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Alternatives to a Compensation Plan for Victims of Physical Violence

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ALTERNATIVES TO A COMPENSATION PLAN FOR VICTIMS OF PHYSICAL VIOLENCE

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There has been persistent press[1] and legal[2] comment on the problem of compensation to victims of crime in the past year. This concern has been provoked by the reported rising crime rate in this country,[3] the awareness of witness apathy in preventing acts of violence and the inauguration of compensation plans for victims of violence in New Zealand[4] and England.[5]

The New Zealand and English plans are test projects of experimental value to those countries and domestic states which seek to aid uncompensated victims of criminal violence by making awards from a government fund.[6] To qualify for compensation, the victim's injury or death must have been caused by an offense against the person, such as assaults, woundings, sexual offenses of violence and offenses against property accompanied by personal violence.[7] The significant features of these plans are payments for loss of work, medical expenses and a discretionary award for pain and suffering.[8] Identity and apprehension of the wrongdoer is unnecessary for compensation. The British plan is most stringent on proof of the violent crime;[9] the New Zealand three-member board need only be convinced of the probability that a criminal act occasioned the injury or death.[10] Both schemes avoid litigation, delay, expense and technicalities of proof. Both programs compel repayment of compensation to the board upon restitution to the victim by the offender.[11]

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1. *E.g.*, N.Y. Times, Feb. 21, 1965, § 6 (Magazine), p. 19; Time Magazine, Sept. 11, 1964, p. 63.

2. *E.g.*, Barry, *Compensation Without Litigation*, 37 AUSTL. L.J. 339 (1964); Childres, *Compensation for Criminally Inflicted Personal Injury*, 37 N.Y.U.L. REV. 444 (1964); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 224 (1964).

3. See N.Y. Times, March 22, 1965, p. 1, col. 4 (city ed.).

4. Criminal Injuries Compensation Act, Act No. 134 of 1963 (N.Z.) [hereinafter cited as N.Z. Act No. 134]; See Cameron, *Compensation of Victims of Crime; the New Zealand Experiment*, 12 J. PUB. L. 367 (1963).

5. The six-member Criminal Injuries Compensation Board was established by a White Paper in May, 1964. Home Office, *Compensation for Victims of Crimes of Violence*, Cmnd. No. 2323 [hereinafter cited as Cmnd. No. 2323].

6. See generally Fry, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 191 (1959).

7. Cmnd. No. 2323, §§ 13-16; N.Z. Act No. 134, Schedule of Offenses.

8. All awards, however, are subject to minimum and maximum amounts. Cmnd. No. 2323, §§ 19-22; N.Z. Act No. 134, § 19.

9. Cmnd. No. 2323, §§ 23-24.

10. See Cameron, *supra* note 4, at 371.

11. Cmnd. No. 2323, § 28; N.Z. Act No. 134, § 250.

Public comment in both countries indicates acceptance that "compensation can justifiably be restricted to the victims of crimes of violence."[12]

Before its adoption, an array of grounds of opposition to the British welfare remedy was voiced. The most substantial objection was the *cost to the public*,[13] particularly in the duplication of tax cost expended on law enforcement. Another objection was that public complacency would result if this socialized crime insurance was adopted.[14] One authority was adamant that crime prevention is the best insurance[15] and that, with a decrease in crime, private crime insurance could become feasible for everyone. Further opposition, even among those who are convinced that the public and the victim are not compensated by punishment alone, was based on the fear that the public would be unable to "protect itself from fraudulent claims."[16] This seems a specious argument as few would find self-inflicted wounds to be profitable;[17] furthermore, administrative boards are not without access to investigative agents.

The concept of a compensation program is gaining support and strong advocates[18] in the United States, but these same objections must be resolved.[19] The belief that present American civil and criminal proceedings provide the victim with adequate relief is probably the major obstacle to serious consideration of a compensation plan.

This article investigates the extent to which American jurisprudence affords reparation to the victims of violence and suggests some revisions in our legal system which would alleviate this area of poor redress.

Present Reparation to Victims

Municipal Corporation Liability for Failure in Governmental and Proprietary Functions

Until recently[20] sovereign immunity had shielded federal, state and municipal governments from liability. There has been, however, a trend

12. Cameron, *supra* note 4, at 371.

13. Mueller, *Compensation for Victims of Criminal Violence*, 8 J. Pub. L. 191, 291 (1959).

14. *Ibid.*

15. *Id.* at 235-36.

16. Inleau, *Compensation for Victims of Criminal Violence*, 8 J. Pub. L. 191, 203 (1959).

17. Fry, *supra* note 6, at 193. The risk of successful deception is negligible for few persons would voluntarily wound themselves to obtain a modest compensation.

18. *E.g.*, Childres, *supra* note 2; Goldberg, *supra* note 2.

19. See generally 8 J. Pub. L. 191 (1959).

20. Municipal tort liability has been declared by decision: Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963) (city liable for police brutality following arrest) delimiting City of Fairbanks v. Schaible, 375 P.2d 201 (1962); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (municipality liable for injuries arising from negligent operation of playground); Hargrove v. Town of Cocoa Beach, 96 So. 2d

toward holding governmental units liable for their negligent performance of *proprietary* functions, such as sewage disposal plants,[21] reservoirs,[22] and parks.[23]

Most waiver of immunity statutes[24] extend to municipalities and subject them to the same rules which govern actions against individuals, *i.e.*, private tort law. Immunity persists, however, where the governmental body is negligent in performing a governmental function.[25]

Although providing police protection is a general duty owed to the public at large,[26] its negligent performance creates no right of action in the individual citizen, in spite of waiver of immunity statutes. There is one noticeable exception to this rule: A municipality will be held liable for its failure to protect a victim to whom it owes a *special duty* created by actual or constructive notice of potential injury.

In *Schuster v. City of New York*,[27] decedent, in response to an F.B.I. flyer concerning a dangerous fugitive, supplied police with information leading to the arrest of one Willie Sutton, a criminal of national reputation. Schuster's part was so widely publicized that, at his request, police furnished

130 (Fla. 1957) (city liable when prisoner suffocated from fire in city jail); *cf.* Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 359 P.2d 457 (1961) (hospital liable for negligent treatment of patient). *But see* ORE. REV. STAT. § 30.320 (1963), Wickman v. Housing Authority of Portland, 196 Ore. 100, 247 P.2d 630 where authorities were created to be purely governmental in nature and thus immune from tort liability. California has made sweeping legislative changes in its governmental tort liability laws ranging from nuisance and property actions to liability for mob or riot damages, but negligence arising from the performance of a police function is not covered. Calif. Civil Code, § 22.3. See Von Alstyne, *Governmental Tort Liability; A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463 (1963); Barnett, *Foundations of the Distinction Between Public and Private Functions in Respect to the Common-law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1936).

21. Cloyer v. Delaware, 23 N.J. 324, 129 A.2d 1 (1957). See Annot., 57 A.L.R.2d 1336 (1958).

22. Gonella v. Municipal Authority of the City of New Kensington, 29 West L.J. 171 (Pa. C.P. 1947) (municipal authority was exercising proprietary function).

23. Wall v. Hudson County Park Comm'n, 80 N.J. 372, 193 A.2d 857 (1963) (commission held liable when child was burned in fire ignited on park property by employee of commission); Honaman v. City of Philadelphia, 322 Pa. 535, 185 Atl. 750 (1936) (city held liable when woman was struck by baseball while walking on sidewalk along park). "[G]enerally a municipality is not liable for inadequate police service. But where, in its capacity of landowner, performance of its duty of reasonable care requires other precautions, the city is responsible for damage resulting from failure to employ them." *Id.* at 540, 185 Atl. at 752 (dictum). See Note, *Municipal Liability in Pennsylvania*, 100 U. PA. L. REV. 92, 102 (1951).

24. *E.g.*, Court of Claims Act, N.Y. Sess. Laws 1939, Ch. 860, § 8. See Williams v. City of New York, 185 Misc. 876, 57 N.Y.S.2d 39 (1945).

25. PROSSER, TORTS § 1004 (3d ed. 1964).

26. MCQUILLAN, 18 MUNICIPAL CORPORATIONS §§ 53.23-39 (3d ed. 1950). For municipal non-liability to the general public for failure to provide police protection see, *e.g.*, Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945); Betham v. City of Philadelphia, 196 Pa. 302, 46 Atl. 448 (1900).

27. 5 N.Y.2d 75, 154 N.E.2d 534 (1958).

him with protection which was later withdrawn over his protests. Schuster was killed by persons unknown. His administrator brought an action for wrongful death against New York City. The New York Court of Appeals, with three vigorous dissents,[28] reversed the lower court. The majority reasoning was in substantial accord with the lower court dissent.[29] It held that a *special duty* of police protection was due decedent and that it was negligently unfulfilled.[30] The concurring opinion noted that the withdrawal of protection with knowledge of the danger may have been the proximate cause of death.[31] The court emphasized Schuster's informer status[32] as creating a superior duty on the city to protect a citizen who had fulfilled the citizen's duty to aid law enforcement.[33]

It is submitted that the rationale of Schuster will not extend beyond its facts to cover victims who personally resist the criminal act during its commission. Supplying concrete verbal or physical aid to law enforcement in advance is the requirement.

Commission and Authority Liability for Failure in Their Function

Cities are subject to constitutional debt limitations which cannot be exceeded. As debt limitations increasingly obstruct the needs and progress of larger cities, supplemental municipal authorities[34] with delegated powers are created. This device permits expenditures once forbidden to a city. Where the city does not retain control of the authority,[35] better service to citizens has resulted through needed construction and better management. A typical enabling act[36] gives an authority power to sue and be sued, to hire personnel, to acquire real and personal property by eminent domain and to borrow and

28. *Id.* at 75, 89, 154 N.E.2d 534, 542 (Conway, C.J., dissenting); *id.* at 75, 96, 154 N.E.2d 534, 546 (Desmond and Frossel, J. J., dissenting).

29. 286 App. Div. 389, 391, 143 N.Y.S.2d 778, 781 (Beldock, J., dissenting). For critical discussions of their decision see 58 W. VA. L. REV. 305 (1956); 34 CHI.-KENT. L. REV. 164 (1955); SCOTS L.T., Nov. 26, 1955, p. 201.

30. 5 N.Y.2d 75, 86, 154 N.E.2d 534, 540.

31. *Id.* at 88, 154 N.E.2d at 542 (McNally, J., concurring).

32. *In re* Quarles, 158 U.S. 532, 535 (1895).

33. However, the administrator's wrongful death action did not come within the purview of a state statute imposing liability on the city for injury or death caused by rendering aid to policemen. See N.Y. Penal Law § 1848 (1960); Riker v. City of New York, 204 Misc. 878, 126 N.Y.S.2d 229 (1953) (recovery allowed although police request was imprecise and plaintiff was injured after aiding the officer); *accord*, Isereau v. Stone, 207 Misc. 941, 140 N.Y.S.2d 585 (1955); Runkel v. New York, 282 App. Div. 173, 123 N.Y.S.2d 839 (1951).

34. Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 Atl. 834 (1938).

35. Courts will strike a statutory transfer of power to operate hospitals to a new department if control is retained by the municipality. Rappaport v. Department of Public Health, 227 Ind. 508, 87 N.E.2d 77 (1949).

36. Vilean Development Law, PA. STAT. ANN. §§ 1701-19 (1964), Belorisky v. Redevelopment Authority of the City of Philadelphia, 357 Pa. 329, 54 A.2d 277 (1947) (constitutionality upheld).

issue bonds.[37] All these powers exist without any probability of private profit accruing to anyone. One defect is that the operation and managing board are not directly responsible to the electorate.[38]

Authorities do not perform governmental functions for the municipality, yet some courts are reluctant to find them performing proprietary functions for the city. Even when a New Jersey court declared a housing authority to be acting in a proprietary capacity for a city, it found no duty of police protection in that proprietary performance.[39] In *Goldberg v. Housing Authority of Newark*,[40] a milkman, having been beaten and robbed in a self-service elevator, predicated his recovery against the housing authority on the authority's negligence in failing to provide adequate police protection[41] within the multi-unit project after it had received notice of the serious crimes occurring therein. The supreme court, in reversing the superior court,[42] found for the defendant holding that a housing authority is to be treated as a private owner whose duty of maintaining reasonably safe conditions on the premises does not include police protection.

New Jersey law prohibits the private owner of residential property from providing police protection[43] unless the municipality agrees to assign special policemen under the supervision and direction of the Chief of Police at the owner's expense. The public nature of the authority was not sufficient[44] to permit it to hire its own policemen; no standard for the inclusion of this preventive act within the private owner's duty could be created,[45] and the authority could not encroach on the exclusiveness of public policy protection as a city governmental function.[46]

The dissent concluded that even if the public housing authority were treated as a private owner it failed in its duty to take reasonable precautions by employing additional special guards or police during the daytime hours against the foreseeable dangers to invitees from criminal acts. To rely solely

37. See 3 ANTIEAU, MUNICIPAL CORPORATION LAW 328.07 (1964).
38. *Id.* at 28.08.
39. Goldberg v. Housing Authority of Newark, 38 N.J. 578, 186 A.2d 291 (1963).
40. *Ibid.*
41. One Newark policeman patrolled the interior walks from 8:00 A.M. to 4:00 P.M., while three special policemen were maintained by the defendant between the hours of 4:00 P.M. and 8:00 A.M. All three were off-duty when the attack occurred at 8:30 A.M.
42. 70 N.J. Super. 245, 175 A.2d 433 (1961).
43. Special policemen shall be under "the supervision and direction of the chief of police. . . ." 40 N.J. REV. STAT. § 47-19 (1964 Supp.).
44. 55 N.J. REV. STAT. § 14 A-11 (1964) provides that such housing projects "shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing is situated."
45. 38 N.J. at 588, 186 A.2d at 296.
46. *Id.* at 581, 186 A.2d at 292. The duty of police protection is one of government and does not fall within the proprietary nature of the authority. *Ibid.*

on the protection by the public police force was thought unjustifiable in the operation of a multi-unit project which by "size, composition and mode of operation" differed from an ordinary private multi-dwelling or apartment and presents "special damages requiring special precautions."[47]

The problem of who should bear the financial burden of police protection in a subsidized housing development was both a practical and social consideration. The majority considered it unfair to place the cost of both special and private police on tenants who can least afford it[48] when the whole community should be charged with the expense. A judicial dilemma arises because the Goldberg majority refused to hold the authority liable as a private owner since private owners are prohibited from providing police protection even though the court recognized that the authority was performing a municipal proprietary function. Nor could the city be held liable in failing in a governmental or proprietary capacity.[49]

Public social and economic responsibility in this type of case was emphasized by the court. The minority's effort to allow recovery against an authority seems progressive, but does not establish responsibility in the general public. The majority's insistence on placing the economic burden on the whole public best serves the judicial trend toward holding the municipality for its operational failures.

The Goldberg problem was to determine the extent of the duty to attempt to provide safe surroundings that a public project owner owes to its tenants and invitee members of the public. The police protection system cannot be expected and does not succeed in preventing crime at all times—yet, many states prohibit and penalize the carrying of arms as anticipatory self-defense.[50] If the basic assumption is made that an individual should have redress against the public entity which assumes the duty of police protection and then miscarries it, a decision must be made on where redress will lie—the city for governmental failure, or the authority for proprietary failure.

Wrongdoer's Liability

Damages Recoverable in Civil Action

Money plays a restorative and punitive role in a civil action and has a part in the punitive role of sentencing and probation procedures in criminal property offenses such as embezzlement and larceny. It is suddenly ignored,

47. *Id.* at 593, 598, 186 A.2d at 304.
48. *Id.* at 591, 186 A.2d at 298.
49. Compare Wendler v. City of Great Bend, 181 Kan. 753, 316 P.2d 265 (1957) wherein the municipality which operated an airport was held to be exercising a proprietary function as distinguished from a governmental function.
50. "[T]he State which forbids our going armed in self-defense cannot disown all responsibility for its occasional failure to protect." Fry, *supra* note 6, at 193.

however, where the sentence is for a criminal offense of physical injury or death. The restoration of society and the victim becomes punishment and revenge through incarceration or death. Society represents the victim in revenge, but compelling compensation from the offender or itself to the victim has been either forgotten or ignored. Historically, the victim's right of prosecution of the criminal fell away through disuse because the compensatory fine was paid to the sovereign. The sovereign, and later society, injured only in an abstract sense sought punitive redress as a means of prevention and example.[51]

Preview of damage actions now available to the victim is necessary to show the way toward restoring his active participation in both the prosecution and the reparation of the offender. Where the wrongdoer is identified and solvent he may be subjected to a civil action for actual and exemplary damages, sometimes called punitive.[52] Exemplary damages[53] are awarded only when the defendant's conduct was wilful or wanton to the person or property and are by nature punitive in all jurisdictions as a holdover from the common-law practice of awarding heavy damages to punish the defendant for his misconduct and to deter him in the future.[54] There is an equally strong element of compensation[55] for loss above what the plaintiff can actually prove as actual damages.[56] Attacks have been lodged against this practice, but exemplary damages cover counsel fees,[57] which are not recoverable as actual damages. Exemplary damages are awarded as compensation to the plaintiff

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51. DAVIS, SOCIETY AND THE LAW §§ 271-72 (1962).

52. [The punitive doctrine] does tend to bring to punishment a type of cases of oppressive conduct, such as slanders, assaults, and minor oppressions . . . which are characteristically criminally punishable, but which in actual practice go unnoticed by prosecutors occupied with more serious crimes.

McCORMICK, DAMAGES 276 (handbook series 1935).

53. See BLACK, LAW DICTIONARY 467 (4th ed. 1951); see also MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH, 23 (2d ed. 1960); Restatement, Torts § 908 (1939).

54. Punitive damages are not awarded upon any theory of compensation to the sufferer, but as punishment to the offender. Tidewater Oil Co. v. Camden Securities Co., 49 N.J.S. 155, 139 A.2d 318 (1958). There is a reluctance in personal property actions to allow exemplary damages or to admit that they are partially punitive. N.Y. Law Rev. Comm., No. 65(j) §§ 1-40 (1944).

55. [D]icta in the older cases . . . suggest that damages for the injury itself, as distinct from the financial loss entailed, are not compensation at all, but a kind of *solatium*, a sympthetic payment admitted to be less than is really due.

MUNKMAN, *op. cit. supra* note 53, at 11.

56. "Juries may be allowed to give damages that express indignation at the defendants' wrong rather than a value set on the plaintiff's loss." Gostkowski v. Roman Catholic Church of the Sacred Heart, 262 N.Y. 320, 324-25, 186 N.E. 798, 800 (1933). See Note, 70 HARV. L. REV. 517 (1957).

57. "[T]he purpose is not to punish the defendant for his offense but to compensate the plaintiff for his injuries . . . exemplary damages cannot exceed the amount of the plaintiff's expenses of litigation." Doroszka v. Lavine, 111 Conn. 575, 578, 150 Atl. 692-93 (1930).

for his loss only because the act is not considered by society to be of the caliber of wrong to warrant criminal punishment. The injured plaintiff collects in the civil action what would otherwise be a fine to the state in the criminal action.[58] This may be a penal sanction amounting to compensation in civil court. The punitive element is present in some compensation statutes designed to deter the employment of minors under illegal conditions.[59]

In addition to the exemplary damage award left to the jury's determination, many statutes provide for multiple recovery. Multiple damages, a form of exemplary, but punitive only in the broad sense,[60] supply relief solely to the private individual whether wrongful intent was present or not and are determined by the damage actually done,[61] though compensation may exceed that. They are common in antitrust statutes[62] wherein the plaintiff may recover, either by statutory edict or judicial discretion, threefold the damages established as a means of compensation for additional injuries and the "cost of suit, including a reasonable attorney's fee."[63]

Evidentiary Problem in Civil Action

Civil relief appears amply provided until one recognizes the evidentiary problem. By the weight of authority in the United States, a criminal judgment of conviction or acquittal is not admissible in a civil action,[64] even as evidence of the facts.[65] This exclusionary rule was adapted because the criminal judgment lacked the evidentiary requisites of admissibility: similarity of object, issues, mutuality, and degrees of proof. The victim's time and testimony in the criminal action must be repeated and the additional cost of proving the offense before a civil jury is on him.

Exception has been made to this exclusionary rule where the criminal

58. Exemplary damages are a windfall to the injured party and should therefore be forfeited to the state. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1177 and n.7 (1931).

59. PA. STAT. ANN. tit. 77, § 672 (1964 Supp.) provides that compensation shall be 150% of the amount that would be payable to such minor if he were legally employed.

60. McCormick, *op. cit. supra* note 52, at 277, 296; see Vold, *Are Threefold Damages under the Anti-Trust Act Penal or Compensatory?*, 28 KY. L.J. 117, 158 (1939).

61. In Pennsylvania the penalty for trespass and conversion of trees is treble the jury verdict. PA. STAT. ANN. tit. 18, § 4935 (1963).

62. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

63. *Ibid.*

64. Over two-thirds of the states follow this rule, but there are many which indicate a desire to repudiate it. Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3 N.E.2d 17 (1936); State Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946); see also Zubrod v. Kuhn, 357 Pa. 200, 53 A.2d 604 (1947) wherein the defendant's criminal assault and battery conviction was ruled inadmissible in a civil action because the element of intent must be shown to exist. In some states previous traffic convictions cannot be shown as it might prejudice the jury. Matchen v. State, 349 P.2d 28 (Okla. 1960); State v. Eichler, 248 Iowa 1267, 83 N.W.2d 576 (1957); But see Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965).

65. *But see* MODEL CODE OF EVIDENCE rule 314 (1947).

defendant, seeking to profit from his own wrong,[66] is plaintiff in the civil action to settle his rights arising from his commission of the crime, and, where the civil action involves the same facts and issues, but debatably not the same parties,[67] and, in some divorce suits.[68] In some jurisdictions admissibility has been permitted either as conclusive,[69] prima facie[70] or circumstantial evidence,[71] subject to a showing of fraud, perjury or sufficient error.

The exclusion rule does satisfy the requirement of having the defendant re-confronted by witnesses, prevents jury presumption of guilt, and assures him of the opportunity of presenting evidence that the conviction was falsely obtained. On the other hand, since the "safeguards afforded the accused were greater under criminal procedure"[72] than under the civil and the elements of proof were higher, the repetition seems technical and illogical.

Should the prevailing rule be overthrown and the judgment admitted as prima facie on circumstantial evidence, establishment of the commission of the crime and defendant responsibility probably would not be aided greatly in a victim's suit. He would still be subject to all of defendant's controverting testimony and retrial of the criminal act would ensue.

The possibility of admitting the criminal judgment as conclusive evidence is distinctly unlikely in jurisdictions which do not deem it res judicata upon the civil court because of the difference in parties and proof.[73] Assuming,

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66. Eagle, Star and British Dominion Insurance Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).

67. See Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965) wherein a federal extortion conviction was held admissible as evidence of extortion in a civil action for restitution.

68. A conviction for adultery is admissible in Pennsylvania as evidence in a divorce proceeding and is itself grounds for divorce. PA. STAT. ANN. tit. 23, § 51 (1955), Romano v. Romano, 34 Pa. D. & C. 215 (1939); see Mueller and Whinery, *Second Hand Judgments: Reciprocal Use of Judgments in Civil and Matrimonial Cases*, 15 WASH. & LEE L. REV. 44 (1958).

69. Eagle, Star and British Dominion Insurance Co. v. Heller, 149 Va. 82, 140 S.E. 314.

70. A final judgment in a criminal prosecution under the anti-trust laws is prima facie evidence in any action against the defendant. 38 Stat. 731 (1914), as amended, 69 Stat. 283 (1955), 15 U.S.C. § 16 (1955), Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932); True v. Citizens' Fund Mutual Fire Ins. Co., 187 Minn. 636, 246 N.W. 474 (1933).

71. Wolff v. Employers Fire Ins. Co., 282 Ky. 824, 140 S.W.2d 640 (1940).

72. To state that a civilized community is willing to see a man hanged on such a finding of fact but to treat such a finding as a mere opinion in a subsequent case involving dollars and cents, is a reflection on the administration of justice, as well as an offense to common sense.
Wright, *Evidence-Admissibility of Criminal Convictions in Civil Actions*, 21 CAN. B. REV. 653, 658 (1943).

73. In Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965) the court found a substantial identity of facts, issues and parties; *cf.* Pennsylvania Turnpike Comm. v. United States Fidelity and Guaranty Co., 412 Pa. 222, 194 A.2d 423 (1963) wherein a substantial identity of parties were found. Neither case holds that all criminal convictions are admissible in a later civil action.

however, that the factual elements of both the crime and the tort are identical,[74] it could be argued that the parties are the same. A criminal action involves the wrongdoer and the state. The state represents the public; the victim is the injured member of that public. In a civil action the victim and the wrongdoer are the parties. Note that no new party is involved in the civil action.

It is submitted that the judgment conviction should be admissible as conclusive evidence in a civil action where the facts, issues and parties in both cases are substantially the same. As an alternative, the conviction should be admitted as prima facie evidence.

Penal Fines

Other than isolated instances of penal statutes permitting judicial direction of property restitution in addition to punishment,[75] or in lieu of punishment as a condition of probation upon a suspended sentence,[76] there are no statutory means of paying damages to the victim for physical injury due to crime. No statute providing, a criminal court can make no direction for restitution for injuries suffered in an action for aggravated assault and battery.[77] Statutes permitting restitution of property usually provide for reinstitution of the civil action or declare that the criminal proceedings do not divest the injured of the civil action.[78] A new statutory practice outside of the

74. "For almost every crime admits of being treated as a 'tort' . . . so that the person wronged by it can sue the wrong-doer for pecuniary compensation." KENNY, OUTLINES OF CRIMINAL LAW, 542 (16th ed. 1952).

75. "[F]or any crime wherein property has been stolen, converted . . . in addition to the punishment . . . defendant may be sentenced to restore such property to the owner thereof and in default . . . pay the value of the same." PA. STAT. ANN. tit. 18, § 5109 (1963); see Commonwealth v. Bushkoff, 177 Pa. Super. 231, 110 A.2d 834 (1955); Commonwealth v. Dunbar & Keenan, 196 Pa. Super. 592, 176 A.2d 135 (1961), *cert. denied*, 371 U.S. 839 (1962); see also KY. REV. STAT. § 431.200 (1963); WISC. STAT. ANN. § 57.01(1) (1957).

76. 62 Stat. 842 (1948), as amended, 72 Stat. 834 (1958), 18 U.S.C. § 3651 (1958). The purposed N.Y. PENAL LAW § 25.10 would provide that "the court may as a condition of the sentence, require that the defendant . . . make restitution of the fruits of his offense or make reparation, in an amount he can afford to pay, for the loss or damage caused thereby."

77. PA. STAT. ANN. tit. 19, § 981 (1944), repealed in part by PA. STAT. ANN. tit. 19, § 5201 (1963) provides that in any conviction for robbery, burglary or larceny the defendant shall make restitution to the prosecutor. In Commonwealth v. Rouchie, 135 Pa. Super. 594, 7 A.2d 102 (1939), restitution to the prosecutor of an aggravated assault and battery conviction was reversed. To date no substantive revision allowing restitution to the injured party of aggravated assault and battery has been made. PA. STAT. ANN. tit. 18, § 4709 (1963). See also NEB. REV. STAT. § 28-543 (1956).

78. In states adhering to the common law rule that a private wrong to an individual injured through the commission of a felony is merged with the public wrong, legislation specifying that any such injured person is a creditor of the offender and his estate has granted the cause of action. E.g., N.Y. PENAL LAW § 512(b); PA. STAT. ANN. tit. 18, § 5109 (1963).

property or criminal fields is the occasional provision declaring a maximum and minimum penalty, or fine, payable directly to the person subjected to discrimination in his civil rights.[79] With these inroads as precedent, the legislature may formulate statutes providing for restitution to victims of violence for personal injuries sustained.

FOREIGN PRACTICES

Foreign practices in handling reparation to the victim, which may or may not exceed pure restitution, have been the subject of an extensive comparative study.[80] The practice common to almost all countries is a civil damage suit against the offender, divorced from any criminal proceedings. Some countries permit the victim's claim, though civil in character, to be brought within the criminal proceedings;[81] others have devised a fine schedule imposed by the criminal judge[82] and payable to the state, while many provide for money awards as restitution in place of punishment in the criminal proceedings.[83]

Direct compensation to victims is a fairly common practice on the continent. In all but one country,[84] the compensation plan is an outright welfare measure by the state to the victim. If the offender appears to be insolvent,[85] the victim need only make a claim and show that he has need.

The French and German procedure of permissive joinder of the civil action within the criminal proceeding should be examined. They provide some experience for the joinder of the criminal and civil actions for the same offense.

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79. For any violation of N.Y. CIVIL RIGHTS LAW §§ 40(a)(b), 42, 43, the violater is "liable to a penalty of not less than one hundred dollars nor more than five hundred dollars to be recovered by the person aggrieved. The violation is also a misdemeanor which carries a fine or imprisonment or both. Odam v. East Avenue Corp., 264 App. Div. 985, 37 N.Y.S.2d 491, *affirming* 178 Misc. 363, 34 N.Y.S.2d 312 (1942). A more typical provision is that of PA. STAT. ANN. tit. 18, § 4654 (1963) which provides for a fine of not more than $100.00 or imprisonment, or both, for specified acts of discrimination on account of race or color in places of public accommodation. Injunctive relief may also be granted under this section. Everett v. Harron, 380 Pa. 123, 110 A.2d 383 (1955); see also Human Relations Act, PA. STAT. ANN. tit. 43, § 961 (1964).

80. SCHAFER, RESTITUTION TO VICTIMS OF CRIME (1960).

81. La Code Française de Procédure Pénale, Ants. 2, 3, 4 (as amended 1963); for a good critical discussion see Howard, *Compensation in French Criminal Procedure*, 21 MOD. L.R. 387 (1958). Hungary, Norway, Sweden, Dominican Republic, Holland and Israel also permit this practice. See generally SCHAFER, *op. cit. supra* note 82.

82. Germany's compensatory fine known as Busse for insult and personal injury is available under the "adhesive procedure," but this compensatory award excludes any civil recovery; the Swiss Busse-fine paid by the convicted offender may be applied in part to the award given to one who has suffered severe hardship, but will not receive any compensation. See Swiss Penal Code, Art. 60(1) (1937).

83. See British Criminal Justice Act, § 11(2) (1948); the Crimes Act 1961, 1 Stat. 487 (N.Z.); Criminal Justice Act, (1957) 3 Reprint of Statutes 461 (N.Z.).

84. In Cuba *civil* compensation is awarded in the criminal proceedings, Codigo de Defensa Social (Code of Social Defense) arts. 11-1, 122-3 (1938).

85. SCHAFER, *op. cit. supra* note 82, at 106.

In France the principle that a person who causes damage to another is obliged to repair it is common to both penal and civil law.[86] No distinction is made between property and nonproperty injury when the civil action for reparation is brought within the criminal proceedings.[87] Once the victim elects to sue in civil court he cannot have the action remanded to the criminal proceeding. German law allows property claims only to be brought into the criminal proceedings. The victim may submit his verbal civil claim—suffered from the criminal offense—unless the criminal judge regards it as inadmissible or protracting of the case.

This "adhesive" procedure was designed to avoid the duplication of court work, but it is rarely used because lawyers and criminal judges consider civil claims as alien to criminal procedure and frequently decline to give judgment on them.[88] Such a decision is not prejudicial to the victim as his claim still may be brought in the civil court.

France's penal system permits enforcement of the reparation judgment against the offender's prison work income, whereas Germany's system leaves payment from prison earnings to the offender's discretion. This is consistent with the rehabilitation and penal reform policies which deplore placing a lien against the future earnings of a convict and further disabling him from rehabilitation.[89]

ALTERNATIVES FOR IMPROVING AMERICAN JURISPRUDENCE

Joinder of Criminal and Civil Actions

Legislation permitting joinder[90] of the criminal prosecution by the state and the damage claims of the injured plaintiff before the criminal judge is a possible means of diminishing the victim's labors and costs toward financial restoration. Of course, such a joinder would be within the discretion of the trial judge; it would be granted only where the civil claim does not extend or disrupt the criminal proceedings to the offender's prejudice. Fines often vary according to the judge's view of the circumstances and perhaps damages could be considered as well. The effect of the joinder would be to permit the state prosecutor, in a technical sense, to plead the cases of both state and the victim. The public would not object to the side benefits for any one of its citizens when its own status is being restored, hopefully more in fact than in theory. The legislation permitting joinder would indirectly be providing public financial

86. Reparation must be in full, even in the difficult case of moral damage. Code de Procédure Pénale, art. 3, para. 2.

87. SCHAFER, *op. cit. supra* note 82, at 22.

88. SCHAFER, *op. cit. supra* note 82, at 40.

89. *E.g.*, WISC. STAT. ANN. § 59:20(8) (Supp. 1965). This policy was also specifically considered in N.Z. Act No. 134.

90. The legislation could be designed similar to FED. R. CIV. P. 18, 20.

assistance to the victim through state paid prosecutors without distinct taxation for that purpose. The sharp objection to this remains that a fair criterion on which to allow joinder may be impossible to establish. Admission and trial of the civil damage suit in the criminal proceedings would subject the basis of the suit to a higher degree of proof, and would tend to interfere with, and delay the trial of the offender's guilt.[91] A practical obstacle to adoption of joinder in this situation may be the common-law concept that only civil damages exist, thus the resistance to even discussing outright damages in American criminal proceedings.[92] Statutory joinder would eliminate the strict dichotomy between civil damages and criminal punishment.

Allocating Present-day Fine to Victim

To avoid resistance from the criminal judge who is constrained to consider civil damages in his court, any reparation in the criminal proceedings must have a punitive purpose. A portion of the present-day fine to the state, which may or may not supplant imprisonment, could be allocated as damages to the victim. This would continue the punitive practice of restoring the public to its former status and compensating that member of the public directly injured. This will require a re-evaluation of the nature and extent of the punitive element in both criminal fines payable to the state and discretionary provisions for payment of the loss. Where an order by the criminal court to pay the victim the value of property taken "supplants the imposition of a fine or imprisonment, the criminal quality of the punishment is completely eliminated."[93] If the presumption is made that it might be a more fitting function of the criminal law to punish through reparation to the offended, than solely to the public, the offender's punishment, not being mitigated by that reparation, the "supplanting" or additional fine factor would not eliminate the criminal quality of the punishment.

Additional Fine System for Benefit of Victim

A practical reform could be the establishment of distinct statutory fine systems for the benefit of victims of criminal violence. This fine could be considered and rendered at the criminal judge's discretion, without disruption of the trial of the wrongdoer's guilt, and without prejudice to a civil suit. The fine imposed could be deducted from any later civil judgment against the defendant by the same plaintiff. The judicial tendency to enforce the state fine at its minimum and the victim's recovery at its maximum should be encouraged so as not to deplete the defendant's funds on the state fine.

91. Howard, *supra* note 81, at 389.
92. SCHAFER, *op. cit. supra* note 20, at 123.
93. Hall, *Restitution and the Criminal Law*, 39 COLUM. L. REV. 1185, 1197 (1939).

The lack of strict uniformity in this discretionary finding is inevitable, but no more so than with jury damage determinations. The one salient objection to the creation of a statutory fine system or to the allocation of penal fines is that they both presume the identity, apprehension, conviction and solvency of the wrongdoer.

State Compensation Plan

It is submitted that a compensation plan to assist victims of criminal violence should be adopted in every state. Although the case for adopting such a plan is not watertight,[94] moral and practical considerations indicate that the state is, at least, partially responsible[95] and that losses ought to be spread.[96] A public assistance for victims has just been adopted in California. That plan provides that aid be given "to the family of any person killed and to the victim and family of any person incapacitated as a result of a crime of violence."[97] The aid is, of course, conditioned on need.

The British and New Zealand plans are ideal. They compensate victims of all crimes of violence.[98] In the alternative it has been suggested that the plan be limited "to injury to a person caused by criminal homicide, criminal assault . . . and forcible rape."[99] The plan adopted should contain a provision providing for repayment if the victim recovers civil damages, a penal fine or a statutory fine.

Conclusion

Although the alternatives of joinder of actions in the criminal court and inclusion of the victim in a fine system present practical and theoretical problems, the "fine" proposal appears worthy of experiment. Construction of a statutory fine system to enforce the victim's right to both monetary and punitive relief would expose the absence of this relief when the wrongdoer cannot be found. This might help to overcome present public rejection of any responsibility for compensating victims of criminal acts. The possibility of extending municipal liability to cover failure of police protection is unlikely. It is impractical and theoretically bad to hold citizens and their governments solely liable for the violation, in their neighborhoods, of a state law. It has been recommended that municipal liability be limited to a maximum amount and the remaining municipal loss shifted to the state on "payment of a nominal sum per person or assessed valuation."[100]

94. Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. Rev. 444, 455-59 (1964).
95. *Id.* at 456.
96. *Id.* at 457.
97. Cal. Welfare Code ch. 1549, § 2 (Supp. 1965).
98. Commd. No. 2323, §§ 13-16.
99. Childres, *supra* note 94, at 459.
100. Antieau, *Tort Liability of Municipalities*, 40 Ky. L.J. 131, 148-49 (1951).

A state compensation plan similar to that of Britain and New Zealand appears to be the most fair and workable form of redress for victims of criminal violence. The real goal under a concerted public liability plan is *prevention.* Direct economic interest tends to promote investigation and concern for both the wrongdoer and the victim. Better means for prevention is the most desirable end of a compensation plan for victims of crime.

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