance as the "moral hazard," which is considered to be "one of the main elements, if not the chief element, of an insurance risk. . . ." Bienvenu, *Arson as a Defense*, 32 INS. COUNSEL J. 41, 47 (1965), quoting from *Connecticut Fire Ins. Co. v. Manning*, 160 Fed. 382, 385 (8th Cir. 1908).

54. N.Y. INS. LAW § 168(6) (2d page, 1st paragraph of Standard Fire Policy), voids fire insurance on a presumption of misconduct by the insured where there is a wilful concealment or misrepresentation of any material fact before or after a loss. Over insuring property under a fire policy is also prohibited for the same reason. MASS. ANN. LAWS ch. 175, § 95 (1959). Professional liability policies may not insure against wilful or intentional assaults or batteries. MASS. ANN. LAWS ch. 175, § 111E (1959). Individual accident and health policies are permitted to include an optional provision avoiding liability "for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony . . ." ILL. REV. STAT. ch. 73, § 969a(2)(j) (1963); R.I. GEN. LAWS ANN. § 27-18-4 (1956). Incorporation is prohibited where the purpose of the corporation is to insure against the "deliberate or intentional crime or wrongdoing" or the insured. MASS. ANN. LAWS ch. 175, § 47 (1959).



any automobile driver at any moment may carelessly cause harm to others. In this respect, the risk for each operator is equal. But predictions must be more guarded in the case of criminal conduct. For one thing, the crime statistics do not conclusively establish what they indicate, namely that some persons, for economic or environmental reasons, are more crime-prone than others. For another, crimes, unlike automobile accidents, are not susceptible to homogeneous classification. On an obvious level, property crimes are distinguishable from crimes involving violence to the person, and these categories are capable of further delineation into, for example, homicides and rapes.

Any compulsory crime risk insurance legislation which did not respect these significant variations would be easy prey to any lawyer's knife, that is, if the popular sentiment against it were not enough to suppress it.

### C. THE SPECIAL RISK POLICY

The special or limited risk policy offers protection against perils ordinarily considered uninsurable. The National Association of Insurance Commissioners has defined it, more expansively, as "one that contains unusual exclusions, limitations, reductions or contains such a restrictive nature that the payments or benefits under such a policy are limited in frequency or in amount."<sup>55</sup> Special risk policies have been written upon flagpole sitters, divers for sunken treasure, professional sports participants and, more recently and more to the present point, attempts have been made to devise a life policy for juvenile diabetics.<sup>56</sup>

With such antecedents, it is conceivable that an insurance company could prepare and propose a special risk policy for the victims of all crimes or of a particular kind of criminal conduct. Notwithstanding this theoretical possibility, neither insurance companies nor potential insureds would feel such a suggestion to be practical.

Insurance companies would be confronted with a dilemma of major importance, a dilemma which, it is only fair to record, they met courageously, albeit unprofitably, in the days of polio epidemics.<sup>57</sup> Should crime risk policies be offered in areas of crime contagion, areas which are generally the large metropolitan com-

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55. Sommer, *Limited and Special Risk Contracts*, in GREGG, *LIFE AND HEALTH INSURANCE HANDBOOK* 288 (2d ed. 1964).

56. Washington Post, Jan. 6, 1965, p. B10, cols. 1, 2.

57. Sommer, *supra* note 55, at 299.

plexes, or should the insurer be less businesslike, gambling on the financial success of a venture open to all?

Of course, chance can be substantially eliminated by keeping the premium high enough both to discourage wide acceptance and to insure a satisfactory return. But in doing so, coverage becomes less attractive since it is too costly for most people. That has been the observable cycle in property crime insurance. Only a few are able to afford it, since lack of risk-distribution causes high rates. Since the rate is high, few persons find it within their means and so on ad infinitum. The circular motion is accelerated, however, by the fact that special crime risk policies are unlikely to be marketable on a large scale because few persons are willing to admit that crime is cause for grave concern. For these reasons, special crime risk policies are not practical at the present time.

#### D. EXCLUSIONS IN EXISTING COVERAGE

The inadequacies of special crime risk policies are more predictable and more evident than those of existing life, accident or health policies. But that is not to say that life, accident and health policies are immune from defect. The inadequacy of many of these policies to protect against losses from criminal acts must come as a shock to many policyholders and beneficiaries.

Unfortunately, a considerable number of life and accident policies are written with benefits excluded where the injury or death was suffered through "any violation of the law,"<sup>58</sup> through the "illegal acts of any person,"<sup>59</sup> by "homicide,"<sup>60</sup> through "the intentional act of any person,"<sup>61</sup> or from "assault or battery" or

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58. *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 So. 1006 (1913); *California State Life Ins. Co. v. Fuqua*, 40 Ariz. 148, 10 P.2d 958 (1932); *Metropolitan Life Ins. Co. v. Roma*, 97 Colo. 493, 50 P.2d 1142 (1935); *Sovereign Camp of Woodmen of the World v. Purdom*, 147 Ky. 177, 143 S.W. 1021 (1912).

59. *Atlantic Life Ins. Co. v. Greenfield*, 199 Va. 506, 100 S.W.2d 717 (1957).

60. *Lloyd v. Unity Life Ins. Co.*, 225 La. 585, 73 So. 2d 470 (1954).

61. *Travellers' Ins. Co. v. McConkey*, 127 U.S. 661 (1888); *Continental Cas. Co. v. Cunningham*, 188 Ala. 159, 66 So. 41 (1914); *Olson v. Southern Sur. Co.*, 201 Iowa 1334, 208 N.W. 213 (1926); *Broyles v. Order of United Commercial Travelers*, 155 Kan. 74, 122 P.2d 763 (1942); *Patrick v. Pilot Life Ins. Co.*, 241 N.C. 614, 86 S.E.2d 201 (1955). But even where the policy excepts an injury or death caused by such intentional acts, the courts steadfastly refuse to apply the literal meaning of the policy language. *Jefferson Standard Life Ins. Co. v. Myers*, 256 Ky. 174, 75 S.W.2d 1095 (1934). *Contra*, *Beem v.*

"felony."<sup>62</sup> Even without exclusions in explicit terms, the words "accident" or "accidental means," which are found in the insuring clause of accident policies and in the double indemnity endorsements to life policies, have been construed to exclude injuries or death caused by the criminal act of a third person.<sup>63</sup>

Why do insurance companies limit policies in this way? On analysis, no convincing necessity or logic justifies this restrictive attitude. Certainly, the magnitude of the risk is not great enough to warrant its exclusion, at least in comparison with other causes of injuries. The risk is not as catastrophic or unpredictable as war or riot, two other exclusions in such policies. Nor does public policy, similar to that which precludes a beneficiary who murders the insured from profiting by his own wrong by recovering on the policy,<sup>64</sup> inhibit the payment of criminally caused claims. Yet, the denial of a crime victim's claim may well rest either on an inference that his own misconduct precipitated the injuries or on the fear of fraudulent claims. Nevertheless, a blanket exclusion of all claims cannot be justified by such vague phantoms. In the end, the explanation may be predicated upon an insurance company practice of denying a claim wherever the occasion allows.

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General Acc. Fire & Life Assur. Corp., 231 Mo. App. 685, 105 S.W.2d 956 (1937).

Some courts, *mirabile dictu*, construe the exclusion to require a "specific" intent to kill the insured. Thus, mistaken identity killings become, by judicial craftsmanship, accidents. *Independent Life & Acc. Ins. Co. v. Hopkins*, 80 Ga. App. 348, 56 S.E.2d 177 (1949); *General Acc. Fire & Life Assur. Corp. v. Hymes*, 77 Okla. 20, 185 Pac. 1085, 8 A.L.R. 318 (1919); *Harper v. Jefferson Standard Life Ins. Co.*, 119 W. Va. 721, 196 S.E. 12, 116 A.L.R. 389 (1938). On this reasoning, the insanity of the perpetrator becomes relevant to recovery on the policy. *Ruvolo v. American Cas. Co.*, 39 N.J. 490, 189 A.2d 204 (1963). *Contra*, *Pruitt v. Life Ins. Co.*, 182 S.C. 396, 189 S.E. 649 (1937).

62. *Langvin v. Rockford Life Ins. Co.*, 338 Ill. App. 499, 88 N.E.2d 111 (1949).

63. *Lambert v. National Cas. Co.*, 249 Ala. 85, 29 So. 2d 572 (1947). But the weight of authority is to the contrary. 1A APPLEMAN, *INSURANCE LAW AND PRACTICE* § 486 (rev. ed. 1965). The judicial distinction between those accidents which are accidents and those which are not caused Mr. Justice Cardozo to remark that "the attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934).

Sometimes there is a presumption that the injury or death was from accidental means and sometimes not, but this legal crutch is proffered to the beneficiary, in the main, where there is an issue of possible suicide by the insured. Cases are collected in Annot., 142 A.L.R. 742 (1943), and Annot., 12 A.L.R. 2d 1264 (1950).

64. 1A APPLEMAN, *op cit. supra* note 63, at § 381.

Such denial, however, may constitute an illegal practice in the conduct of the corporate affairs of the insurance company.<sup>65</sup>

The restriction of insurance claims grounded in crime losses has a long history. In a typical theft policy, for example, burglary is defined so narrowly that what will constitute a burglary in criminal law may not be compensable within the theft policy.<sup>66</sup> Although homicide may be committed in an almost limitless variety of ways, only those deaths which are caused by

- a) an accidental injury visible on the surface of the body or disclosed by an autopsy, or
- b) a disease or infection resulting directly from an accidental injury as described and beginning within 30 days after the date of the injury, or
- c) an accidental drowning<sup>67</sup>

are considered to be accidental deaths within a double indemnity rider to a life policy. So too, while the criminal law may view the willing female as the victim of an abortion, the proceeds of an insurance policy may be denied her because, in insurance parlance, a victim cannot be both victimized and willing.<sup>68</sup> In fact, I seem to recall that Sancho Panza shrewdly unmasked a loud and bellicose alleged victim of a rape who struggled more fiercely to retain the compensation she received than the virtue she supposedly lost. Insurance companies are mindful of the same necessity to distinguish the victim from the cheat.

The courts too have searched sedulously for the draftsman's intent in insurance policy restrictions. More often than not, the search has resulted in undoing that intent. Thus, an accident policy excluding liability for loss, if the injury causing it resulted from the intentional act of the insured or of any other person, was held not to exclude liability for the intentional killing of the insured by another, since the word "injury" did not include a *fatal* injury.<sup>69</sup> In another policy, an exclusion of deaths resulting from "taking poison" was read to mean the intentional, not accidental,

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65. MASS. ANN. LAWS ch. 175, § 47(b) (1959); *J. D'Amico, Inc. v. City of Boston*, 345 Mass. 218, 186 N.E.2d 716 (1962).

66. VANCE, *INSURANCE* 1014-18 (3d ed. 1951).

67. Ormsby, *Life Insurance Riders—Disability and Accidental Death Insurance* in GREGG, *LIFE AND HEALTH INSURANCE HANDBOOK* 270-71 (2d ed. 1964).

68. *Jacob v. Prudential Ins. Co. of America*, 256 App. Div. 884, 9 N.Y.S.2d 27, *aff'd*, 281 N.Y. 623, 22 N.E.2d 177 (1939).

69. *Ziolkowski v. Continental Cas. Co.*, 284 Ill. App. 505, 1 N.E.2d 410 (1936), *aff'd*, 365 Ill. 594, 7 N.E.2d 451 (1937).

taking of poison,<sup>70</sup> even though to do so renders the exception pleonastic since an accidental death policy by its own terms excludes intentional acts by the insured.

Indeed, as a general rule, any death is accidental which is unforeseen by the insured.<sup>71</sup> On that basis, the survivors of the Toronto citizen who recently gave his life in attempting to foil a bank robbery in that city,<sup>72</sup> would not be entitled to benefit from his accidental death policy. Nor, if he had been a bank teller, who had intervened and survived, could he be certain of collecting workmen's compensation payments, since they too must arise from an accident.<sup>73</sup> In an endeavor to ameliorate the impact of these holdings, the National Association of Insurance Commissioners has proposed a Uniform Individual Accident Policy Provisions Act which, in an optional provision, excludes liability "for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony, or to which a contributing cause was the insured's being engaged in an illegal occupation."<sup>74</sup>

All these perplexities could be resolved by a simple expedient. A statute could be enacted substantially to the effect that no insurance company may exclude from benefits under any accident or accidental death policy losses suffered by the criminal or inten-

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70. *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642, 43 N.E. 765, *affirming* 59 Ill. App. 515 (1896).

71. *Higgins v. Midland Cas. Co.*, 281 Ill. 431, 118 N.E. 11 (1917); *Releford v. Reserve Life Ins. Co.*, 154 Tex. 228, 276 S.W.2d 517 (1955). See generally 1A APPLEMAN, *op. cit. supra* note 63, at § 486.

72. *Editorial, Compensation for Victims of Crime*, 7 CRIM. L.Q. 141 (1964).

73. 6 SCHNEIDER, *WORKMEN'S COMPENSATION* § 1560 (perm. ed. 1948). Most workmen's compensation statutes, with variations in language, exclude injuries caused by the wilful act of a third person directed against an employee for reasons personal to the employee. GA. CODE ANN. § 114-102 (1956); TEX. REV. CIV. STAT. art. 8309 (1948); WYO. STAT. ANN. § 27-49 (1957).

Some state nonoccupational disability laws also require that an injury, to be compensable, be caused by an accident. The California law seems to be the most comprehensive, including wage losses occasioned by persons who are unemployed on account of "sickness or injury." CAL. UNEMP. INS. CODE § 2601. Cf. N.J. STAT. ANN. § 43: 21-29 (1964); N.Y. WORKMEN'S COMP. LAW §§ 201(8), 227. In Rhode Island recovery seems to be limited to wages lost due to nonoccupational sickness only. R.I. GEN. LAWS ANN. § 28-39-2 (1956).

Under Soviet law the social security legislation provides payment for disability resulting from a criminal offense as well as from sickness or accident. Johnson, *Compensation for Victims of Criminal Offenses on English and Soviet Law*, 17 CURRENT LEGAL PROBLEMS 145 (1964).

74. The Uniform Act was approved by the Commissioners on June 15, 1950 and has since been enacted in every state. Neal, *Regulation of Health Insurance* in GREGG, *LIFE AND HEALTH INSURANCE HANDBOOK* 1090 (2d ed. 1964).

tional or illegal act of any person other than the insured, except where, in the situation from which the loss arises, the insured acts to prevent a crime or to apprehend a suspect. Nothing in this provision should be interpreted to permit payments of benefits to a beneficiary from whose criminal, intentional or illegal act, the claim ensues.

Such legislative action would not be novel, since the statutes are already replete with tried and proved exemplars for it.<sup>75</sup> Nor need there be any doubt of its legality. The states have long held sway over insurance matters, even after the Supreme Court held insurance to be subject to federal regulation within the purview of the commerce clause,<sup>76</sup> since the proposal does not offend any known restraint upon the exercise of the state's police powers. Nor is the intervention of the state in a voluntary insurance arrangement objectionable where, in lieu of any compelling presentation by the insurers, the equities clearly preponderate on behalf of the crime victim. This legislation therefore, constitutes my first proposal to alleviate some of the suffering of crime victims.

#### E. MAJOR OCCUPATIONAL POLICY

One major drawback of all compensation schemes thus far proposed or effected is that they keep the level of payments so low that full compensation for all damages must be a rarity under them.<sup>77</sup> In my view, insurance provides the ideal setting for achieving payments more commensurate with the losses actually sustained by crime victims.

At least two possibilities for remedying this exist. The first is a "major occupational" policy or rider, to be attached to any outstanding accident policy or rider, and devised along the lines of the now popular major medical expense rider. The objective of this rider would be to reduce the burden of loss of income, when it amounts to a catastrophic expense, by paying

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75. Thore, *Regulation of Life Insurance*, in *id.*, at 1080. Recent legislation requiring that an uninsured motorist endorsement be offered in connection with all motor vehicle policies is typical. CAL. INS. CODE § 11580.2; FLA. STAT. ANN. § 627.0851 (1964); ILL. REV. STAT. ch. 73, § 755a (1963); N.Y. INS. LAW § 167(2a); S.C. CODE ANN. § 46-750.31(3) (1962); VA. CODE ANN. § 38.1-381(b) (1964).

76. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

77. Under the English system "the rate of loss of earnings allowed is not to exceed twice the average of industrial weekly earnings as determined by the Ministry of Labor—about \$50 a week. Therefore, top rate cannot exceed \$100 a week." Hussey, *supra* note 52, at 29.

benefits more nearly approximating the actual wages of the insured than the usual accident policy does.

The worries of those underwriters who fear that raising benefits will induce malingering by the insured will be silenced by incorporating into this rider the three features that typify major medical coverage. A total maximum amount recoverable should be stipulated with the insured sharing a portion of the burden, say ten or twenty per cent. In addition to the maximum amount and co-insurance aspects, the coverage might well include a stated deductible, which, in those cases where coverage is attached to an existing accident policy, could be the maximum payable under the basic policy plus a fixed sum, called a "corridor." Where there is no basic accident policy owned by the insured, then a fixed sum must suffice.

The likelihood is that the major occupational coverage would more frequently appear as a rider to a basic accident policy since the experience in the "double indemnity" field has proved that many persons who would not otherwise purchase such coverage will do so when it is tacked on to a policy they wish to purchase. If the pattern follows that of major medical, the minimal cost of the additional coverage will be a further inducement to widespread acceptance of the rider.

#### F. PAIN AND SUFFERING RIDER

The third remedial possibility arises from my conviction that pain and suffering, items of what is called "common law damages," cannot go uncompensated. In some crimes, particularly forcible rape, kidnapping and some robberies, the unliquidated claim for compensation for pain and suffering is all that the victim generally has. Thus, it would appear to mock the victim and play havoc with consistency to urge the compensation of a forcible rape victim, as Professor Childres does,<sup>78</sup> and in the next breath to reject her claim for pain and suffering. The systems in effect in England and New Zealand do not make that mistake.

Concededly, pain and suffering might rightfully be excluded in some legal situations. If, in the process of sentencing a criminal, a judge is unable to assess the victim's pain and suffering, then the probation statute might condition probation upon restitution of

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78. Childres, *supra* note 21, at 459. Senator Yarborough's proposal for federal compensation to crime victims defines compensable injuries as "actual bodily harm and includes pregnancy and mental or nervous shock." S. 2155, 89th Cong., 1st Sess. § 102 (1965).

the victim's "actual damages or loss," as does the federal statute.<sup>79</sup> If random speculation is the only available guide in proving the extent of pain and suffering, then we might adjure the command given to Moses in the Book of Exodus<sup>80</sup> to provide for the victim's complete cure, which I take it was an admonition to pay actual (provable) damages only. But, in less exceptional circumstances, pain and suffering cry out for recompense.

Nevertheless, the format for a policy rider to pay such damages must be drawn with considerable finesse, since money and fraud are not, in the estimation of insurance companies, unlikely cousins. A prototype may be seen in the uninsured (hit-and-run) motorist endorsements that have burgeoned of late in automobile liability policies in this country.<sup>81</sup> As in them, a limit on the maximum allowable recovery should be established. Questions, which will inevitably develop, concerning the nature of the conduct which caused the damages<sup>82</sup> should be settled by arbitration between the insurer and the insured.<sup>83</sup> Any decision should, by stipulation, be conclusive as to the rights and obligations of the parties. And, as a precautionary measure, during the trial period of the program, payments should be limited to cases of appreciable injury

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79. 18 U.S.C. § 3651 (1964). In the District of Columbia, restitution is imposed as a condition of probation in only about 5% of all probation orders and then only in property crimes, or more rarely, assaults. Interview with Chief Probation Officer Edward Garret.

In some states the court's authority to order restitution is limited to those situations where probation is ordered. Thus, whenever either a sentence or its execution was suspended without an order of probation, restitution could not be compelled. Apparently, restitution would be ineffective without the probation office to supervise its collection. VA. CODE ANN. § 53-274 (1958).

Some consider that the granting of probation in order to collect restitution is an abuse of probation. Letter from Mr. Paul Kalin, former Director, Michigan Saginaw Project in Probation, to the author March 2, 1965.

80. *Exodus* 21:18-19.

81. A six page bibliography on the subject is included in 19 ARB. J. 45 (1964). The fourteen states which have made the uninsured motorist coverage compulsory are listed in Aksen, *Arbitration Under the Uninsured Motorist Endorsement*, 1965 INS. L.J. 17 n. 4.

82. Experience with the uninsured motorist coverage has indicated the advisability of delineating in the policy the arbitrable issues to be decided by the arbitrator. *Rosenbaum v. American Sur. Co.*, 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

83. Some states do not permit an agreement to arbitrate a future dispute. Illinois recently reversed this policy by statute. See Dubin, *The Uninsured Motorist: A Look at the Various Uninsured Motorist Statutes*, 15 W. RES. L. REV. 386 (1964); Kamins, *Uninsured Motorist Insurance: Panacea or Problem?*, 53 ILL. B.J. 398 (1965); McLaughlin, *Arbitration Under Uninsured Motorist Insurance*, 1962 INS. L.J. 353 (1962).



and certain crimes should be excluded. Among excepted crimes should be ranked those in which the insured's involvement bulks large, namely seduction and statutory rape and others of a similar nature.

Since I envision coupling this pain and suffering coverage to an existing life, accident and health or even a theft policy, some consideration should be given to protecting the proceeds of this recovery from the claims of creditors. Such is the customary practice now, by statute,<sup>84</sup> where benefits are payable either upon death or total and permanent disability. The statutes should be reviewed to assure that the claims of creditors could not force crime victims, who happen to have insurance coverage, to lose the small solace which that gives. On balance, the avoidance of the possibility of unnecessary charges upon the public treasury is of a higher order than the interests of a creditor.

A further advantage of this proposal is the partial alleviation of the victim's desire for revenge. The thought that vengeance might so easily be appeased delights me, for vengeance should hardly be the mainspring of justice.

I am not much persuaded, however, by the suggestion that compensation will dull the victim's cooperation in the prosecution of the offender. That criticism has never been voiced with respect to the victim of theft insurance, where the same possibility exists. Indeed, to argue by unsubstantiated innuendo is unworthy of those who would champion rather than deprecate the crime victim. Moreover, a system of state compensation is vulnerable to the same criticism and more. State compensation plans will, in a very real sense, be in competition with private insurance. The unequal nature of the competition will discourage the purchase of private insurance, all the more so where the private insurance policy contains a nonduplicating benefits clause.<sup>85</sup>

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84. MD. ANN. CODE art. 48A, § 385 (1957); N.Y. INS. LAW § 166.

85. Present group hospital and surgical policies not uncommonly contain the following proviso:

Benefits shall not be provided under this Contract for . . . any case provided for, or for which benefits *may be or could have been obtained in whole or in part* upon application therefor in the appropriate manner, or by following the appropriate procedure, under any *Federal or State Compensation Act* or similar legislation, or any case to the extent benefits are obtained under any other law of the U.S., the D. of C., or any State or political subdivision thereof . . . .

See Exclusion 6 of Family Surgical-Medical Certificate of Medical Service of D. of C.; Exclusion 9 of Preferred Hospital Service Certificate of Group Hospitalization, Inc. of D. of C.

## CONCLUSION

The best crime insurance, Professor Mueller has said<sup>86</sup> is crime prevention. The elemental truth of that assertion is obscured by the ease of its statement. Yet, for my purposes, its truth is evident since crime prevention has long been a necessary function of those insurers whose coverage extends to property crimes. Reducing the ratio of losses and the cost of insurance requires constant vigilance by the insurer — not only in underwriting the risk, but in educating the insured to conduct that might make a crime loss less probable. Present efforts range from recommending safety precautions to tight-fisted enforcement of claim procedures. Undoubtedly, more can be done and would be if insurance companies assumed a greater share of the cost of crime.

Consequently, crime prevention through insurance activity would be merely one by-product of these proposals which aim to broaden the payment structure and the insurable class of those who are crime victims through:

1. Legislation prohibiting the exclusion of crime victims from the benefits of existing coverages, except in certain limited circumstances.

2. The issuance of a "major occupational" policy to complement a basic accident policy or to substitute for it.

3. The drafting of a pain and suffering rider to be attached to almost any existing policy, with adequate provisions to safeguard the insurance company from the fraudulent claims of some policyholders who might treat this new approach as a windfall rather than as a method of alleviating their just losses.

Private insurance plans need no defenders. Their obvious flexibility and variability and, on frequent occasions, nominal cost speak for themselves. Of course, some persons will, by their own default or for good cause, reject these advantages.<sup>87</sup> But that is no reason for haste in governmental intervention, for the American

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86. Mueller, *supra* note 20, at 235.

87. In the statement of purposes for the New Jersey Temporary Disability Benefits Law, it is recognized that the prevalence and incidence of non-occupational sickness and accident among employed people is greatest among the lower income groups, who either cannot or will not voluntarily provide out of their own resources against the hazards of earnings loss caused by non-occupational sickness or accident.

N.J. STAT. ANN. § 43:21-26 (1964).

tradition of free choice for all people, rich and poor, has been a source of national pride.<sup>88</sup>

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88. It would immeasurably enlighten the discourse over crime victim compensation to admit candidly that the thrust of proposals for state compensation is predicated upon the indigency or irresponsibility of some crime victims. Confirmation for this is found in the recent California legislation for crime victim compensation for the needy. See note 19 *supra*.