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Victim Compensation And Restitution: Legislative Alternatives

In 1982, Colin Joseph was brutally struck over the head with a sawed-off shotgun. The wound produced by the shotgun was so severe, that Joseph was required to undergo emergency medical treatment and nearly died.¹ Today, Colin Joseph is still required to take the drug Dilanton to control seizures. The use of the drug Dilanton impairs one's ability to drive a car, obtain a driver's license, and engage in those ordinary activities that people enjoy in the pursuit of their life.² Medical expenses for Joseph's treatment were \$20,000.³

The man who brutally assaulted Colin Joseph was convicted in a Wyoming district court of aggravated assault and battery. In addition to being sentenced to one year in the county jail and fined \$1,000, he was ordered to make restitution to his victim in the amount of \$20,000.⁴ The Wyoming Supreme Court affirmed the conviction but reversed the sentence and held that under Wyoming law, imposing a jail sentence and awarding restitution are mutually exclusive.⁵

Until recently Wyoming provided no compensation for victims of crime other than restitution. The Wyoming Supreme Court has declared that restitution is not available if the offender is incarcerated. Even if the offender is not incarcerated, restitution is often unavailable as a practical matter. Therefore, victims like Colin Joseph would often suffer financial losses without any hope of compensation. In response, the Wyoming Legislature has acted to provide compensation for Wyoming's victims.⁶ There is little doubt that the legislature should have acted to provide compensation. There are, however, some questions raised by Wyoming's compensation program.

FACTS ABOUT CRIME

Violent crime has been occurring and continues to occur at an increasingly alarming rate. A recent report by the United States Department of Justice indicates that nationally, a violent crime is committed every 26 seconds.⁷ In Wyoming, in 1983, there were 1,219 violent crimes committed against our citizens and 19,412 crimes against their property.⁸ Assaults injured 926 victims, rape violated the personal security of 110 women, and murder ended the lives of thirty individuals.⁹

1. *Barnes v. State*, 670 P.2d 302, 303 (Wyo. 1983).

2. *Id.* at 303.

3. *Id.*

4. *Id.* at 302.

5. *Id.* at 304.

6. WYO. STAT. § 17-13-308 (Supp. 1984). See Wyoming Crime Compensation Act, WYO. STAT. §§ 1-40-101 to -119 (Supp. 1985).

7. U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES 5 (1984).

8. *Id.* at 63.

9. *Id.*

PURPOSE OF THE CRIMINAL LAW
AND PURPOSE OF THE VICTIMS' RIGHTS MOVEMENT

The broad policy underlying our system of criminal justice is preventing harm to society.¹⁰ Specifically, the purpose of the criminal law is to "prevent injury to the health, safety, morals and welfare of the public."¹¹ This important policy goal is accomplished by punishing those who have harmed society and by threatening with punishment those who may harm society in the future.¹² Criminal law seeks to prevent physical harm, such as death or bodily injury. It also seeks to prevent the taking and destroying of property.¹³

There is also a "second class" of activity the criminal law seeks to prevent. In this class, the harm that is sought to be prevented is simply a mischievous situation; or a situation of danger, as in the case of reckless driving. Also within this class are the inchoate crimes of attempt, conspiracy and solicitation, where, when the defendant's conduct is over, no member of society has suffered any damage (personal, property, or intangible) at all.¹⁴

As stated above, the purpose of our system of criminal law is to protect society.¹⁵ The victims' rights movement, on the other hand, focuses on the impact crime has on the individual victim and his or her family.¹⁶ It cannot be disputed that society as a whole is injured when a crime is committed against one of its members. However, the esoteric concept of "society being injured" by a crime means little to the victim of a brutal assault whose life may never be the same.¹⁷

The thrust of the victims' rights movement is, therefore, away from the traditional concepts of criminal justice and toward recognizing and creating new rights for the victims of crime. The victims' rights movement seeks to restore a balance to our system of justice in order that the victim, as far as possible, is made whole again by means of financial, emotional, and legal assistance. As stated by the President's Task Force on Victims of Crime: "The innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds— personal, emotional, and financial—have gone unattended. . . . Only the sustained efforts of Federal, state, and local governments, combined with the resources of the private sector, can restore balance to the criminal justice system."¹⁸

10. W. LaFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 9 (1972).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. See *supra* text accompanying notes 10-12.

16. Kiesel, *Crime and Punishment—Victim Rights Movement Presses Courts, Legislatures*, A.B.A. J. 25 (1984).

17. See *supra* text accompanying notes 1-3.

18. THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *FINAL REPORT* (Dec. 1982).

LEGISLATIVE ALTERNATIVES

Legislative initiatives responding to the needs of victims may be grouped into three broad categories. The first, and by far the most common category are laws providing some form of financial assistance. These laws include victim compensation programs and restitution. The second category includes laws that recognize certain rights of victims and seek to protect them, and to help victims understand the criminal justice process and their role in it. The most common types of legislation in this category are victim notification statutes, laws which protect victims from intimidation, and laws which allow victims to offer input into the sentencing of their assailants. The third category of legislative initiatives includes laws designed to protect special classes of victims such as children, the elderly, victims of sexual offenses, and victims of domestic violence.¹⁹

Although the other two categories are important, this comment focuses on the financial assistance alternatives: victim compensation and restitution. Specifically, this comment contains a discussion of victim compensation programs in general and the newly enacted Wyoming "Crime Victim's Compensation Act" in particular, and restitution. Financial assistance to victims meets the victim's immediate and most basic needs and should be considered of primary importance. Victims of crime and their families often suffer severe economic loss including property damage or loss, medical expenses, funeral expenses and lost wages. "Recognizing these residual financial hardships borne by victims, most state legislatures have passed laws designed to reimburse victims for at least some of their crime-related economic losses."²⁰ A significant majority of the states have enacted victim compensation programs which allocate state funds to compensate the victims of certain types of criminal activity. Additionally, most states have enacted or strengthened restitution statutes which require offenders to personally compensate their victims.²¹

Until recently, in Wyoming the recognition of the rights of victims of crime has been virtually non-existent. Prior to 1985, the only victim's rights program recognized in Wyoming was restitution. Wyoming's restitution program was of limited utility. In 1985, the Wyoming State Legislature enacted a victim compensation program. Even with its new

19. Anderson & Woodward, *Victim and Witness Assistance: New State Laws and the System's Response*, JUDICATURE, Dec.-Jan. 1985, at 223. Other victim's rights programs include: (1) Shelter services for the victims of sexual assault and domestic violence; (2) Victim Bill of Rights or victim service programs which provide various rights and services to the victims of crime; and (3) Victim participation in sentencing which allows the victim to present to the sentencing judge information on how the crime has had an impact on the victim. The bill of rights includes notification of the progress of case investigations and other important events in the criminal justice process, information on how to apply for a victim compensation award, and information on possible restitution. Counseling, secure waiting areas, and protection from intimidation are also included within the victim bill of rights. See Note, *State Legislation in Aid of Victims and Witnesses of Crime*, 10 J. OF LEGIS. 394 (1983); NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, VICTIM RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY (1984) [hereinafter cited as LEGISLATIVE DIRECTORY]; Kiesel, *supra* note 16.

20. Anderson & Woodward, *supra* note 19, at 223.

21. *Id.*

compensation program, however, Wyoming is still trails most states in the Rocky Mountain region in providing rights for its victims.²²

VICTIM COMPENSATION

At the present time, forty states, including Wyoming, and the District of Columbia, have enacted legislation compensating certain classes of victims.²³ The concept of compensating the victims of crime is not new. As many of the commentators discussing victim compensation programs note, the Code of Hammurabi contained a system of victim compensation thirty-seven centuries before the adoption of the first program in the United States.²⁴ There are two primary justifications which underlie the modern attempt to statutorily compensate victims of crime.²⁵ First, a victim compensation statute is necessary because other remedies available to the victims of crime are too restrictive, ineffective, or not viable. The second justification is a theoretical rationale which justifies the state in compensating its victims of crime.

Practical Problems with Other Remedies

The victim of a crime has a remedy in tort but the problems associated with civil recovery are legion.²⁶ Initially, the offender must be apprehended before a civil suit can be commenced against him. The victim must then finance the suit and prove his damages as well as the offender's liability. Finally, the offender is often judgment proof. If the offender had money, he may have exhausted his resources in defending himself in either the criminal or civil case. In general, a civil suit is an inadequate remedy for most victims of crime.

In the rare case of a solvent offender, however, a civil suit may fill a gap left by a victim compensation program. As most victim compensation programs do not provide for recovery of property damage and usually provide for a limited maximum award, a solvent offender may provide additional relief for the victim.²⁷

Private insurance coverage is a valuable but often costly form of protection. It is a fact that those persons who are the most in need of in-

22. See *infra* text accompanying notes 151-57. An Appendix which contains a summary of victim rights legislation in states in the Rocky Mountain Region follows this comment. The states surveyed include Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah and Wyoming.

23. Anderson & Woodward, *supra* note 19, at 223. WYO. STAT. §§ 1-40-101 to -119. (Supp. 1985).

24. McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URBAN LAWYER 346 (1976).

25. Note, *State Appellate Court Interpretations of Victim Compensation Statutes*, 10 NEW ENG. J. ON CRIM. & CIVIL CONFINEMENT 87, 91 (1984). See McAdam, *supra* note 24, at 347-53; Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 446, 461 (1973).

26. McAdam, *supra* note 24, at 347-48.

27. See Friedsam, *Legislative Assistance to Victims of Crime: The Florida Crimes Compensation Act*, 11 FLA. ST. U.L. REV. 859, 867-68 (1983-84); Note, *Compensating Victims of Crime: Evolving Concept or Dying Theory?* 82 W. VA. L. REV. 89, 92-93 (1979-80).

insurance are those who are the least able to afford the cost of insurance.²⁸ Even those who do have insurance are frequently underinsured. A further problem with insurance is that injuries suffered due to the intentional or illegal acts of another are often excluded from coverage. Insurance hardly provides complete protection for the victim of crime. Private insurance, like a civil suit, can supplement but cannot replace victim compensation programs.²⁹

Another suggested remedy for victims of crime is welfare. Although welfare programs in some states may aid some victims in limited circumstances, overall they are an inadequate remedy both theoretically and practically.³⁰ In theory, welfare is to provide benefits to citizens who are generally in need rather than to provide aid to victims of crime whose need arises due solely to the crime. In practice, some of the prerequisites to receiving benefits, such as residency, and income requirements reduce the effectiveness of using welfare to aid the victims of crime.³¹

The final alternative to a victim compensation program is restitution. Restitution looks to the offender, rather than the state for payment to the victim. Since restitution involves a direct payment from the offender to the victim, it has the added benefit of assisting in the rehabilitation of the offender.³² There are, however, several problems associated with the use of restitution. First, the offender must be apprehended, and then plead *nolo contendere* or guilty, or be found guilty.³³ Second, not all crimes are suitable for imposing restitution or restitution may not be allowed if the offender is sentenced to prison. Third, there is a concern that imposing restitution may create a feeling of resentment on the part of the offender, which in turn, may create problems for the victim and his family. Fourth, the offender may be unable to pay an award of restitution, or there may be superior claims to any financial resources the offender may have. Finally, an award of restitution may impair the offender's chances for probation or parole:

When restitution is a condition of probation, failure to keep the payments current is a violation of probation possibly leading to revocation of the privilege, and thus, in some ways, the process begins to resemble imprisonment for debt. A further problem . . . the possibility of a wealthy offender "buying his way out"—has led many commentators to reject the procedure as a denial of equal protection.³⁴

However, like civil suits against solvent offenders, an award of restitution from a solvent offender may provide additional relief to the victim

28. McAdam, *supra* note 24, at 348; see Lamborn, *supra* note 25, at 454-55.

29. Friedsam, *supra* note 27, at 868. See McAdam, *supra* note 24, at 348.

30. Lamborn, *supra* note 25, at 456-58. See Note, *supra* note 27, at 93-94.

31. Note, *supra* note 27, at 93-94.

32. McAdam, *supra* note 24, at 348-49. See Lamborn, *supra* note 25, at 450-53; Friedsam, *supra* note 27, at 866-67. See *infra* note 140.

33. McAdam, *supra* note 24, at 348-49.

34. *Id.* at 349, quoting Comment, *Rehabilitation of the Victims of Crime: An Overview*, 21 U.C.L.A. L. REV. 317, 324-25 (1973).

for those injuries and losses which are not compensated under a victim compensation program.

Thus the four major alternatives to a state program of victim compensation—tort recovery, insurance, welfare, and restitution—are unsatisfactory. This indicates the need for a comprehensive victim compensation program.³⁵

Theoretical Rationale

Although victim compensation programs are generally accepted as beneficial to society, before such a program can be enacted, legislators must be shown the benefits which will be achieved by a program so that they may be convinced that a victim compensation program should be enacted.³⁶ There are five generally accepted reasons why victim compensation legislation should be enacted.³⁷

One argument in support of victim's compensation legislation, and the one which should be considered the weakest reason, is that the state, by its apprehension and imprisonment of the offender, impedes the victim's tort remedy.³⁸ The fallacy of this proposition is two-fold. As stated above, one problem with a victim's tort remedy is a *failure* to apprehend the offender. Apprehension can only increase the victim's chance of a tort recovery. A second problem is that most criminals lack sufficient assets to satisfy a judgment. The criminal's insolvency can hardly be traceable to any act of the state and therefore it is difficult to claim that the state has impaired the victim's tort remedy. In fact, by apprehending the offender, the state has eliminated one barrier to the victim's tort recovery. Although this first justification does not stand under scrutiny, there are four additional justifications for a victim's compensation program which are quite compelling.

First, out of a sense of fairness, we owe something to our victims of crime. For too long society has ignored the victims of crime while at the same time the offender's rights have increased dramatically. Aside from the many constitutional protections the offender receives, once an offender is convicted and incarcerated, society feeds, clothes, houses and often educates or trains him.³⁹ In most states the offender's victim receives nothing from the criminal justice system other than a vague sense of justice when the offender is incarcerated.

Second, there is a welfare rationale. This rationale is grounded upon the premise that an innocent victim ought to be entitled to aid, in order to maintain that degree of dignity, security and comfort which he needs for himself and his family.⁴⁰ The underlying theory of this rationale is that

35. *Id.*

36. Note, *supra* note 27, at 94.

37. McAdam, *supra* note 24, at 349.

38. *Id.* at 352-53.

39. *Id.* at 349-50. See Friedsam, *supra* note 27, at 863-64.

40. McAdam, *supra* note 24, at 350-51. See Friedsam, *supra* note 27, at 863-64; Note, *supra* note 27, at 97.

society has undertaken the burden to assist other classes of society, such as the aged and the poor, who are in need. The victims of crime are an additional class of citizens who are no less deserving of financial assistance from society.

Third, there is a duty owed by the state to its citizens to protect them from crime. The state has exercised its police power by enacting criminal laws and punishing offenders. The state provides society with law enforcement personnel to enforce the criminal law and to that end it is the responsibility of law enforcement personnel to detect and prevent crime in order to protect society. Thus, when a citizen becomes the victim of a crime, the state has breached its duty to protect.⁴¹ This duty of the state is a moral duty, similar to that discussed in the preceding paragraph. Because this duty is merely a moral one, the state is free to condition recovery for its breach by the establishment of any limitations it chooses. These limitations are frequently expressed as maximum awards and exclusions from recovery under the typical victim compensation program.

The fourth rationale for a victim's compensation program is that the program facilitates crime detection and prevention.⁴² All victim compensation statutes only permit recovery if the victim comes forward and cooperates with law enforcement authorities. The theory is that more crimes will be reported by those who may qualify under the compensation program.⁴³ It can be assumed that with more crimes being reported, a greater number of offenders should be apprehended. Additionally, many programs allow individuals to recover who are injured while attempting to prevent a crime or apprehend a criminal. The goal of greater crime detection and prevention justifies adopting victim compensation statutes along with companion legislation which grants awards to intervenors or "good samaritans" injured while trying to prevent the commission of a crime.⁴⁴

None of the five theoretical rationales independently justify a victim compensation program. However, when the last four are considered together, along with the lack of realistic and viable alternatives, they present a persuasive argument to adopt a victim's compensation program.

COMPONENTS OF VICTIM COMPENSATION PROGRAMS

Victim compensation legislation requires the state to establish a pool of funds to provide financial assistance for victims of crime who meet certain statutory criteria.⁴⁵ A typical victim compensation statute may be divided into four sections: eligibility, administration, compensation, and funding.⁴⁶

41. McAdam, *supra* note 24, at 351-52.

42. *Id.* at 353.

43. *Id.*

44. *Id.*

45. LEGISLATIVE DIRECTORY, *supra* note 19, at 1.

46. Note, *supra* note 25, at 93.

Eligibility

The victim's eligibility for benefits may be divided into two basic categories.⁴⁷ First, the victim/claimant must meet certain statutory criteria. Second, the victim must meet certain procedural requirements.

Statutory Criteria

In all compensation programs, the victim is required to report the crime within a specific time to the appropriate state or local law enforcement authorities. The victim must also cooperate in the investigation of the crime and prosecution (if any) of the criminal.⁴⁸ However, the victim or his dependents may be awarded compensation under the victim compensation program even though no arrest is made.⁴⁹ The requirement of promptly reporting the crime to law enforcement authorities will assist in achieving one of the purposes of enacting a victim compensation program—crime detection and prevention.

Under many victim compensation programs benefits are awarded to third parties. For example, in many programs the definition of victim includes intervenors or "good samaritans" who are injured when they attempt to assist the original victim or law enforcement authorities.⁵⁰

In order to prevent possible fraud and collusion, most states have enacted a family member exception to their programs. Under this exception, a victim is ineligible for compensation if he falls within certain enumerated relationships to the offender. For example, family members of the criminal and others living with him are often ineligible for compensation.⁵¹

Victim compensation programs typically limit eligibility to recovery for statutorily recognized losses and injuries. All victim compensation statutes pay for direct pecuniary loss due to the personal injury or death of the victim. This includes medical expenses, lost earnings, funeral expenses, and other reasonable expenses approved by the compensating agency.⁵² The majority of states, however, do not allow compensation for non-physical injuries or property loss. The reasons most frequently cited for these exclusions are the potential cost of compensating victims for

47. *Id.*

48. *Id.* at 94-96.

49. *Id.* at 93.

50. *Id.*

51. *Id.* at 97-98. There is substantial criticism of this exclusion because of the inequitable results it causes. 'Criticism is justifiably directed at the incongruous results of this sort of provision, under which a meritorious case involving relatives (however defined) receives no consideration while a less deserving victim receives compensation only because his attacker was a stranger. This inequitable conclusion is tolerated for the sake of preventing fraud.' McAdam, *supra* note 24, at 362. See, e.g., *Weisinger v. Van Rensselaer*, 79 Misc. 2d 1023, 362 N.Y.S.2d 126 (N.Y. Sup. Ct. 1974) where the claimant had been shot in the chest by his distraught wife. Even though they had been separated for about a year, the compensation claim was denied.

52. McAdam, *supra* note 24, at 357. Additionally, many states also provide compensation for counseling and rehabilitation of the victim. See NEB. REV. STAT. § 81-1819 (1981).

lost and destroyed property. An additional reason for these exclusions is the possibility of fraudulent claims. Personal injuries are viewed as more tangible and less susceptible to fraud or exaggeration. Further, property is often recovered by the police and it is more frequently insured.⁵³

A further requirement in most states is that the victim must sustain a "minimum economic loss directly due to a statutorily recognized crime."⁵⁴ This requirement is considered by some to be a controversial aspect of victim compensation programs. The typical requirement is that the victim must sustain at least \$100.00 in damages to be eligible for an award. The major argument against such a minimum loss requirement is that it leaves many persons, with legitimate claims, without a remedy. Proponents of the requirement argue that the requirement reduces the overall cost of programs and avoids trivial claims.⁵⁵ One proposed compromise is to establish a minimum loss requirement of \$50.00.⁵⁶ The best approach, however, is to establish a \$100.00 minimum loss requirement. This will reduce the initial cost of the program. Then, depending on the financial status and experience of the program, the amount can be adjusted downward to enable persons with smaller claims to obtain benefits.

A final limitation on recovery in most states is a financial need requirement. This requirement is the most controversial aspect of victim compensation programs.⁵⁷ This limitation requires the victim to make a showing of financial hardship before he can be eligible for an award.⁵⁸ The commentators who have considered the financial need requirement are generally opposed to such a provision.⁵⁹

The only major justification for the financial need requirement is to reduce the overall cost of the victim compensation program.⁶⁰ The counter arguments, however, completely outweigh this consideration. First, the requirement forces victims with just claims to be without a remedy. The loss sustained by the rich or middle class victim is as real and as substantial as that sustained by the impoverished victim.⁶¹ Second, the financial need requirement is contrary to the theory of victim compensation. If persons are entitled to receive compensation because "they bear the burden of criminal victimization, it makes little sense to compel them to deplete their resources in order to qualify for benefits."⁶² Additionally, the col-

53. McAdam, *supra* note 24, at 357. See Friedsam, *supra* note 27, at 873.

54. Note, *supra* note 25, at 94-95.

55. Note, *supra* note 27, at 103. It should be noted that the minimum loss requirement is not what is commonly called a "deductible." Under this requirement, if a victim receives injuries amounting to \$75 they will recover nothing. If the victim's injuries were \$150 they will recover the entire \$150. If the requirement was a deductible, the victim would only receive \$50 (\$150 loss, minus the \$100 minimum loss requirement).

56. *Id.*

57. McAdam, *supra* note 24, at 355. See Friedsam, *supra* note 27, at 875-82; Note, *supra* note 27, at 104.

58. McAdam, *supra* note 24, at 355.

59. *Id.* See Friedsam, *supra* note 27, at 881-82.

60. Note, *supra* note 27, at 104.

61. *Id.* at 355.

62. *Id.*

lateral source limitation, discussed below, would mean that those with adequate resources, are probably insured, and would be precluded from recovery.⁶³ Third, the financial need requirement gives the victim compensation program a "welfare image." As a result, there is a hesitancy on the part of victims to "come forth and apply for compensation, and a corresponding drag on crime reporting that is unintentionally imposed by such indignities."⁶⁴ Fourth, such a requirement increases administrative expenses by requiring difficult and time-consuming decisions, regarding financial hardship.⁶⁵ Thus, the financial need requirement has little to recommend it. The current trend is away from imposing such requirements.⁶⁶

Procedural Requirements

The second set of requirements which must be met by victims in order to obtain benefits are procedural.⁶⁷ In most programs the victim must comply with mechanical filing procedures in order to receive the award.⁶⁸ Typically, the victim must file a claim for compensation with the appropriate state agency within a given time period. The reporting and filing requirements are necessary to ensure the efficient and timely administration of the compensation program.

Administration

Each victim compensation statute establishes some form of compensation administration and provides the general procedures for implementing and operating the victim compensation program. Administration of the program may be carried out by a new administrative agency, or it may be delegated to an existing administrative agency such as the state worker's compensation division; or it may be delegated to the state court system.⁶⁹ The statutes also provide the general procedures authorizing the compensation division to make rules, regulations, and policies regarding victim compensation.⁷⁰ Compensation divisions are normally required to make the public aware of their victim compensation programs through advertising or through public service announcements.

The commentators who have considered the issue of administering a victim compensation program prefer the establishment of a new administrative agency.⁷¹ This position is based primarily on the advantage of expertise. "[T]he development of expertise in this relatively new area of the law is encouraged when a newly-minted administrative agency is

63. Note, *supra* note 27, at 104.

64. McAdam, *supra* note 24, at 355-56.

65. Note, *supra* note 27, at 104. See McAdam, *supra* note 24, at 356.

66. Note, *supra* note 27, at 104.

67. Note, *supra* note 25, at 95.

68. *Id.*

69. *Id.* at 102. See McAdam, *supra* note 24, at 353-55.

70. Note, *supra* note 25, at 102.

71. McAdam, *supra* note 24, at 354.

used."⁷² In addition, a new agency avoids the transfer of improper attitudes "that existing agencies continually perpetuate."⁷³

Although the above considerations are important, it would appear that expertise could be acquired within the framework of a pre-existing agency with expanded jurisdiction over the victim compensation program.⁷⁴ In addition, the cost of establishing a new agency is significantly greater than the cost of expanding a pre-existing agency.⁷⁵ Therefore, depending on circumstances such as population and the crime rate, a victim compensation program could be effectively administered through an existing agency.

Compensation

There are three predominant methods of paying victims under a victim compensation program. These methods include lump sum payments, periodic payments over time, and emergency awards. These methods, when used in combination, allow flexibility in the program's administration.⁷⁶

Irrespective of the method of payment or combination of methods used, typically there is a maximum amount of compensation recoverable under a single claim. The maximum award recoverable under various victim compensation programs ranges from a low of \$5,000 to a high of \$50,000.⁷⁷ The majority of states have established \$10,000 as the maximum award available.⁷⁸ The establishment of a maximum award can best be rationalized by the legislature's concerns over fiscal control.⁷⁹

Almost all states have adopted a collateral source limitation as a limit on the amount of the award. This limitation reduces an award by the amount of financial assistance received by the victim from collateral sources.⁸⁰ The programs include collateral sources such as tort recovery, insurance, restitution, and welfare reimbursements in determining an award. The collateral source limitation prevents a windfall or double recovery by victims.⁸¹ It follows, therefore, that only those victims who are truly in need receive benefits.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 364. Emergency awards are only granted in certain circumstances and are available for doors, locks, and windows which are damaged or broken during the commission of a crime. See COLO. REV. STAT. § 24-4.1-112 (1982) (\$500 emergency award); NEB. REV. STAT. § 81-1820 (1981) (\$500 emergency award).

77. McAdam, *supra* note 24, at 364.

78. *Id.*

79. Note, *supra* note 25, at 109.

80. McAdam, *supra* note 24, at 364. See COLO. REV. STAT. § 24-4.1-110 (1982); NEB. REV. STAT. § 81-1817 (1981).

81. McAdam, *supra* note 24, at 364. To illustrate the operation of the collateral source limitation, assume the victim compensation program has a maximum award of \$10,000 and the victim has a \$15,000 compensable injury. If the victim has insurance coverage of \$10,000 he would receive an award of \$5,000. If the victim had insurance coverage of \$20,000, he

Funding

Every state statute provides some method for funding the victim compensation program.⁸² In many states, funding is based upon appropriations from the state's general revenues and is supplemented by the state's right of subrogation to the victim's right to recover in subsequent civil litigation against the offender.⁸³ Revenue is generated in some states by imposing additional court costs, percentage surcharges, or fines upon the offender who either has plead *nolo contendere* or guilty, or has been found guilty. These costs, surcharges, and fines are "generally earmarked for the compensation program's use."⁸⁴

A recent trend in victim compensation program funding since the now famous "Son of Sam" murders in New York City, has been the implementation of "profits of crime" or "notoriety for profit" statutes.⁸⁵ Under these statutes, the payment to the offender by the news or entertainment media, for the right to reproduce the crime and the surrounding events, is retained by the state in an escrow account for the benefit of the victim or is placed into the victim compensation fund.⁸⁶ The policy of preventing someone from profiting from their own wrong is the justification for these statutes.

Thus, victim compensation programs can be funded from three sources: appropriation from the state's general revenue (supplemented by a right of subrogation); additional court costs and fines; and a profit from crime statute. Although the cost of a compensation program is a consideration, it should be noted that no jurisdiction initiating a victim compensation program has repealed it; rather, most states have expanded benefits. Experience has shown that the cost is not exorbitant.⁸⁷ The continual expansion of programs by states which have enacted them, demonstrates that these states have concluded that the benefits from such a program clearly outweigh the costs.

When one considers the extreme financial burden that the victims of serious crimes may experience, a solid, comprehensive victim compensation program can prove invaluable in assisting the victim. For example, elderly persons frequently find themselves the victims of serious crimes because they are seen by many criminals as helpless and "easy targets." These elderly victims, who are often living on fixed incomes, cannot afford the medical expenses that may result from a violent attack on their person. Thus in such cases, victim compensation programs provide a source of funds to ease the burdens of unexpected expenses which this class of victims simply cannot afford.

would receive no award. If the victim had no insurance, he would receive the \$10,000 maximum award. The insurance company is not subrogated to the victim's right to recover from the fund.

82. Note, *supra* note 25, at 113.

83. *Id.* at 113-14.

84. *Id.* at 114 (citation omitted).

85. *Id.*

86. *Id.*

87. Lamborn, *supra* note 25, at 461.

The indigent members of society are also likely to find themselves the victims of serious crime. This class of likely victims is also unable to bear the financial burdens that a criminal act imposes. It is unlikely that members of this class will have insurance and even if they do, they are likely to be underinsured. Additionally, the poor are often unaware of any legal rights they may have. The poor might look to the state for relief. This relief would typically be in the form of welfare. However, as stated above, welfare is an inadequate remedy to the poor. Welfare provides benefits to citizens in order that they may maintain a certain minimum quality of life. It is not designed to provide benefits for victims of crime. A victim compensation program is specifically tailored to the needs of victims of crime, including the poor.

THE WYOMING CRIME VICTIMS COMPENSATION ACT

The Wyoming Legislature, during the 1985 general session, enacted a victim compensation program entitled the "Crime Victims Compensation Act."⁸⁸ In light of the above considerations I will discuss the central provisions of the Crime Victims Compensation Act. The Act addresses many of the problems victims suffer, however, the Act may prove to be deficient in a number of areas.

Maximum Award

The maximum award available to a victim or the victim's dependents is \$10,000.⁸⁹ Although a majority of states have adopted a \$10,000 maximum award, this amount is inadequate. Even though most victims are not injured to the extent of \$10,000, there should be a larger award available for those few victims who incur losses in excess of \$10,000. Although this limit may be justified because Wyoming's program is new, it should be reviewed later and increased, if possible, in order to more fully compensate victims who suffer severe losses.

Emergency Award

The Act provides for an emergency award of up to \$1,000 if undue hardship would result to the victim if an immediate award is not provided.⁹⁰ This provision is designed to provide immediate relief to the victim or the victim's dependents for expenses relating to emergency medical treatment and for funeral expenses. Any emergency award granted is deducted from the final compensation award.

Minimum Loss Requirement

The Act requires that the victim or the victim's dependents incur an economic loss of \$100 or more in order to be eligible for a compensation award.⁹¹ This will reduce the initial cost of the program below what it would

88. WYO. STAT. §§ 1-40-101 to -119. The Act will become effective May 23, 1985.

89. *Id.* § 1-40-109(b).

90. *Id.* § 1-40-111.

91. *Id.* § 1-40-106(a)(iii).

be without the requirement. Depending on the financial condition and experience of the program, this minimum loss requirement should be adjusted downward at a later time in order to allow victims with smaller, but still legitimate claims, to obtain benefits.

Compensable Injuries and Losses

Under the Act, compensable injuries and losses include medical and hospital expenses, loss of earnings, loss of future earnings, loss of support to the victim's dependents, including home maintenance and child care, and funeral expenses.⁹² Additionally, any other loss resulting from the injury or death to the victim may be compensable if deemed reasonable.⁹³ Counseling and rehabilitation services are also important considerations for injured victims. The Act makes such services compensable by including them under the definition of medical expenses.⁹⁴

In order to prevent fraudulent claims and an increased financial burden on the program, most states specifically exclude property loss. The Wyoming Act does not specifically exclude property loss. However, property loss appears to be excluded from compensation under section 1-40-110(a) by negative inference. This section defines the type of losses for which compensation will be awarded. Under this section, all compensable losses and expenses must result from the personal injury or death of the victim. Although property loss may be a result of the crime, it does not result from the personal injury or death of the victim.⁹⁵ Therefore, property losses appear to be excluded under the Wyoming Act.

Compensation for pain and suffering is excluded from most victim compensation programs due to the speculative nature of such claims. Again, the Wyoming Act does not mention pain and suffering as a compensable loss, nor does it specifically exclude such claims. However, compensation for pain and suffering appears to be excluded from recovery under the Act. Although pain and suffering are directly related to the victim's personal injury, the Act refers to compensable injuries and losses in terms of "expenses," "economic loss," and "loss."⁹⁶ This language seems to imply that the loss must have an economic basis. While pain and suffering are proper elements of recovery under a personal injury tort claim, for purposes of the Act they are not "losses" in an economic sense. Thus the Act limits losses to true economic losses resulting from the personal injury or death of the victim.⁹⁷

Both the property exclusion and the pain and suffering exclusion are justified. Property losses are often covered by the victim's insurance. Property losses are often difficult to appraise. Awards must be limited if the program is to continue to provide relief for those victims who have suf-

92. *Id.* §§ 1-40-110(a), -102(a)(v).

93. *Id.* § 1-40-110(a)(iv).

94. *Id.* § 1-40-102(a)(vi).

95. *Id.* § 1-40-110(a).

96. *Id.*

97. *Id.*

ferred clear losses from the crime. If speculative claims are compensated, then the program's ability to meet the tangible losses, which should clearly be compensated, may be imperiled.

Financial Need Requirement

Under the Wyoming Act, a showing of financial need or hardship is not a prerequisite to recovery. However, the need for financial aid is a relevant consideration in determining whether to award compensation. Thus, while not a prerequisite for recovery, financial status of the victim still forms a guideline for determining whether an award should be given. This "middle course" is a poor choice.⁹⁸ An award made to victims not experiencing financial hardship burdens the program, and such a standard increases administrative expense by requiring difficult and time consuming decisions as to a victim's financial status.⁹⁹

On the other hand, by making financial condition a relevant consideration, the Wyoming Act suffers from the same criticisms discussed above with regard to financial need requirements in general. It fails to compensate victims who have suffered real losses. The Wyoming Legislature should eliminate the financial condition consideration because it increases expenses, produces inequitable results, and is contrary to the theory underlying victim compensation programs.

Recovery

Victims, victims' dependents, and intervenors or "good samaritans" who are injured while attempting to prevent a crime, apprehend a criminal, or help the victim, can recover under the Act.¹⁰⁰ By including intervenors under the statutory definition of "victim," the Act entitles intervenors and their dependents to the same benefits as that accorded to victims and the victims' dependents.¹⁰¹ This is appropriate because an intervenor who suffers a loss is as much a victim of the crime as the original victim.

Family Member Exclusion

To prevent fraud and collusion, most states enacting victim compensation programs have included a family member exclusion. The potential for inequitable results caused by such an exclusion is significant. The Wyoming Legislature has achieved a sensible compromise by providing that the victim or the victim's dependents will not be denied compensation solely because the victim is "a relative of the offender or was living with the offender as a family or household member at the time of the injury or death."¹⁰² The Act does, however, allow the commission to make an award, in such circumstances, only if it "can reasonably determine the

98. *Id.* § 1-40-110(b)(ii).

99. McAdam, *supra* note 24, at 356.

100. WYO. STAT. §§ 1-40-102(a)(iv), (ix), -106(a), -110.

101. *Id.* §§ 1-40-102(a)(ix), -110.

102. *Id.* § 1-40-106(b)(i).

offender will receive no economic benefit from the compensation."¹⁰³ If the commission realistically looks to family member relationships with an eye toward fraud and collusion, a deserving victim can be compensated while the offender will not benefit from his acts. This provision should prove to be a realistic and workable compromise.

Collateral Source Limitation

The Wyoming Act has a rather unique form of collateral source limitation. This Act provides as follows:

In determining the amount of compensation to be allowed by order, the commission shall consider amounts received or receivable from any other source or sources by the victim or his dependents as a result of the incident or offense giving rise to the application. The commission shall not deny compensation solely because the applicant is entitled to income from a collateral source.¹⁰⁴

As stated above, the collateral source limitation in most states reduces the award by the amount of financial assistance received by the victim from collateral sources. Under the Act, when determining the amount of compensation to be awarded, the commission need only consider the victim's collateral sources. The commission does not have to deduct all amounts received from collateral sources from an award. Additionally, the Act specifically provides that compensation shall not be denied solely because the victim or the victim's dependents is entitled to income from a collateral source.

This provision's usefulness is questionable. The policies behind the collateral source limitation are to reduce the overall cost of the program and to prevent a double recovery by victims. By merely making collateral sources a relevant consideration, victims may obtain an award in addition to their collateral sources. Even if a collateral source is identified, it will not necessarily reduce an award. This also presents the real possibility of double recovery by some victims. A true collateral source limitation is necessary to ensure that only those who actually suffer a loss due to the crime recover benefits. This provision of the Act should be re-examined and a true collateral source limitation should be enacted in its place.

Compensable Criminal Acts

Under the Wyoming Act, a victim, or the victim's dependents, are entitled to compensation for injuries or death which is the result of a criminal act.¹⁰⁵ "Criminal act" is defined under the Act as "an act committed or attempted. . . which is punishable as a felony. . . ."¹⁰⁶ Thus the

103. *Id.*

104. *Id.* § 1-40-110(d).

105. *Id.* § 1-40-106(a).

106. *Id.* § 1-40-102(iii).

Act specifically excludes misdemeanors. Because misdemeanors are excluded from the provisions of the Act, a significant number of victims will be without any remedy.

Some of the misdemeanors excluded from the Act include simple assault and battery, fourth degree sexual assault, and vehicular homicide.¹⁰⁷ Victims of such crimes have as much of a right to be compensated for their injuries as do victims of a "felony." The \$100 minimum loss requirement would prevent trivial claims from being filed. Therefore, the only effect of this provision is that victims of misdemeanor offenses will not be compensated. The economic loss to a victim is neither greater nor less due to the crime's classification.

Funding

The Wyoming program derives its funding from four sources. The Wyoming Legislature has made an appropriation of \$75,000 from the general fund.¹⁰⁸ This amount may well be insufficient. In 1983, there were 1,219 violent crimes committed in Wyoming.¹⁰⁹ Even with a minimum loss requirement and a true collateral source limitation, there is a real possibility that the claims alone will exceed the initial funding appropriation. There is also considerable administrative expense involved in the program. Under the Act, every application for an award of compensation requires a full hearing by the Crime Victims Compensation Commission.¹¹⁰

This initial appropriation is not the program's only source of funding. Funding is also provided through a "surcharge" assessed in certain criminal cases. A defendant who pleads guilty, or is found guilty of a felony is assessed a surcharge of twenty-five dollars, in addition to other penalties which may be imposed. For most misdemeanors there is a surcharge of fifteen dollars.¹¹¹ Since a plea of *nolo contendere* is generally treated as equivalent to a plea of guilty, this section should be amended to provide for the imposition of the same surcharge when an offender pleads *nolo contendere*.

The program also receives funding through restitution. If the offender is ordered to make restitution, any payments made by him are paid to the commission to the extent of any award *already paid* to the victim.¹¹² The amount of the restitution award paid to the commission is then used as a set off against a judgment in favor of the state in a civil action against the offender.¹¹³ This language is a reference to a prior section of the Act which states that when an award of compensation is made to the victim,

107. *Id.* §§ 6-2-501, -306 (1977); *Id.* § 6-2-106(a) (Supp. 1984).

108. *Id.* § 1-40-119(2). There is a possibility of matching federal funds through a block grant program. 50 Fed. Reg. 16,3353 (1985) (to be codified at 28 CFR pt. 33) (proposed Jan. 24, 1985).

109. See *supra* text accompanying notes 7-9.

110. WYO. STAT. § 1-40-108 (Supp. 1985).

111. *Id.* § 1-40-119.

112. *Id.* § 1-40-112(c).

113. *Id.*

the state becomes subrogated to any right of action the victim has against the offender. The state may bring an action against the offender for the amount of the victim's damages.¹¹⁴ It seems that for the state to retain the portion of the restitution award paid to the commission, the state must bring a civil action against the offender. If the state fails to bring a civil action, the victim is arguably entitled to the entire restitution award. If the restitution order is in excess of the award made by the commission, the victim is entitled to this excess.¹¹⁵ If a compensation award *has not yet been* paid to the victim and restitution is made by the offender, the compensation award is reduced by the amount of restitution paid.¹¹⁶ To the extent of any compensation award made, the state is then left to pursue a civil action against the offender under its right of subrogation.¹¹⁷

The same result could be accomplished in a simpler fashion by having a true collateral source limitation as well as the subrogation provision. An award of restitution is considered a collateral source. If the restitution was made prior to the compensation award, the compensation award could be reduced accordingly. The state could then proceed to collect the amount of the compensation award paid through its subrogation rights. If restitution was made after the compensation award was paid, under a true collateral source limitation, then the victim would be required to reimburse the state up to the amount of the compensation award.

Finally, there is a profit from crime, or notoriety for profit, provision. Profits received from contracts for publication or other media rights are placed into an escrow account for five years in order to satisfy a civil judgment in favor of the victim. At the end of the five-year period, the remaining funds are placed into the crime victims compensation account.¹¹⁸ If compensation is paid to a victim in such circumstances, under the subrogation provision, the state is entitled to a judgment and is entitled to have it satisfied from the escrow account.¹¹⁹ If the surcharge, restitution, and profits from crime provisions generate sufficient revenue, then the only major problem with the program's funding under the Act is the insufficient initial appropriation from the legislature. This initial amount should be large enough to cover administrative costs and claims made before the program receives the revenue produced by other sources. Wyoming's appropriation is not large enough. If the legislature is concerned with fiscal control, then it should provide a larger initial amount with a provision that the program return a portion of the initial funding after the high "start-up" costs have been recovered.

114. *Id.* § 1-40-112(a).

115. *Id.* § 1-40-112(c)(i).

116. *Id.* § 1-40-112(c)(ii).

117. *Id.* § 1-40-112(a). Under the subrogation provision, the state is subrogated to the victim for the entire amount of damage the victim has suffered, not merely for the amount of compensation awarded. Under this section, however, if the state receives a judgment in excess of the amount of compensation paid, then the victim is entitled to the excess.

118. *Id.* §§ 112(d), (e), (f).

119. *Id.* § 112(a).

Administration

The body responsible for the administration of the Act is the Crimes Compensation Commission. The commission was created within the office of the Attorney General.¹²⁰ Thus the Act creates a new agency within a pre-existing agency. The commission, even though an agency, has been exempted from certain provisions of the Wyoming Administrative Procedures Act (WAPA).¹²¹

As stated above, one advantage to establishing a new agency is expertise. However, taking into consideration such factors as population and the crime rate, a victim compensation program administered by an existing agency can be more efficient. An existing agency can acquire expertise. Placing the program's administration within an existing agency can be significantly less costly than establishing a new agency.¹²²

In Wyoming, with its low population, it would have been more appropriate to delegate the responsibility for administration of the Act to a pre-existing agency with expanded jurisdiction rather than establish a new agency. Specifically, the State Worker's Compensation Division could easily have assumed the responsibility for administering the program. The State Worker's Compensation Division has already acquired a significant degree of expertise in the processing of claims for compensation by those who have been injured. Processing of claims for worker's compensation involves determining the propriety and the amount of the award under the statutory requirements. Considering the degree of similarity between the State Worker's Compensation programs and the Act, it is apparent that the two involve quite similar duties and responsibilities. Thus, the State Worker's Compensation Division could have assumed the responsibility for administering the Act efficiently and at a lower cost.

The statutorily imposed method for determining compensation claims by the commission will result in high administrative expenses and will place heavy burdens on the program. It will also delay and deter victims from pursuing their claims. In the majority of states enacting victim compensation programs, a claim for compensation is handled similarly to a claim for worker's compensation. The victim/claimant first files a claim for compensation with the agency administering the victim compensation program. The claim is then processed by the agency and an initial determination is reached and the claim is either approved and an award granted, or it is denied. If the claim is denied or the victim disputes the amount of the award, then the victim may request a hearing by the agency.

Under the Wyoming Act, every application filed for a compensation award with the commission must be accompanied by a full hearing in order

120. *Id.* § 103(a).

121. *Id.* § 104(c). The commission is exempt from the WAPA in its rulemaking and in the conduct of hearings. However, the commission is still under the WAPA for most purposes including the definition of an agency. See WYO. STAT. § 16-3-101(b)(i) (1977).

122. See *supra* text accompanying notes 72-75.

for the victim to obtain compensation.¹²³ At a minimum, the hearing must include the taking of evidence, a transcript, findings of fact, and conclusions of the amount of compensation to be awarded.¹²⁴ Additionally, the power of the commission in conducting the hearing includes the power to subpoena witnesses, require the production of records and other evidence, request access to reports of investigations and medical records, direct medical examinations of victims, and proscribe rules and procedures for its hearings.¹²⁵ It is clear that requiring a hearing in all cases is costly, inefficient, and unnecessary. A preferable approach is the one currently in use in other states. Once an application is filed, if the victim is clearly entitled to compensation, it should be awarded without the necessity of a hearing. In close cases, a hearing could be required or the claim could be denied with the victim then entitled to request a hearing. This would reduce the cost of the program, increase efficiency, and allow the program to be more responsive to the needs of victims.

Judicial Review

Under the Act, the commission's promulgation of rules and the *conduct of hearings* are exempt from the provisions of the Wyoming Administrative Procedures Act (WAPA).¹²⁶ This presents the question of whether, by exempting the conduct of hearings from the WAPA, the legislature has precluded judicial review of the commission's *decision* whether to award compensation.

The "legislative intent to restrict judicial review of an administrative action must be clear and persuasive reason must exist to believe that restriction was the legislative purpose."¹²⁸ In order to preclude judicial review of administrative actions, if the statute is not specific in denying that review, it must give "clear and convincing evidence of an intent to restrict" judicial review.¹²⁹ The mere failure of the legislature to specifically provide for judicial review is no evidence of any legislative intent to withhold judicial review.¹³⁰

The judicial review provision of the WAPA provides as follows:

Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, or any per-

123. WYO. STAT. § 1-40-108(a) (Supp. 1985).

124. *Id.* § 1-40-108(b), (c), (d).

125. *Id.* § 104(b)(v), (i), (viii), 104(c).

126. *Id.* § 104(c).

127. *Id.* § 114(a).

128. *Holding's Little America v. Board of County Comm'rs*, 670 P.2d 699, 702 (Wyo. 1983).

129. *Id.* at 703.

130. *Id.*

son affected in fact by a rule adopted by an agency, is entitled to judicial review. . . .¹³¹

The Act merely provides that the promulgation of rules and the conduct of hearings are exempt from the WAPA. There is no specific language in the Act which precludes judicial review nor is there any legislative intent to withhold judicial review of the commission's decisions regarding compensation. There is a significant distinction between the conduct of hearings and the final decision resulting from such hearings. It thus appears that a final decision of the commission is subject to judicial review under the WAPA. The interests of the state are best served by a policy which allows judicial review of agency actions.¹³²

RESTITUTION

Restitution, although not actually a section of many programs, is an important aspect of victim compensation. In many cases restitution can provide financial assistance to the victims of crime and their families. As stated above, however, in many cases restitution is of marginal utility. Still, restitution can effectively *supplement* a victim compensation program.

Traditional criminal sanctions have proved unsuccessful in furthering the aims of our criminal justice system.¹³³ Sentencing defendants to serve sentences in "overcrowded and expensive prisons" has failed to protect society or rehabilitate the offender.¹³⁴ While in prison, offenders are not rehabilitated but are subject to abuse and experience an environment in which they learn values that "make them more dangerous to society than they were before confinement."¹³⁵

On the other hand, society has become angry and frustrated with the "system of assembly line justice" in which convicted offenders are placed on probation or parole and let free to commit further crimes.¹³⁶ In the search for solutions to this perplexing situation, legislators and legal reformers "have increasingly turned to restitution as a constructive alternative to the severity of imprisonment and the leniency of probation."¹³⁷ A well developed system of restitution can offer benefits that the current criminal legal system presently lacks.¹³⁸

131. WYO. STAT. § 16-3-114(a) (1977).

132. *Kesler v. Police Civil Service Comm'n*, 665 P.2d 937, 942 (Wyo. 1983). Even though exempt from the WAPA, enactment of rules and the conduct of hearings by the commission may still be subject to judicial review. See *Rocky Mountain Oil and Gas Ass'n. v. State*, 645 P.2d 1163 (Wyo. 1982); *Battle, Administrative Law, Wyoming Style*, 18 Land & Water L. Rev. 223, 224-40 (1983); WYO. R. APP. P. 12.12.

133. For a discussion of the use and constitutionality of restitution, see *Note, Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984).

134. *Id.* at 931.

135. *Id.*

136. *Id.*

137. *Id.* at 931-32. See *Victim and Witness Protection Act of 1982*, 18 U.S.C. § 3579 (1982). See COLO. REV. STAT. §§ 17.28-101 to -102 (1978); NEB. REV. STAT. §§ 29-2219, -2262, 47-402 (1981); WYO. STAT. §§ 17-13-307 to -315 (Supp. 1984).

138. Casson, *Restitution: An Economically and Socially Desirable Approach to Sentencing*, 9 NEW ENG. J. ON CRIM. & CIVIL CONFINEMENT, 349, 353 (1983).

Restitution is different from victim compensation discussed above. Restitution "implies making the victim whole, as much as possible, by the direct action of the offender."¹³⁹ Victim compensation programs involve the payment of benefits by the state to the victims of crime. The primary distinction between the two concepts is that a victim compensation program is generally based upon a theory of social responsibility to the victim, while restitution is based on the criminal paying for his actions. Restitution restores the victim and is also seen as therapeutic and a method to help rehabilitate the offender.¹⁴⁰

An order of restitution requires "the criminal offender to pay money, or render services, to his victim in order to redress the loss that he has inflicted."¹⁴¹ The sentencing court orders the offender: (1) to pay a certain sum of money directly to his victim; (2) to participate in some form of work program in which a portion of his remuneration is paid to the victim; (3) to render services to the victim; or (4) to engage in some type of community service work in lieu of repayment to the victim.¹⁴² As a sentencing solution, restitution may be imposed at any stage of the criminal process. Informal compromises and settlements between the offender and the victim, sanctioned by the state, may make formal charges unnecessary. Even after indictment, defendants may be able to avoid trial by making restitution. More often, courts order restitution during sentencing as a substitute for, or in addition to, a fine or imprisonment. Most commonly, courts order restitution as a condition of probation or parole.¹⁴³

Although restitution is an effective sentencing option, it is not an appropriate option or punishment for some crimes.¹⁴⁴ When the victim's or society's loss is difficult to quantify in economic terms, as it is in murder or rape cases, restitution is a less effective and less easily quantified penalty than it is in the cases of property crimes such as theft or arson.¹⁴⁵ Additionally, restitution is not a sufficiently severe sanction in the case of wealthy offenders or offenders committing violent crimes.¹⁴⁶ Even in these cases, however, restitution may still be used effectively if it is combined with other forms of criminal sanctions.¹⁴⁷

139. *Id.*

140. *Id.* at 353-54. Advocates of restitution note the impersonal basis of the criminal justice system and the lack of remorse on the part of the criminal for the harm he has caused. "A system of restitution, if properly handled, could serve to keep the criminal-victim relationship alive long after the original offense so as to impress upon the mind of the criminal that he has injured a human being, not some impersonal entity known as the state." *Id.*

141. Note, *supra* note 133, at 932-33.

142. *Id.*

143. *Id.* at 933. In Wyoming, restitution can only be ordered as a condition of probation or parole and cannot be imposed in addition to imprisonment. See *infra* text accompanying notes 151-56. See *Barnes v. State*, 670 P.2d 302 (Wyo. 1983).

144. Note, *supra* note 133, at 933.

145. *Id.*

146. *Id.*

147. *Id.*

In most jurisdictions, judges have always had the common law authority to order restitution to victims.¹⁴⁸ However, judges are often reluctant to order restitution or are simply unaware that it is available under the common law, as a sentencing option.¹⁴⁹ State legislatures enacting restitution statutes provide the "reluctant" and "unaware" judges with statutory reinforcement for that common law authority.¹⁵⁰

Before the recent compensation program was enacted, restitution was the only victim's rights legislation in Wyoming.¹⁵¹ The only reported case under the Wyoming restitution statute is *Barnes v. State*.¹⁵² In *Barnes*, the defendant was convicted of assault and battery for beating, and nearly killing, his victim.¹⁵³ The trial judge sentenced the defendant to one year in the county jail, imposed a fine of \$1,000, and ordered restitution in the amount of \$20,000 to the victim.¹⁵⁴ The Wyoming Supreme Court reversed the sentence and held that the Wyoming restitution statute does not permit a judge to order restitution to the victim *in addition to* incarceration.¹⁵⁵ Under the current Wyoming restitution statute, restitution may only be ordered as a condition for a suspended sentence or probation.¹⁵⁶

Restitution and incarceration need not and should not be mutually exclusive.¹⁵⁷ The *Barnes* case provides an excellent example of why the two should not be mutually exclusive. In *Barnes*, the defendant committed a violent crime causing severe injuries which cost the victim \$20,000 in medical expenses. An order of restitution and incarceration in the case of a defendant such as *Barnes* would be justified. *Barnes'* victim needs to be compensated. Yet *Barnes* should be incarcerated because he has committed a violent crime and other goals of the criminal justice system, such as isolation and deterrence, can be achieved by imprisoning such offenders.

The Wyoming Legislature did not amend the restitution statute when it enacted the recent compensation act. The legislature should reconsider the current restitution statute and legislatively overturn the *Barnes* holding. The legislature should explicitly state that the two sentencing options are not mutually exclusive.

148. LEGISLATIVE DIRECTORY, *supra* note 19, at 7. See Note, *supra* note 133, at 934; *contra*, *Barnes v. State*, 670 P.2d 302, 303-304 (Wyo 1983); *Sorenson v. State*, 604 P.2d 1031, 1036 (Wyo. 1979); *Phillips v. State*, 553 P.2d 1037, 1041 (Wyo. 1976).

149. LEGISLATIVE DIRECTORY, *supra* note 19, at 7.

150. *Id.*

151. WYO. STAT. §§ 7-13-307 to -315 (Supp. 1984). The pertinent portion of the Wyoming restitution statute provides as follows: "If the sentencing court orders suspended imposition of sentence, suspended sentence or probation, the court shall consider as a condition that the defendant in cooperation with the probation and parole officer assigned to the defendant, promptly prepare a plan of restitution. . . ."

152. 670 P.2d 302 (Wyo. 1983).

153. *Id.* at 302-03.

154. *Id.* at 302.

155. *Id.* at 303-04.

156. WYO. STAT. § 7-13-308 (Supp. 1984). Wyoming does not recognize a judge's common law authority to order restitution. See *supra* note 148.

157. See Casson, *supra* note 138, at 358-65.

Restitution can be effectively combined with the victim compensation program. First, as stated above, property losses are not compensated under the Wyoming Compensation Act. Additionally, there is a maximum award recoverable under a single claim. In these cases of non-compensable losses and losses in excess of the maximum award available, restitution can effectively fill the void left by the victim compensation program. The Wyoming Legislature should amend the restitution statute so that restitution and compensation are available along with potential incarceration for the offender.

CONCLUSION

The current system of criminal justice has failed the victims of crime. Society must assume the responsibility of providing aid to the innocent victim. Even though crime injures society as a whole, the individual victim feels the most impact because he suffers the immediate injuries and losses. The Wyoming Legislature assumed this responsibility when it enacted a victim compensation program. The program is a significant step in providing for the individual victim. There are, however, provisions of the Act which should be reconsidered in order to strengthen the program. The legislature must also amend the current restitution statute so that both restitution and incarceration may be ordered by the sentencing judge.

LARRY B. KEHL

APPENDIX

VICTIM RIGHTS LEGISLATION
IN THE ROCKY MOUNTAIN REGION¹⁵⁸

STATE	TYPE OF LEGISLATION	SUMMARY
ARIZONA	Victim Participation ¹⁵⁹	Requires Victim Impact Statement and Victim Statement of Opinion for use in sentencing. In felony cases, allows the victim to be represented either personally or through counsel in aggravation or mitigation proceedings.
	Parole Notification Participation ¹⁶⁰	Requires notification of impending parole hearing and allows the victim to appear personally or submit a written report of opinion regarding parole.
	Profits from Crime ¹⁶¹	Profits from contracts for publication and other media rights, are placed into a "Crime Victim's Account" for distribution to the victim or the victim's immediate family.
	Restitution ¹⁶²	General restitution provision as a sentencing alternative or a condition of parole.

158. On the federal level, Congress has enacted a comprehensive victim's rights package for the federal courts entitled the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1501, 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580 (1982). The restitution provision of the Act has, however, failed its first constitutional challenge in *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. (1983)). The government has appealed the decision to the Eleventh Circuit Court of Appeals. Kiesel, *supra* note 16, at 25. See Goldstein, *A New Role for the Victim? - The Federal Victim Protection Act of 1982*, 100 F.R.D. 94 (1983); Graves, *The Victim & Witness Protection Act of 1982*, 100 F.R.D. 104 (1983).

159. ARIZ. REV. STAT. §§ 12-253(4), 13-702(F) (Supp. 1984).

160. *Id.* § 31-411(F).

161. *Id.* §§ 13-4201 to -4202 (1978).

162. *Id.* §§ 31-412(C), (D), 13-603(C), 13-803 (Supp. 1984).

COLORADO	Compensation ¹⁶³	Maximum amount of \$10,000 with an emergency award of \$500. Additional award of \$250 for window, door and lock damage.
	Restitution ¹⁶⁴	General Restitution provision as a sentencing alternative or a condition of parole.
	Victim's Bill of Rights ¹⁶⁵	Includes the right to: (a) notification; (b) information about victim impact statements for use in sentencing; (c) profits from crime; (d) notification of proceedings and charges; (e) information about compensation, legal, medical, mental health, financial aid, entitlements, protection from intimidation, release and case disposition; (f) notification and participation in sentencing; (g) restitution; (h) secure waiting areas; (i) victim is free from civil action by offender.
IDAHO	Restitution ¹⁶⁶	General restitution provisions as a sentencing alternative or condition of parole.
	Profits from Crime ¹⁶⁷	Prohibits offenders from receiving financial benefits as a result of crime, for 5 years. Victims may receive funds through civil judgments if the remaining funds are returned to offender.
KANSAS	Compensation ¹⁶⁸	Maximum award of \$10,000. No emergency award provided. Funded through approach (<i>Kansas cont. next page</i>)

163. COLO. REV. STAT. §§ 24-4.1-100.1 to -120 (Supp. 1984).

164. *Id.* §§ 17-28-101 to -102, 16-11-204.5 (Supp. 1984).

165. *Id.* § 18-8-701 to -708 (Supp. 1984).

166. IDAHO CODE §§ 19-5302, 18-6106 (Supp. 1984).

167. *Id.* § 19-5301.

168. KAN. STAT. ANN. §§ 74-7301 to -7318 (1983).

		priations from general revenue.
	Victim Involvement in Sentencing ¹⁶⁹	Victim Impact Statement is required in all pre-sentence investigation reports.
	Restitution ¹⁷⁰	Requirement that judges and parole boards order restitution unless specific reasons are given for not making the order.
MONTANA	Compensation ¹⁷¹	Maximum award of \$25,000. No emergency award provided. Funded through fines, penalty assessments and restitution.
	Restitution ¹⁷²	Restitution for criminal mischief and arson.
NEBRASKA	Compensation ¹⁷³	Maximum award of \$10,000 with emergency award of \$500. Funded through state revenue appropriation.
	Funding Victim Service Programs ¹⁷⁴	Establishes the Crime Victim & Witness Assistance Fund with special appropriation fund primarily for local programs.
	Victim's Bill of Rights ¹⁷⁵	Includes right to: (a) notification; (b) information on disposition; (c) protection from intimidation; (d) information on victim services, compensation, and social services; (e) information on the criminal justice system and procedures; (f) secure waiting areas; (g) profits from crime. <i>(Nebraska cont. next page)</i>

169. *Id.* § 21-4604 (Supp. 1984).170. *Id.* §§ 21-4603, 22-3717.

171. MONT. CODE ANN. §§ 53-9-101 to -133 (1983).

172. *Id.* § 45-6-101(2).

173. NEB. REV. STAT. §§ 81-1801 to -1842, 74-7301 (1981).

174. *Id.* § 81-1423 (Supp. 1980).175. *Id.* §§ 81-1801 to -1842 (1981).

	Victim Participation ¹⁷⁶	Victim Impact Statement is part of the pre-sentence investigation report. Prosecuting attorney must make a good faith effort to consult with the victim prior to plea bargain agreement.
	Restitution ¹⁷⁷	Restitution permitted as a sentencing option as well as a condition of probation or parole.
NEW MEXICO	Compensation ¹⁷⁸	Maximum award of \$12,500 with emergency award permitted. Funded through appropriations from general revenue.
	Parole Notification ¹⁷⁹	Requires local district attorneys to notify victims of parole hearings and decisions.
	Escape Notification ¹⁸⁰	Requires local district attorneys to notify the victim if the offender escapes.
	Profits from Crime ¹⁸¹	Prohibits offenders from receiving financial benefits as a result of crime, for five years. Victims may receive funds through civil judgments. Remaining funds are returned to offender.
	Child Victim or Witness Protection ¹⁸²	Provides for the use of video taping of depositions of children under the age of 16 for use at trial.
	Restitution ¹⁸³	General restitution provision as a sentencing alternative or a condition of parole.

176. *Id.* §§ 29-2261, 23-1201.

177. *Id.* §§ 29-2219, -2262, 47-402, (1980).

178. N.M. STAT. ANN. §§ 31-22-1 to -21 (Supp. 1981).

179. *Id.* § 31-21-25 (Supp. 1984).

180. *Id.* § 33-2-48 (Supp. 1978).

181. *Id.* § 31-22-22 (Supp. 1984).

182. *Id.* § 30-9-17 (Supp. 1978).

183. *Id.* § 31-17-1 (Supp. 1981).

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NORTH DAKOTA	Compensation ¹⁸⁴	Maximum award of \$25,000 with provision for \$100 emergency award. Funded through appropriations from general revenue.
	Restitution ¹⁸⁵	General restitution provision as a sentencing alternative or a condition of parole. Restitution may also be ordered in addition to incarceration.
SOUTH DAKOTA	Restitution ¹⁸⁶	Restitution may be imposed as a condition of suspended sentence or probation. Includes restitution to the victim or community service.
	Profits from Crime ¹⁸⁷	Profits received from contracts for publication and other media rights are placed into an escrow account and payable to the victims upon obtaining a money judgment in a civil action.
UTAH	Restitution ¹⁸⁸	General restitution statute. If restitution is not ordered, requires explanation. Restitution is required to be a condition of probation or parole.
WYOMING	Compensation ¹⁸⁹	Maximum award of \$10,000. Emergency award of \$1,000. Fund through state appropriation, surcharges against offenders, restitution, and profits from crime statute.
	Restitution ¹⁹⁰	Restitution <i>may</i> be ordered as a condition of suspended sentence or probation.

184. N.D. CENT. CODE §§ 65-13-01 to -21 (Supp. 1983).

185. *Id.* §§ 12.1-32-07 to -08, -02.

186. S.D. CODE §§ 23A-28A-1 to -14 (Supp. 1984).

187. *Id.* §§ 23A-28-1 to -11, 23A-28-11 to -12 (Supp. 1984).

188. UTAH CODE ANN. § 76-3-201 (Supp. 1984).

189. WYO. STAT. §§ 1-40-101 to -119 (Supp. 1985).

190. *Id.* §§ 7-13-307 to -315 (Supp. 1983). See *supra* text accompanying notes 151-57.