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A Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal

By Patrick Campbell

B.A., 1975, Ohio University; J.D., 1978, University of Toledo; Visiting Instructor, University of Cincinnati College of Law

My object all sublime
I shall achieve in time
To let the punishment fit the crime
The punishment fit the crime.

In recent years, a plethora of victim compensation laws has been enacted throughout the United States.¹ Many explanations are offered for this phenomenon,² but perhaps the simplest and most logical one is that fundamental changes in the basic concepts embodied in the American system of criminal procedure are occurring. These changes are actually a reordering of society's priorities.

Traditionally the American criminal procedure has focused on defining the balance to be struck between the criminal's individual liberties and the State's enforcement of its penal statutes. This balancing


process is apparent when one contrasts the opinions of the Warren Court with those of the Burger Court. The Burger Court has unquestionably whittled away at what it considers to be the excesses of the Warren years. However, weighting the criminal justice system more heavily against the criminal’s rights has not placated the concern of many who feel that the system still lacks any procedure whereby those who suffer the immediate harm of an infraction can be assisted. The current arid adversarial procedure is clearly insufficient.

When a crime is committed, society is certainly harmed; however, the unfortunate victim is directly affected, yet he remains unaided. Within the criminal justice system, the victim is frequently relegated to the position of a helpful, yet nonessential, witness at the trial. It is precisely this void in the American criminal justice system that the victim compensation laws in the United States have sought to fill.

In reality, concern for the victim’s well-being is nothing new. Various societies have long grappled with the problem, and as is usually the case, the common law and civil law jurisdictions have chosen different approaches in attempting to resolve it. While victim compensation laws which provide state aid to victims of crime are a relatively novel concept in the United States, the continental European countries have permitted the victim of a crime to join a civil action with the criminal prosecution since Napoleon’s reign. This article will examine and compare an example of each of these differing approaches—the actio civile in France and the victim compensation laws of the State of California. In the end a hybrid form is suggested as the best way to resolve the problem, but first, a thorough explanation of the actio civile is warranted before a comparative analysis is undertaken.


4. In primitive and early Western Civilization, prior to the state’s assumption of responsibility for adjudicating criminal proceedings, the offender was held directly liable to the victim. An excellent example can be found in the custom among the North American Indian Tribes of having an offender of the tribal laws provide compensation or restitution directly to his victim’s clan. Wolfgang, Victim Compensation in Crimes of Personal Violence, 50 MINN. L. REV. 223, 223-24 (1965).

Victim Compensation in Civil Law Jurisdictions: The Action Civile

Since 1808, the French Code de procédure pénale has provided a means by which the victim of a crime can become a party to the proceedings against the criminal.6 Simply stated, a crime committed in France gives rise to an action publique,7 or prosecution, and an action civile.8 The action civile is vested in the partie civile, i.e., the individual who personally suffers the damage directly caused by the offense.9 The partie civile may bring his action civile in either the criminal courts at the same time as the action publique10 or in the civil courts as a separate cause.11

If the partie civile decides to bring his action civile before the civil courts, the rule that le criminal tient le civil en l'état applies, and the civil trial must await a determination of the action publique.12 Once the partie civile has chosen to bring the action civile before the civil jurisdiction, he cannot transfer it to the criminal jurisdiction.13 However, if the ministère public initiated the action publique, and a judgment on the merits has not yet been rendered by the civil jurisdiction, the action civile may be transferred.14 The rule is relaxed when the partie civile desires to shift the action civile from a criminal jurisdiction to a civil one. There is no difficulty in doing so, so long as there has not yet been

6. La loi de 17 November 1808 [1806-09] Duv. & Boc. 319. Other continental European countries and former colonies have adopted similar provisions. SWEDISH CODE OF JUDICIAL PROCEDURE, ch. 22, §§ 1-8 (BRUZELIUS AND THELIN 1979); RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC CODE OF CRIMINAL PROCEDURE, art. 29 (1960); MOROCCAN CODE OF CRIMINAL PROCEDURE, arts. 1-14 (1959).
8. Id. art. 2.
9. Id. Nevertheless, the right to bring an action civile is not limited to persons; for example, a union may pursue an action civile which is relative to the collective interests of the profession it represents. Code de travaille (C. Trav.) art. 11. The collective interests requirement is satisfied even if only a limited number of union members have a direct interest in the action civile itself. Judgment of Oct. 7, 1959, Cass. crim., [1960] Recueil Dalloz, Jurisprudence (D. Jur.) 294. Associations that are formed to combat racism are also vested with the rights of a partie civile for certain infractions of the Code pénal. C. Pr. Pen. art. 2-1. Recently, the Cour d'assises de Paris upheld the right of a feminist association, Choisir, which is dedicated to safeguarding women in danger, to sue as a partie civile in a rape prosecution though only nominal damages were awarded. Judgment of Dec. 15, 1977, Cour d'assises, Paris, [1978] Receuil Dalloz-Sirey, Jurisprudence (D.S. Jur.) 61.
10. C. Pr. Pen. art. 3.
11. Id. art. 4.
12. Id. However, it is the responsibility of the defendant to seek the stay in the civil jurisdiction; the fact that a complaint has been filed with the ministère public is insufficient, in and of itself, to stay the civil proceedings. Judgment of April 30, 1970, Cass. civ. 25, [1970] D.S. Jur. 189.
14. C. Pr. Pen. art. 5.
There are two methods by which the *partie civile* may bring his *action civile* before the criminal jurisdictions. The easiest method occurs when the *action publique* has already been set in motion by the *ministère public*; in this instance, the *partie civile* merely joins his *action civile* demanding damages. If the infraction which is the basis of the *action civile* is a *crime*, which roughly translates into a felony in American jurisprudence, the *action civile* may be joined at any time during the *instruction*. If the infraction is a *délit* or *contravention*, which are roughly equivalent to misdemeanors, the *action civile* may be joined at any time before or during the trial. However, it must be joined before the *ministère public* has made his petition on the merits at trial; or, if the court has adjourned prior to sentencing, then before the petition on sentencing is submitted by the *ministère public*.

The second method of initiating an *action civile* is used when the *action publique* has not yet been commenced. In this event, the victim may initiate the *action publique* in either of two ways, again depending on whether the underlying infraction is a *crime*, *délit*, or *contravention*. If a *crime* or *délit* is involved, the victim may file a complaint naming himself as a *partie civile* with the appropriate *juge d'instruction*; the complaint need not specifically identify a given individual as the alleged wrongdoer. The *juge d'instruction* delivers the complaint to the *ministère public* who can submit a petition not to proceed with the *instruction* if he feels that the facts are legally insufficient to support a prosecution or, if proved, that they would not entail criminal sanctions. In any event, the *juge d'instruction* may proceed with the *instruction*.

The permissive tone of the Code has been ignored by the Cour de cassation which has held that the complaint, even though styled as an *action civile*, must be treated the same as a *requisitoire introductif*, filed

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16. C. Pr. Pen. art. 87. Thus, the *partie civile* may join his *action civile* to the *action publique* at any time prior to an order being issued by the *chambre d'accusation*, the indicting chamber, ending the *instruction*. Judgment of June 25, 1937, Cass. crim., [1938] Recueil Périodique et Critique (D.P.) 148.
17. C. Pr. Pen. arts. 418-19. Article 536 provides that the procedure outlined in Articles 418-26 regarding the constitution of the *partie civile* in cases involving a *délit* also govern when the case involves a *contravention*. Thus, cites hereinafter will only be to articles 418-26 when referring to *délis* and *contraventions*.
18. C. Pr. Pen. art. 421.
19. Id. art. 85.
20. Id. art. 86.
21. Id.
by the ministère public, which is how an instruction is usually initiated. This is so even though the action civile could not possibly benefit the partie civile and the partie civile only desires to establish the guilt of the accused and thus obtain the benefits of prosecution by the state.

If the infraction which is the basis of the claim is a délit or contravention, the victim may commence an action publique by a citation directe. The citation establishes which law has been violated and which act will be prosecuted. It must also indicate the court before which the matter is pending, the time and place of the hearing, and the capacity in which the individual is cited, i.e., accused, party civilly responsible, or witness. When the citation is filed and delivered at the request of the partie civile, it must also state his name, occupation, and domicile. As with the complaint filed by the partie civile with the juge d'instruction when a crime is involved, the Cour de cassation has held that the citation directe filed by the partie civile must be tried in the same manner as if it were filed by the ministère public.

These provisions of the Code de procédure pénale only establish a means by which the victim of a crime may seek compensation for his

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22. In a forgery case, the chambre d'accusation perfunctorily issued an order not to proceed with the instruction because it would only cause social prejudice against the accused. The Criminal Chamber of the Cour de cassation reversed stating that an abstract examination of the complaint alone is an insufficient basis for issuance of such an order. The court found that the chambre d'accusation erred in relying on the prosecutor's petition, which was not prepared in accordance with article 86. Judgment of Feb. 21, 1968, Cass. crim., [1968] D.S. Jur. 691.

23. C. PR. PEN. art. 80.

24. In an involuntary manslaughter case against several teachers for the death of a child at a swimming class, the parents were allowed to join as parties civiles even though the state assumed liability for such accidents and no damages could be recovered from the teachers. Judgment of June 8, 1971, Cass. crim., [1971] D.S. Jur. 594.

25. C. PR. PEN. art. 388.

26. Id. art. 551.

27. Id. The formalistic nature of bringing an action civile when the citation directe is used by the partie civile is a result of the dual methods used to initiate criminal proceedings under the French system. The more serious infractions of the penal code, crimes, must first be investigated by the juge d'instruction during the instruction prior to a trial. The juge d'instruction is in fact a judicial officer who determines whether or not a crime has occurred, id. arts. 175-84, and therefore, whether the proceedings should advance to the chambre d'accusation, which conducts a further investigation before issuing an indictment in the cour d'assises. Id. art. 212-14. However, lesser infractions, délits and contraventions, may be tried without a preliminary investigation. Id. art. 27. The filing of the citation is sufficient. Id. arts. 388 & 531.


29. Judgment of Jan. 22, 1953, Cass. crim., [1953] D. Jur. 109. (Prosecution by citation directe should proceed against government employees who illegally opened the mail of the partie civile even though the government was the only party who could be held liable for damages).
injuries; they do not afford the victim a cause of action in and of themselves. The *partie civile* must still state a claim cognizable under the substantive civil law.\textsuperscript{30} This particular aspect of the *action civile* probably causes the French courts the most difficulty. The civil and criminal courts have occasionally differed in their interpretations of the various articles within the Code civil which create causes of action,\textsuperscript{31} and at times, the criminal courts have even ignored its provisions.\textsuperscript{32}

At all stages of the criminal proceedings, the *partie civile* is permitted to exercise a full panoply of procedural rights. Once an *instruction* is commenced, the *partie civile* is entitled to be represented by counsel,\textsuperscript{33} and he may not be questioned if counsel is not present.\textsuperscript{34} If bail is

\textsuperscript{30} C. PR. PEN. art. 10.

\textsuperscript{31} The following two cases illustrate this discrepancy. Article 1382 of the Code civil is the essence of the French law of torts; thus, it is frequently used in an *action civile* to establish the defendant's civil liability. It provides: "Any act of man which causes damage to another obliges him by whose fault it occurred to make reparation." *Id.* art. 1382. More specifically, in the context of an automobile accident where both the driver and the passengers have imbibed alcohol to the point of inebriation, an issue arises as to whether the passenger's injuries are in fact the fault of the driver who lost control of the automobile because of his intoxicated state or the fault of the passengers who voluntarily rode with the driver knowing the condition he was in.

The Criminal Chamber of the Cour de cassation held that in such a situation the mere presence of the passenger in the automobile is not the fault which generates the accident; rather it is the failure of the driver to handle the car properly which lies at fault. The court thus found that the mother of the deceased passenger was entitled to full recovery on the *action civile* that she had brought along with the driver's prosecution for voluntary manslaughter. Judgment of Jan. 24, 1962, Chain. crim., [1962] D. Jur. 678.

In a civil case dealing with this exact issue, the Cour d'appel de Paris held that by drinking to the point of inebriation with the driver, the passengers consciously accepted the risk and cooperated themselves in committing the fault which was the cause of the injuries they sustained. The passengers thus had no recourse against the driver. Judgment of Dec. 7, 1961, Cour d'appel, Paris, [1962] D. Jur. 694.


\textsuperscript{32} The criminal courts have previously found the Code civil inapplicable. In a rather amusing case, a prostitute joined as a *partie civile* in the *action publique* against her pimp. She claimed as damages the percentage of her earnings which the pimp had taken and was granted such relief by the trial court. On appeal, the pimp claimed that the trial court had erred in granting such recovery since article 1131 of the Code civil, which states that all obligations based on illicit contracts are void, applied to the *action civile*. The Cour de cassation rejected this argument stating that the recovery represented reparation for damages previously inflicted; it was not contractual. Judgment of July 7, 1945, Cass. crim., [1946] D. Jur. 149.

The case commentator noted that this was a clear break with the past precedent that no jurisdiction, including the criminal, could grant damages other than those which conform to the general principles of civil responsibility. Savatier, *id.* at 150.

\textsuperscript{33} C. PR. PEN. art. 114.

\textsuperscript{34} *Id.* art. 118.
granted, the sum must be sufficient to cover the costs of the proceedings and the damages demanded by the partie civile.\textsuperscript{35} During the hearings, the partie civile may pose questions if the juge d'instruction authorizes the partie civile to do so.\textsuperscript{36} The partie civile is also entitled to notice of all jurisdictional orders\textsuperscript{37} and may appeal an order not to investigate, an order to dismiss, or any order which is harmful to his civil interests.\textsuperscript{38} He is also entitled to restitution of any of his property which was used in the instruction.\textsuperscript{39}

If the juge d'instruction finds that a crime was committed and a trial is commenced before the Cour d'assises, the partie civile is to receive a list of witnesses to be summoned by the accused, and the partie civile is to provide the accused with a list of his witnesses at least twenty-four hours before the trial.\textsuperscript{40} An objection can be raised at trial to any witness being heard if such notice was not given or was given improperly.\textsuperscript{41} The partie civile may also have copies of all steps of the proceedings made at his expense.\textsuperscript{42} Again, the partie civile may pose questions to the witnesses, though at this stage it is through the intermediary of the président de chambre.\textsuperscript{43} The partie civile may also propose conclusions which the court must rule on.\textsuperscript{44} Finally, the arguments of the partie civile are heard after the witnesses have finished presenting the testimony. The ministère public and the accused are heard next, the partie civile and the ministère public are given an opportunity to reply to the accused's arguments, and the accused is heard last in rebuttal.\textsuperscript{45}

After the Court d'assises pronounces judgment on the action publique, and after all the parties have been heard, the court rules on the action civile. The court decides whether the damages demanded are to be awarded, without the assistance of a jury; this may be done at a subsequent hearing presided over by a single judge who reports to the full court if it is deemed appropriate.\textsuperscript{46} If the accused is acquitted or

\textsuperscript{35} \textit{Id.} art. 142.
\textsuperscript{36} \textit{Id.} art. 120.
\textsuperscript{37} \textit{Id.} art. 183.
\textsuperscript{38} \textit{Id.} art. 186.
\textsuperscript{39} \textit{Id.} art. 99.
\textsuperscript{40} \textit{Id.} art. 281.
\textsuperscript{41} \textit{Id.} art. 330.
\textsuperscript{42} \textit{Id.} art. 280.
\textsuperscript{43} \textit{Id.} art. 312.
\textsuperscript{44} \textit{Id.} art. 315.
\textsuperscript{45} \textit{Id.} art. 346.
\textsuperscript{46} \textit{Id.} art. 371. This is so even if an appeal has already been brought on the decision pronouncing the sentence. Judgment of May 30, 1958, Cass. crim., [1958] D. Jur. 160.
absolved, the *partie civile* may still be awarded damages if the injuries resulted directly from the fault of the accused and the facts that are the object of the prosecution are the facts adjudicated at trial.\(^{47}\) When the accused is acquitted, the burden is on the *partie civile* to show that through the fault or negligence of the accused he suffered damage.\(^{48}\) If the accused is found guilty, obviously there is no need to find fault on his part; however, it remains necessary to show that the injury flowed directly from the facts which served as the basis of the prosecution.\(^{49}\)

In cases involving *délits* and *contraventions*, the *partie civile* may be represented by counsel,\(^ {50}\) is entitled to notice of the trial date,\(^ {51}\) can submit questions to the judge to be asked of the accused,\(^ {52}\) and other witnesses,\(^ {53}\) and may propose conclusions upon which the court must rule.\(^ {54}\) Once all of the witnesses are heard, the arguments of the *partie civile*, the ministère public, and the accused are entertained. Each is then given an opportunity to reply in the same order.\(^ {55}\) The *partie civile* is heard only in his capacity as a plaintiff; he may not be heard as a witness.\(^ {56}\)

The court rules on the *action civile* after it decides whether a *délit* or *contravention*\(^ {57}\) occurred. There is no provision for finding the accused liable on the *action civile* if he is not guilty of a *délit* or a *contravention*, contrary to cases where defendant is accused of a crime,\(^ {58}\) and the court may only award damages to the *partie civile* to redress the

\(\text{47. C. Pr. Pén. art. 372.}\)

\(\text{48. In an *action publique* against an employee of the *partie civile* for theft, the employee was acquitted, but the evidence showed that the employee had not locked all the doors and windows in the building and had entrusted the keys to an unauthorized person. This was found sufficient to justify granting the *partie civile* damages resulting from the theft. Judgment of Feb. 26, 1969, Cass. crim., [1969] D.S. Jur. 325.}\)

\(\text{49. In an *action publique* brought against a commercial transporter for failure to acquire the proper license, the Cour d'assises awarded damages to the Société nationale des chemins de fer (SNCF), the national railroad company, which had joined as a *partie civile*. The Cour de cassation reversed stating that there was no relation between the wrong and the indemnity granted SNCF. Judgment of Nov. 20, 1973, Cass. crim., [1973] Bulletin des Arrets de la Cour de Cassation, Chambre Criminelle (Bull. Crim.) n° 434, 1052.}\)

\(\text{50. C. Pr. Pén. art. 424.}\)

\(\text{51. *Id.* art. 420.}\)

\(\text{52. *Id.* art. 442. Article 536 provides that the administration of proof for a *contravention* is the same as that outlined in articles 427-57 for a *délit*; thus, any references to these sections apply to the prosecution of a *contravention* as well.}\)

\(\text{53. *Id.* art. 454.}\)

\(\text{54. *Id.* art. 459.}\)

\(\text{55. *Id.* arts. 460, 536.}\)

\(\text{56. *Id.* art. 422.}\)

\(\text{57. *Id.* arts. 466, 539.}\)

\(\text{58. *See* text accompanying note 47 *supra.*}\)
harm caused by the infraction.\textsuperscript{59} The court can order a provisional payment of all or part of the damages allowed.\textsuperscript{60}

Once it is determined that the defendant is liable to the \textit{partie civile}, recovery is permitted for all of the damages inflicted: material, physical and psychological.\textsuperscript{61} The court is not limited to granting only the damages requested by the \textit{partie civile}; it may increase the amount requested if it believes an increase is warranted.\textsuperscript{62} However, the \textit{partie civile} is not relegated to simply monetary compensation. The criminal court may also grant restitution of property within its custody.\textsuperscript{63} The courts have corrected falsified documents, closed illegal premises, and advertised their findings in the newspapers.\textsuperscript{64}

Whether the infraction is a \textit{crime}, \textit{délit}, or \textit{contravention}, the \textit{partie civile} is also entitled to appeal the criminal court's judgment to the extent that it affects his civil interest. If a \textit{crime} was involved, an appeal is brought directly to the \textit{Chambre criminelle} of the Cour de cassation by filing a petition for review.\textsuperscript{65} If a \textit{délit} or \textit{contravention} was the basis of the prosecution, an appeal is first brought before the appropriate Cour d'appel,\textsuperscript{66} and a petition for review may be filed with the Cour de cassation once the Cour d'appel renders its judgment.\textsuperscript{67} The Cour d'appel is not permitted to alter the trial court's judgment in any way unfavorable to the \textit{partie civile}.\textsuperscript{68}

Checks are built into these procedures to ensure that the \textit{action civile} is not abused. If the victim of a crime wishes to initiate an \textit{instruction}, he is required to deposit a sum sufficient to defray the costs of

\textsuperscript{60} C. PR. PEN. arts. 464, 539.
\textsuperscript{61} Id. art. 3.
\textsuperscript{63} Id. arts. 373, 478, 543.
\textsuperscript{65} C. PR. PEN. art. 567.
\textsuperscript{66} Id. arts. 497, 546.
\textsuperscript{67} Id. art. 567.
\textsuperscript{68} Id. arts. 515, 549. Nevertheless, the Cour de cassation has held that in an appeal brought by both the \textit{partie civile} and the \textit{ministère public}, the Cour d'appel can dismiss the \textit{action civile} on the grounds that the damages claimed are not a direct result of the infraction. Judgment of Feb. 15, 1966, Cass. crim., [1966] Bull. Crim., n° 43, 87.
the investigation unless he has obtained judicial assistance. The **partie civile** who loses his plea for damages in the Cour d'assises when a **crime** is involved is liable for the costs of the proceedings if he initiated the **action publique**; however, the court may suspend the costs in full or in part, considering the circumstances of the case. Likewise, when a **délit** or **contravention** is involved, the **partie civile** who loses is liable for costs, and again, the court may suspend costs in full or in part. Also, an **action publique**, initiated by the **citation directe** of a **partie civile** who thereafter does not appear or is not represented, may not be prosecuted unless the **ministère public** so requests. The **partie civile** in such a case is deemed to waive the **action civile**.

An attempt by the **partie civile** to join an **action publique** is susceptible to a judgment of irreceivability whether a **crime**, a **délit** or a **contravention** is the basis of the prosecution. The issue of irreceivability can be raised by the **ministère public**, the accused, or another **partie civile**. The issue involves a determination as to whether the **partie civile** has a legal basis for bringing the **action civile** and has done so under the proper procedures.

A further restraint on the abuse of the **action civile** is the ability of the accused to bring a criminal action against the errant **partie civile** for **denoncitations calomnieuses** (defamatory accusations) made before judicial officers. Such an action is based on allegations of either a false character being given the facts presented to the judicial officer or a falsification of the facts themselves and a showing of malicious intent.

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69. C. Pr. Pen. art. 88.
70. Id. art. 375.
71. Id. arts. 475, 543.
72. Id. arts. 473, 543. If the accused is found guilty of an infraction, the **partie civile** cannot be held for costs even if he loses his claim for damages unless he has caused unnecessary expenses through frivolous proceedings or acts in an effort to delay. Judgment of June 6, 1967, Cass. crim., [1967] Bull. Crim., n° 175, 413.
73. C. Pr. Pen. art. 425. However, article 425 can only be implemented when the **partie civile** has not manifested an intent to proceed, and it is incumbent on the accused to petition the court for such a dismissal. Judgment of Dec. 29, 1964, Cass. crim., [1965] D.S. Jur. 67. It is sufficient that the **partie civile** send a letter to the court indicating his intent to remain a partie to the **action publique**. Judgment of Feb. 16, 1960, Cass. crim., [1960] D. Jur. 243. The issue may not be raised for the first time on appeal. Id.
74. C. Pr. Pen. art. 87.
75. Id. art. 423.
76. Id. arts. 87, 423.
77. C. Pen. art. 373.
This procedure alone has not proven sufficient to rectify abuses of the *action civile*, largely because it is a difficult burden to bear. Thus the only true Damoclean sword of an accused who is acquitted is the ability to bring an action in the criminal court against the *partie civile* for the damages caused by the prosecution.

If the *partie civile* initiated an *instruction* which ends in the *juge d'instruction* ordering a dismissal, the accused may bring an action for damages before the criminal court which investigated the charge. This in no way prejudices a prosecution for *denonciations calomnieuses*, but is dependent on a similar action not being brought in the civil courts. The court takes charge of the file and holds a hearing in chambers at which all of the parties, including the *ministère public*, are heard. Besides awarding damages, the court may order publication of its ruling at the expense of the *partie civile*. Even if the accused is not specifically named in the complaint filed by the *partie civile*, an action for damages may be maintained if the accused can show from the actions and accusations of the *partie civile* during the *instruction* that beyond doubt he was the object of the complaint.

If the trial of a *crime* ends in acquittal, and the *partie civile* fails to prove the accused's liability for the alleged damages, the Cour d'assises may hear the accused's claim for damages in the same manner that it would hear the *action civile* if the accused were found liable to the *partie civile*. If a *délit* was the basis of the prosecution in which the *partie civile* initiated the *action publique*, and the accused is acquitted, the court can hear the acquitted party's damages claim against the *partie civile*. The Cour d'appel may hear such a claim if it reverses the accused's conviction on appeal. Apparently, the same procedure which is used for a *délit* applies to *contraventions* as well.

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80. Howard, supra note 62, at 394.
81. C. PR. PEN. art. 91. While the former accused need not show malicious intent, there must be established at least a fault imputable to the *partie civile* since this action is based on article 1382 of the Code civil. Judgment of Dec. 20, 1961, Cass. crim., [1962] D. Jur. 55.
83. C. PR. PEN. art. 371.
84. *Id.* art. 472.
85. *Id.* art. 516.
86. For some inexplicable reason article 472 is not incorporated into the procedure used in passing judgment in the tribunal de police, which hears *contraventions*; in fact, its absence is conspicuous since article 543 incorporates articles 473 to 486 in determining the allocation of costs and the method of restitution. However, article 516 is incorporated in providing the manner and disposition of an appeal from the tribunal de police to the Cour d'appel, and a treatise on French criminal procedure indicates that the acquitted accused may bring a damages action in the tribunal de police, though it cites no authority. BOUZAT ET PINATEL, II TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE 1349 (2e ed. 1970) Paris.
any one of the provisions, the acquitted defendant must meet the same burdens which are imposed on the \textit{partie civile} in bringing an \textit{action civile}.

The foregoing discussion should leave the reader with an adequate understanding of how the victim of a crime in France can constitute himself a \textit{partie civile} in an \textit{action publique} and seek reparation in the criminal courts for the harm done to him. The approach that the common law jurisdictions have adopted in aiding the victims of crime to recover for their injuries, as evidenced by the victim compensation law of the State of California, is discussed below.

\section*{Victim Compensation in Common Law Jurisdictions}

Common law jurisdictions have maintained a strict separation of the civil and criminal laws, forbidding a criminal court, in the absence of statutory authority, to sentence a defendant to pay damages to his victim.\footnote{Ray v. State, 40 Ga. App. 145, 146, 149 S.E. 64 (1929); People v. Moore, 43 Mich. App. 693, 697, 204 N.W.2d 737 (1973); Commonwealth v. Rouchie, 135 Pa. Super. Ct. 594, 607, 7 A.2d 102, (1939). However, it should be noted at this point that the State of New Jersey, in the recent revision of its criminal code which goes into effect on September 1, 1979, permits its criminal courts to "sentence a defendant to pay a fine or make restitution in addition to a sentence of imprisonment or probation if: (1) The defendant has derived a pecuniary gain from the offense; or (2) The court is of the opinion that a fine or restitution is specifically adapted to deterrence of the type of offense involved or to the correction of the offender." N.J. STAT. ANN. § 2C:44-2 (West Supp. 1979).}

Traditionally, the victim of a crime had only those remedies which were available in the civil courts. The inadequacies of this system have long been apparent and lately there has been an increased demand for state aid in alleviating the victim's injuries. Given the common law jurisdictions' antipathy toward blending civil and criminal remedies, the logical choice, and the simplest alternative, was to establish a state agency to administer a victim compensation program. This is the approach used in California.

California was the first jurisdiction in the United States and the third common law jurisdiction to adopt a statutory scheme for state compensation to the victims of crime.\footnote{New Zealand in the Criminal Injuries Compensation Act, 1963, Stat. N.Z. no. 134, and England in the Home Office Compensation for Victims of Crimes of Violence, Cmnd. no. 2325 (1964), preceded the original California legislation. CAL. WELF. & INST. CODE § 1500.02 (West 1965) (repealed 1967). For a discussion of the operation of the English} Even though California has had such legislation for almost fifteen years, there is very little case law
of any consequence regarding the administration of the system. However, an overview of the statutory structure should provide the reader with a sufficient understanding of the legislation and the theories which underlie its operation. Being first is not always best but the California procedure for compensating the victims of crimes, as amended, is fairly representative of similar laws recently enacted throughout the United States.

The administration of the victim compensation program in California is entrusted to the State Board of Control. The Board performs an audit function for the legislature in the consideration of claims against the state. It is regarded as an administrative agency and is subject to the rules regarding such agencies in conducting its business. The investigative functions of the Board were formerly conducted by the State Attorney General's Office; this provision was amended in 1977 to give the Board's staff the duty of verification.

The victim of a crime of violence may file an application for assistance with the Board. The application must set forth the date, na-
ture, and circumstances of the crime and include a complete financial statement indicating the cost incurred and sources of indemnification, a description of the disability suffered and an authorization permitting the Board to verify the facts therein.\textsuperscript{96} If the victim fails to cooperate in the verification process his application may be rejected on that ground alone.\textsuperscript{97} The Board considers the completed application at a hearing of which all interested persons must be given at least five days notice.\textsuperscript{98}

At the hearing, the Board reviews the application of the victim and the report compiled by its staff; it may also receive additional evidence which it deems necessary or desirable to properly evaluate the application.\textsuperscript{99} The victim need not appear.\textsuperscript{100} "If a preponderance of the evidence shows that as a direct result of the crime the victim incurred an injury which resulted in a pecuniary loss," the application is approved unless (1) the victim knowingly and willingly participated in the crime, (2) the victim failed to cooperate with law enforcement officials, or (3) the nature of the victim's involvement in the events leading to the crime warrants the preclusion of his recovery.\textsuperscript{101}

The Board may award up to $10,000 for medical related expenses, $10,000 for lost wages or support, and $3,000 for job retraining. The awards must compensate for damages which are a direct result of the injury and must be equal to the pecuniary loss.\textsuperscript{102} Payment may be in a lump sum or in periodic distributions; if periodic, the Board, upon review, may increase, reduce or terminate payment according to need.\textsuperscript{103} All decisions of the Board are to be in writing and are subject to judicial review.\textsuperscript{104}

The California scheme attempts to ensure that it is the criminal and not the taxpayer who subsidizes this procedure in two ways. First, the state is subrogated to the rights of the victim against the perpetrator of the crime or any person liable for the pecuniary loss to the extent of the payments granted, less the amount of any fine imposed by the court.

\textsuperscript{96} Id. \textsuperscript{97} Id. \textsuperscript{98} Id. \textsuperscript{99} Id. \textsuperscript{100} Id. \textsuperscript{101} Id. \textsuperscript{102} Cal. Gov't Code \textsuperscript{103} Id. \textsuperscript{104} Id.
on the perpetrator of the harm. The state is also entitled to a lien on any recovery made by or on behalf of the victim to the extent of the payments granted, and notice of the initiation of an action for damages against those responsible for the injuries which were the basis of the award granted by the Board must be given to the Attorney General. Second, a person convicted of a crime which resulted in the death of or injury to an individual is required to pay a fine commensurate with the crime, not to exceed $10,000, if the defendant has the present ability to pay such a fine and payment would not force the defendant or his dependents to become reliant on public welfare. Also, a fine of $10.00 for each felony conviction and $5.00 for each misdemeanor conviction is added to any fine or penalty imposed by the court. The monies collected under either provision are paid into the Indemnity Fund, which is then used for appropriations by the legislature to indemnify persons under this plan.

The procedure outlined above is indicative of the manner in which the common law jurisdictions have sought to aid the victims of crime. A comparison between the California system and the civil law system reveals the former's weaknesses.

A Comparison of Victim Compensation in Civil and Common Law Jurisdictions

In evaluating the relative merits of the French and California procedures for aiding the victims of crime, it is first noteworthy that both systems permit the victim to pursue the usual tort remedy in the civil courts. However, since under the California scheme the state indemnifies the victim from its own coffers, an involved schedule is used which entitles the state to subrogation or liens to ensure that the victim does not receive a double recovery. This is unnecessary under the French scheme for the wrongdoer is held liable directly, not vicariously, to the victim.

This initial distinction underscores the duplication inherent in the victim compensation laws adopted in common law countries as contrasted with the relative simplicity of the *action civile* in France. Under the California legislation, as with nearly all common law victim compensation laws, the prosecutor and the victim are required to follow two separate procedures to ensure that the ends of justice are met. The
wrongdoer plods through the criminal process, while the victim treads through a bureaucratic maze. This is so because the common law's strict separation of criminal and civil actions system necessitates the creation of an entity separate from the courts to provide the victim with a forum in which to seek compensation from the state for the damages suffered.\textsuperscript{109} On the other hand, the \textit{action civile} places the victim in the criminal court; thus, not only can he recover damages from the perpetrator of the harm, but he can also see that the machinery of the state is used effectively in prosecuting a violation of the community's laws.

In the respect, the ability of the \textit{partie civile} to institute the \textit{action publique} against the accused wrongdoer is indispensable. The \textit{partie civile} can exercise his trial rights, including the presentation of his own evidence,\textsuperscript{110} to insure that the \textit{ministère public} is prosecuting the \textit{action publique} with all due diligence.

Another favorable aspect of the French system is the added accountability arising from the defendant's obligation to place the victim in the position he occupied prior to the crime. The California legislation attempts to achieve this accountability by imposing an additional fine upon those convicted of crimes resulting in physical injury or death;\textsuperscript{111} however, it does not place a direct obligation on the wrongdoer to compensate the victim. Without undertaking an exhaustive statistical study of the French and California systems, one can only speculate whether this aspect of the \textit{action civile} has a more positive effect than the California system on the rehabilitation of the convicted.

Nevertheless, it is clear that a system which enables the victim to confront the perpetrator of harm and to take an active role in seeking personal redress affords the victim a much more therapeutic remedy than a system in which criminal and civil proceedings are separated. This is true particularly in cases in which the victim does not have the means to pursue his civil remedy. Whether he prevails or not, the victim will have had his day in court. Substantial criticism of the criminal court system, as established in California, has emanated from the general perception that once a victim is injured, he has no feasible means of achieving a personal remedy. He is relegated to a powerless posture while a typically overburdened district attorney's office, with no personal stake in the outcome of the case, initiates a lackluster prosecution in the name of "the people." His only other option is to initiate a costly

\textsuperscript{109}. See text accompanying note 87 \textit{supra}.
\textsuperscript{110}. See text accompanying notes 43-45 \textit{supra}.
\textsuperscript{111}. See text accompanying note 107, \textit{supra}.
civil action which would essentially duplicate all of the work, time and money that has already been expended in the criminal action. A proceeding analogous to the *action civile* would answer this criticism.

The effect of having the *ministère public* in the proceedings on the side of the *partie civile* would alleviate this Hobson's choice. In most instances, the *partie civile* would need only to watch while the *ministère public* competently prosecuted the accused.112 Once the accused is convicted, all the *partie civile* need do is prove the damages caused by the infraction. The victim could thereby save substantial litigation costs.

With the present widespread acceptance of plea bargaining as a means of alleviating the already overburdened criminal courts,113 the introduction of an *action civile* might appear especially opprobrious. However, there is no reason why the interests of the *partie civile* could not be included in any plea bargaining negotiations. Once the victim is compensated, the need for punishment by the state is less compelling. Moreover, a frequent condition of probation, especially when a property crime is involved, is that the victim receive restitution from the wrongdoer.114

The final noteworthy shortcoming of the California victim compensation law is the lack of breadth in the type of damages which it treats as compensable. The California legislation is limited to physical injuries or death, compensating the victim only for medical expenses and lost wages.115 Victims of property crimes are left with their tort remedies which involve the same defects as the tort remedies for bodily injury, i.e. the cost of a civil action. The *action civile* provides the procedure for recovering damages caused by any crime if the theory of liability is recognized by the substantive civil law.116

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112. See text accompanying note 49 supra.
114. I witnessed this phenomenon myself while I worked for the Public Defender's Office of Toledo, Ohio: First as a legal clerk, and later, as a legal intern. More often than not, the prosecutor consulted the victims about the acceptability of a negotiated plea; if restitution were acceptable, a suspended sentence with probation was usually the result. Frequently, the victim would even accept a dismissal of the case if restitution had already been made. I doubt that this practice is peculiar to Northwestern Ohio. I add this aside to point out that the victim at present does have a somewhat clandestine role in the American criminal justice system.
115. See text accompanying note 102 supra.
116. See text accompanying note 30 supra.
The action civile is not without its faults. First, if the perpetrator of the harm goes undetected, or if he is found, but indigent, the action civile is pecuniarily worthless. In this regard, the victim compensation laws have effected a much more equitable result.\textsuperscript{117} The California legislation is silent on this point, yet, as long as the victim can prove by a preponderance of the evidence that the injuries were a direct result of a crime of violence, the statute would not appear to preclude recovery even if the wrongdoer escapes criminal conviction. Thus, the common law system ensures compensation for the victim without subjecting him to the vagaries of the criminal justice system.

The problem of victim compensation in the case of indigent defendants has been confronted with even more success by the common law jurisdictions of New South Wales and Queensland. These jurisdictions have chosen to use the criminal courts rather than administrative agencies to provide for victim compensation.\textsuperscript{118} If the criminal escapes apprehension, or is convicted but impecunious, the victim may apply to have the prosecutor's office file a recommendation that the victim be compensated from the public treasury.\textsuperscript{119} Thus, the victim is guaranteed the full amount awarded by the court and does not have to resort to an administrative remedy.

Second, as previously noted, the strict separation of civil and crim-

\textsuperscript{117} See, e.g., ILL. ANN. STAT. ch. 70, § 77(a) (Smith-Hurd Supp. 1979); OHIO REV. CODE ANN. § 2743.64 (Page Supp. 1978). Both of these statutes provide that an award may be granted without regard to the prosecution or conviction of the wrongdoer.

\textsuperscript{118} Crimes Act, 1900 Stat. N.S.W. no. 40, § 437 and Criminal Code Amendment Act, 1968 Queensl. Stat. no. 44, § 663B. The State of New South Wales has permitted the criminal courts to award the victim damages as part of the convict's sentence since 1900, but this provision has lain dormant for many years. Chappel, The Emergence of Australian Schemes to Compensate Victims of Crime, 43 S. CALIF. L. REV. 69, 72 (1970).

\textsuperscript{119} The State of New South Wales permits the victim to apply to the Under Secretary of Justice for payment if the convict is directed to pay a sum by way of compensation. Criminal Injuries Compensation Act, 1967 Stat. N.S.W. no. 14, § 3. The victim may apply even if there is a dismissal or acquittal. Id. § 4. The Under Secretary investigates the merits of the application and reports to the Treasurer who is to pay the victim for the damages he suffered if it is "justified." Id. § 5. In the case of an unsolved crime, the Attorney-General has stated that ex gratia payments will be made under the above stated conditions. Parl. Deb. no. 53, at 3219 (1967) (N.S.W.).

The State of Queensland also permits the victim to apply to the Minister of Justice for payment of court ordered compensation. Criminal Code Amendment Act, 1968 Queensl. Stat. no. 44, § 663(1). Again, the Minister of Justice investigates the application and reports to the Governor in Council who orders payment from the Treasury if he deems it justified. Id. § 663C(2)-(4). While the Queensland legislation does not provide for compensation in cases of an acquittal or dismissal, it does specifically provide for payments from the Treasury to any person who suffers injury from a crime where the crime was reported without delay, the offender cannot be found, and he is neither indicted nor convicted. Id. § 663(1)(c).
inal courts (and judges) in France has resulted in conflicting and often irreconcilable interpretations of the code sections. As a result, criminal judges would, through statutory interpretation, occasionally deny the victim a civil cause for relief.\textsuperscript{120}

In the United States, this dilemma would not confront a victim. Since stare decisis is observed, and since the same court decides both criminal and civil cases, there is no danger of an inconsistent interpretation resulting in a denial of civil relief.\textsuperscript{121}

**A System of Victim Compensation**

A detailed explanation of how a hybrid of these differing systems would function on a daily basis will demonstrate the simplicity of integrating the *action civile* into our criminal justice system. The hybrid victim compensation procedure incorporates the best of both systems and provides the surest method of guaranteeing that victims of crimes receive truly ameliorative relief. The analysis proceeds from the hypothetical commission of a crime in California through the criminal trial and final appeal.

Assume Mr. John Q. Public observed someone tampering with his automobile in the alley behind his house. When he went outside to investigate, the culprit had already broken into his automobile and was attempting to extricate the stereo unit from the dashboard. Upon being discovered, the culprit panicked and lunged at Mr. Public. A brief scuffle ensued, in which Mr. Public suffered a broken arm and some minor abrasions, and the culprit fled. As a result of this criminal activity, the lock on Mr. Public's car door was broken, the dashboard was detached from the frame, and the stereo no longer functioned properly. Under the California Penal Code, the culprit committed the following crimes: Injury to person or property,\textsuperscript{122} attempted petty theft,\textsuperscript{123} and battery.\textsuperscript{124}

Under the proposed hybrid victim compensation procedure, as is the case in France,\textsuperscript{125} the commission of such crimes gives rise to a prosecution and a private action. The private action is brought through the criminal jurisdiction of the courts and can be based on any tort

\textsuperscript{120}. *See* text accompanying notes 30-32 *supra*.

\textsuperscript{121}. Howard, *supra* note 64, at 399.

\textsuperscript{122}. CAL. PENAL CODE § 650½ (West 1970).

\textsuperscript{123}. *Id.* §§ 488, 663, 664(4). The stereo will be valued at under $200, and therefore, the attempt was not to commit grand theft. *Id.* § 487(1).

\textsuperscript{124}. *Id.* at §§ 242, 243.

\textsuperscript{125}. *See* text accompanying notes 7-8 *supra*. 

theory currently recognized in the State of California.\footnote{126}

However, only the person who suffered the damage directly caused by the infraction of the Penal Code is permitted to pursue the private action in the criminal courts.\footnote{127} For example, if Mr. Public is insured and collects from the insurance company for the damage to his person and his property, the cause of action ceases to exist because the insurance company cannot exercise its right of subrogation in the criminal courts.\footnote{128} Assuming Mr. Public has no insurance to cover the damages, he is entitled to bring a private action, since he has clearly suffered these damages as a direct result of several infractions of the Penal Code.\footnote{129}

\textit{Initiation of Criminal Proceedings}

Under the proposed scheme, Mr. Public is still able to bring his

\footnote{126. As under the French system, the private action only provides a procedure whereby the victim of a crime can seek compensation for the harm that has befallen him, it does not provide the victim with a substantive civil claim. \textit{See} text accompanying note 30 \textit{supra}. Thus, the substantive basis for the private action would generally be found in the Civil Code.

The foundation for Mr. Public's private action is \textit{CAL. CIV. CODE} § 1708 (West 1973), which provides that "\textit{e}very person is bound, \ldots, to abstain from injuring the person or property of another, or infringing upon any of his rights." This would provide a basis for both the physical and property damage suffered by Mr. Public.

\footnote{127. \textit{See} text accompanying note 9 \textit{supra}.

128. The \textit{action civile} has been so interpreted by the French courts. Judgment of Oct. 10, 1957, Cass. crim., [1958], D. Jur. 386. Even though certain organizations other than insurance companies have been permitted to bring an \textit{action civile}, this conforms to the general rule that the assignee of a \textit{partie civile} may not bring an \textit{action civile} before the criminal tribunals. Judgment of Feb. 25, 1897, Cass. crim., [1898] Recueil Sirey, \textit{Jurisprudence} (S. Jur.) I 201.

To permit the avaricious ways of insurance companies to enter into the criminal justice process would be counter-productive given that the moral gratification of the victim is a substantial justification for the implementation of the private action. Such an exclusion could be readily absorbed by the insurance industry; policies could provide that any recovery from a private action shall be set off against the settlement with the insurance company. The victim would not suffer from this exclusion either because the prosecutor would be substituted for the insurance company's counsel, and while it might be argued that the insurance companies retain more skilled attorneys than local prosecutor's offices, the ability of the victim to exercise procedural rights at trial, as well as the opportunity to be represented by counsel, see text accompanying note 138 \textit{infra}, would more than satisfy this apparent deficiency.

Concerning the ability of other third party organizations to bring a private action, there is good reason to permit unions and social activist groups to bring private actions, for society in general, or a specific group within society, is often the true victim of many crimes. Apparently, this has not caused great difficulty in the administration of the \textit{action civile} in France, and any perceived problem could be dealt with by legislation limiting the type of groups which could exercise the private action.

\footnote{129. \textit{See} text accompanying notes 122-24 \textit{supra}.}
claim for damages in the civil courts if he has the means and the desire to do so.\textsuperscript{130} But let us assume that Mr. Public wishes to see the culprit humbled in the criminal courts and wants to bring a private action to recover his damages in conjunction with the prosecution.\textsuperscript{131} In California, a procedure is already in existence whereby the victim of a crime may initiate a prosecution, whether it be for a felony or a misdemeanor, by filing a written complaint with the appropriate court.\textsuperscript{132}

\begin{enumerate}
\item CAL. CONST. art. 6, § 5.
\item Substantially the same rules that apply to transferring the \textit{action civile} from the civil courts to the criminal courts, and vice versa, in France should apply to the private action. See text accompanying notes 12-15 supra. Thus, once the victim has brought a tort suit in the civil courts, he may not transfer it to a private action in the criminal courts — unless the prosecutor has initiated the criminal proceeding and the trial has not yet begun in the civil court. However, the victim may abandon the private action in the criminal courts any time prior to the rendition of the verdict at trial and bring a tort suit in the civil courts.

This procedure permits the victim to avoid an unfavorable decision in the preliminary stages of the prosecution, such as a grand jury's failure to indict the accused or the court's granting of a demurrer. In such instances the victim is able to pursue his remedies in the civil courts, or if this proves impractical because the defendant is indigent, the victim may move that a court be assigned to hear the private action and proceed under the same guidelines as when the defendant is acquitted. Such a hearing need not be the private action that is appended to the complaint. As this stands the criminal defendant is no longer being called upon to answer to the state for a crime he may have committed; rather he is called upon to answer to the individual he has harmed. Loopholes in the criminal justice system should not prevent equitable victim compensation.

This procedure is essential because at most pretrial stages the only determinations being made are divorced from the guilt or innocence of the accused, \textit{e.g.}, probable cause, suppression of evidence, jurisdiction. Clearly, these judgments should not be influenced by the possibility of concurrent civil liability. Nevertheless, these judgments should not preclude establishing civil liability in a separate proceeding. This is especially so when the grand jury refuses to indict since the grand jury's standard for determining whether to return an indictment is the same as "\textit{w}ould, in its judgment, warrant a conviction by a trial jury." \textsc{Cal. Penal Code} § 939.8 (West 1970).

Once a final judgment is rendered in either the civil or criminal court, however, it will have the full effect of res judicata. \textit{See}, \textit{e.g.}, Levy \textit{v.} Cohen 19 Cal. 3d 165, 561 P.2d 252, 137 Cal. Rptr. 162, \textit{cert. denied}, 434 U.S. 833 (1977); McNulty \textit{v.} Herbert Corp, 125 Cal. App. 2d 697, 271 P.2d 90 (1954); Poochigian \textit{v.} Layne, 120 Cal. App. 2d 757, 261 P.2d 738 (1953).

\item Generally, "\textit{e}very public offense must be prosecuted by indictment or information. . . ." \textsc{Cal. Penal Code} § 682 (West 1970). Offenses which can be tried in municipal and justice courts are exempt from this requirement. \textit{Id.} § 682(3). Municipal and justice courts have jurisdiction in all criminal cases involving a misdemeanor where the offense was committed in the county in which the court sits. They also have jurisdiction over violations of local ordinances. \textsc{Cal. Penal Code} § 14621 (West. Supp. 1979). Thus, to initiate a prosecution for the commission of a misdemeanor one only need file a written complaint subscribed to under oath in the appropriate municipal or justice court in the county where the offense occurred. \textit{Id.} § 740.

When a felony or a misdemeanor not otherwise provided for is the basis of the prosecution, the superior courts have original jurisdiction. \textsc{Cal. Const.} art. 6, § 5. While prosecution of such crimes in the superior court must be based on an indictment or information, \textsc{Cal. Penal Code} § 737 (West 1970), a written complaint is the basis for the preliminary
Since the crimes committed in Mr. Public's fact situation are all misdemeanors triable in the inferior courts, the criminal proceedings are commenced by his filing a written complaint subscribed to under oath with the municipal or justice court which would have jurisdiction over the offense in the county where the offense occurred, or with any other court having jurisdiction. Mr. Public need only include an additional count stating the substantive basis for his private action and the damages he claims he has suffered.

Pretrial and Trial Procedures

Once the prosecution is initiated under the proposed scheme, Mr. Public is permitted to exercise limited procedural rights. Thus, during the pretrial stages, he is given notice of, and an opportunity to be heard at, any pretrial hearing, including arraignment and preliminary examination if he deems it necessary. Mr. Public is also permitted to file necessary motions or responses to supplement the prosecutor's case. Finally, Mr. Public's agreement is essential to any plea bargaining agreement.

At the trial itself, Mr. Public has the right to notice of all proceedings, the right to cross-examine all witnesses, the right to be heard in all arguments before the court and jury, including opening and closing statements, and the right to submit proposed jury instructions. Mr. examination which is required before an information is filed. Id. § 728. Again, the complaint must be written and subscribed to under oath; however, the complaint must be filed with the magistrate who is to conduct the preliminary examination. Cal. Penal Code § 806 (West Supp. 1979). If the magistrate finds at the preliminary examination that there is sufficient cause to believe that the defendant is guilty of a crime, the defendant is held to answer for the crime. Cal. Penal Code § 872 (West 1970). Upon such a finding, it is the duty of the district attorney in the county in which the offense is triable to file, within fifteen days from such order, an information. Id.

Therefore, whether the prosecutor wishes to aid the victim of a crime or not, the procedure currently exists whereby the victim of a crime can have his private action heard by a criminal court on his own motion whether the crime be a felony or a misdemeanor. More importantly, if the trial is to be in the superior court and the prosecutor refuses to attend the trial, the court must appoint an attorney to perform the prosecutor's duties. Id. § 1130. Such a procedure could also be adopted for the inferior courts.

134. Id. § 859.
135. This would include the right to respond to any demurrer, Cal. Penal Code § 1004 (West 1970), motion to dismiss, id. § 1385, or motion to suppress evidence, Cal. Penal Code § 1538.5 (West, Supp. 1979), filed by the defendant.
136. See note 119 supra.
137. The current order of procedure at trial, embodied in Cal. Penal Code § 1093 (West Supp. 1979), need only be amended slightly in order to accommodate the victim's presence at the criminal's trial. At the opening statement, id. § 1093(2), the prosecutor
Public has the right to be represented by counsel at his own expense to ensure that he will exercise these rights effectively. In contrast to the French system, Mr. Public's attorney would not be heard until after the prosecutor's presentation, but would be heard before the defendant's presentation.

When a prosecution witness testifies, he is initially examined by the prosecutor. If Mr. Public's attorney deems it necessary, he can then subject the witness to direct examination. The defendant has an opportunity to cross-examine the witness. On redirect and recross-examination the same order is followed. Counsel for the defendant conducts the direct examination of its own witnesses, after which the prosecutor conducts his cross-examination. If Mr. Public's attorney wishes to elicit further testimony, he has the option of concluding the cross-examination. The foregoing procedure applies to redirect and recross-examination as well. Mr. Public's attorney has the right to raise objections to any testimony at any time during the course of the trial. Such rights are sufficient to permit Mr. Public's attorney to act as a guardian of the private action, ensuring that the prosecutor presents a competent case; since most prosecutors usually do just that, Mr. Public's attorney will ideally waive most of these rights, thereby creating minimal disturbance or delay in the smooth operation of the trial.

If the case is tried before a jury, the following procedure will apply: Once the jury reaches a verdict on the criminal charges, Mr. Public would proceed first, then the victim's counsel, and finally the defendant's counsel. The victim would not have an opportunity to present evidence in support of the charge, id. § 1093(3), or in rebuttal. Id. § 1093(4). He would be relegated to his right to examine any witness called by the prosecutor or defense counsel, subject to the judge's power to control the proceedings, CAL. PENAL CODE § 1044 (West 1970); any witness he felt compelled to present in order to prove the basis of his private action could be called at the hearing subsequent to the rendition of the verdict. See text accompanying note 148 infra. At the closing statement, CAL. PENAL CODE § 1093(5) (West Supp. 1979), the prosecutor would be heard first and could reserve time for rebuttal, he would be followed by the victim's counsel, and finally, the defendant's counsel. The victim could easily be included in the group permitted to file proposed jury instructions with the court. CAL. PENAL CODE § 1093.5(West 1970).

138. See text accompanying note 45 supra. Also, unlike the French system, the victim who brings a private action would not be precluded from being heard as a witness in the prosecutor's case. The French method can prevent effective prosecution and deter the victim from filing a private action. This result is too harsh; rather, the trier of fact, be it judge or jury, should weigh the victim's pecuniary interest in determining the degree of credibility it would attach to the victim's testimony. People v. Craig, 86 Cal. App. 3d 905, 916 n.3, 150 Cal. Rptr. 676 (1978).

139. Again, all of these rights would be restricted by the judge's power to control proceedings and to limit the introduction of evidence and the arguments of counsel to relevant and material matters. CAL. PENAL CODE § 1044 (West 1970).

140. Id. § 1149.
Public's private action is heard by the judge who presided at the trial.\(^{141}\) If the jury (or the judge if a jury was waived by the defendant) finds Mr. Public's assailant guilty, there is no further need to find fault on the part of the defendant.\(^{142}\) At the hearing on the private action, Mr. Public will be required to show that the injury he suffered was directly caused by the acts which were the basis of the prosecution\(^{143}\) and to prove the amount of the alleged damages to his person and property.

If the judge or jury found Mr. Public's assailant not guilty of the criminal charges, then in order to recover his alleged damages at the subsequent hearing before the judge, Mr. Public must show by a preponderance of the evidence\(^{144}\) that the damages he suffered were directly caused by a violation of the Civil Code\(^{145}\) and were the result of the facts adjudicated at the preceding trial.\(^{146}\) Again, Mr. Public

\(^{141}\) As in the French system, see text accompanying note 46 supra, the jury should not be involved in ruling on the private action. The jury's determination of the defendant's guilt or innocence should not be tempered or mitigated by the thought that it can compromise on that issue by agreeing to find the defendant liable on the private action and innocent of the criminal charges. Obviously, the jury should be instructed on this point by the judge. CAL. PENAL CODE § 1093(6) (West Supp. 1979).

Thus, a victim would be required to waive the constitutional right to a jury trial in a civil case, CAL. CONST. art. 1, § 7, if the victim wished to bring a private action. CAL. CIV. PROC. CODE § 592 (West 1976). This is a small sacrifice to endure since the private action ensures speedier and more certain remedies for the victims of crime. Also, the continuing efficiency of jury trials in civil cases is questionable. A jury is not necessarily a talisman which ensures justice at the trial. Burger, Chief Justice's Yearend Report, 1977, 64 A.B.A.J. 211 (1978); Hogan, Some Thoughts on Juries in Civil Cases, 50 A.B.A.J. 752 (1964); Note, The Jury: A Reflection on the Prejudices of the Community, 20 HASTINGS L.J. 1417 (1969).

\(^{142}\) Since the defendant was found guilty beyond a reasonable doubt of committing the acts which were the basis of the prosecution, it is equally clear that the same acts would be found to have occurred by a preponderance of the evidence. The distinction between these two standards of proof and their applicability is well-established. CAL. PENAL CODE § 1096 (West 1970). That the beyond a reasonable doubt standard is more difficult to prove than the preponderance of the evidence standard is also apparent. Compare People v. Bellon, 23 Cal. 3d 516, 519 P.2d 485, 153 Cal. Rptr. 195 (1979), with Llodas v. Sahadi, 19 Cal. 3d 278, 562 P.2d 316, 137 Cal. Rptr. 653 (1977). The criminal acts adjudicated in this hypothetical prosecution then would also amount to a violation of California Civil Code section 1708. See note 126 supra.

\(^{143}\) In California, one is required to show that the act or omission which caused the damage was a substantial factor in its occurrence in order to recover in a tort action. Vesley v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). This standard should apply to the private action.

\(^{144}\) Since the proceedings at this point are no longer criminal in nature, but rather, are based upon violations of the Civil Code, applying the preponderance of the evidence standard is appropriate. CAL. CIV. PROC. CODE § 206(5) (West 1955).

\(^{145}\) See note 126 supra.

\(^{146}\) See note 143 supra.
must further prove the amount of the personal property damage he suffered.\footnote{147}

At the subsequent hearing on the private action, Mr. Public would be able to call additional witnesses to present the evidence required to meet the burdens he must bear. The defendant would then have an opportunity to present his own witnesses in order to rebut Mr. Public's case. These examinations would be conducted in accordance with the Code of Evidence.\footnote{148} Once the testimony was taken, Mr. Public and the defendant would be permitted to give closing statements, with Mr. Public having the right to open and close the argument. The prosecutor could also make recommendations on the private action to the court if he so desired.\footnote{149} At the end of this hearing, the judge would adequately compensate Mr. Public for the harm he suffered, both to his person and his property.

None of the enumerated requirements should prove to be a bar to Mr. Public's recovery on his private action given the facts in our hypothetical situation. The judge's award can be enforced just like any civil judgment.\footnote{150} Thus, Mr. Public is able to recover for the physical damage he suffered and for the property damage caused to his automobile.\footnote{151} However, the foregoing analysis is based on the assumption that Mr. Public's assailant was properly identified and apprehended and that he did not prove to be indigent once the judgment on the private action was rendered.

\footnote{147} See note 151 \textit{infra}.

\footnote{148} CAL. EVID. CODE § 765-78 (West 1966).

\footnote{149} This would differ from the subsequent hearing on the \textit{action civile} in France where the \textit{ministère public} takes an active role in the proceedings. C. PR. PEN. arts. 460, 536.

\footnote{150} The most useful method of enforcing the judgment on the private action, if the defendant refuses to pay the damages awarded, could be to seek a writ of execution. CAL. CIV. PROC. CODE § 684 (West Supp. 1979). “All goods, chattels, moneys, or other property, both real and personal, or any interest therein . . . ” of the defendant could be attached by Mr. Public, \textit{id.} § 688, and a lien could be granted to the extent of the judgment. \textit{Id.} § 688.1.

\footnote{151} All damages would be awarded in accordance with the Civil Code. CAL. CIV. CODE § 3274 (West 1970). Thus, “[f]or the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.” \textit{Id.} § 3333. “When a breach of a duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.” \textit{Id.} § 3360. Finally, “[i]n an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.” \textit{Id.} § 3294. That the egregious conduct evidenced in Mr. Public's hypothetical case would warrant an award of punitive damages is apparent. Esparya v. Specht, 55 Cal. App. 3d 1, 127 Cal. Rptr. 493 (1976).

Just as in the French system, the damages recoverable under the private action should not be limited to those requested by the victim. \textit{See} text accompanying note 62-64 \textit{supra}. 
If either of these problems occur, since the proposed scheme incorporates the procedure in the Australian states of New South Wales and Queensland,152 Mr. Public is guaranteed recovery of the awarded compensation by the state. If the culprit escapes apprehension,153 Mr. Public can apply to the prosecutor's office to have it file a recommendation with the State Board of Control that Mr. Public be compensated from public funds for the damages he suffered as a result of the crime.154 If Mr. Public's assailant is found to be liable on the private action, but is indigent, Mr. Public is again permitted to apply to the prosecutor's office for a recommendation to the State Board of Control that Mr. Public's award be paid from public funds.155 Should the prosecutor refuse to file such a recommendation, Mr. Public can appeal the determination directly to the State Board of Control. If the Board refuses to pay Mr. Public's claim, or he is in some other way aggrieved by the Board's decision after the prosecutor files a recommendation, such decision is subject to judicial review.156 Payment of the damages award is stayed pending appeal.157 Mr.

152. See text accompanying notes 118-19 supra.
153. The statute of limitations for misdemeanors is one year, Cal. Penal Code § 801 (West 1970), and for most felonies three years. Cal. Penal Code § 800 (West Supp. 1979). The victim of a crime cannot be expected to wait for the statute to run before seeking compensation from the state. Once a complaint is filed by the victim, and a reasonable period of time passed without the culprit being apprehended, perhaps four to six months, the victim should be permitted to recover from the state the damages he suffered.
154. The skeletal structure for this procedure already exists in the present victim compensation scheme being used in California. See text accompanying notes 91-93 supra.
155. After a reasonable time has passed without the culprit being apprehended and upon application of the victim, the prosecutor may file a recommendation with the State Board of Control stating the validity of the claim by the victim, e.g., that the injury sustained is the direct result of the commission of a crime and that the culprit has not yet been apprehended. The prosecutor may request the State Board of Control to compensate the victim for the damages suffered. There is an upper limit on the amount which could be dispensed under this procedure. See text accompanying note 102 supra. Unlike the current California procedure, however, compensation should be based on property damage as well as bodily injury. The state would then be subrogated to any claim the victim would have against the culprit, including use of the private action should the culprit later be apprehended, or any insurance monies that the victim might be entitled to. The exercise of this right of subrogation would not be exercised as frequently as under the current compensation procedure because normally the victim would recover from the defendant at trial on the private action.
157. All appeals are brought through the normal channels. Thus, in Mr. Public's case, an appeal from the municipal and justice courts is first prosecuted before the superior court of the county in which the trial court is located. Cal. Const. art. 6, § 5; Cal. Penal Code
Public has the right to appeal only the ruling on his private action.\textsuperscript{158} If the defendant appeals his conviction and it is reversed subsequent to the granting of damages in the private action, a hearing would have to be held on remand of the private action. Mr. Public would be responsible for proving by a preponderance of the evidence that the damages he suffered were a direct result of his assailant's violation of the Civil Code.\textsuperscript{159} On such a showing, the damages awarded on the private action can then be reinstated.

Finally, as in the French system, certain checks are included within the proposed scheme's procedure to prevent abuses in pursuing a private action. Mr. Public is subject to prosecution for perjury if he knowingly makes false statements in the pleadings or in his testimony.\textsuperscript{160} More importantly, if Mr. Public initiates the prosecution, he is liable for court costs if the defendant is found not guilty and Mr. Public is denied a damages award on his private action.\textsuperscript{161} Also, if Mr. Public initiates the prosecution, the defendant is acquitted, and the private action is dismissed on the merits, the defendant can then have the same court hear his claim for damages resulting from the prosecution at a hearing conducted in all respects like a private action.\textsuperscript{162} The substantive basis for this private action would likewise be found in the provisions of the proposed scheme.\textsuperscript{163} In addition, when a private action is joined to a criminal prosecution, the defendant, the prosecutor, or another victim who has also joined a private action to the prosecution may move that the private action in question be found irreceivable, \textit{i.e.}, that there is no legal basis for bringing the private action or

\textsuperscript{158}§ 1466 (West 1970). Further appeals are brought before the court of appeals, \textsc{cal. const.} art. 6, § 4b, and finally, the supreme court. \textit{Id.} § 4.

\textsuperscript{159} This avoids any problem with double jeopardy arguments because only the civil aspects of the case are appealable. Breed v. Jones, 421 U.S. 519 (1975); United States v. Hess, 317 U.S. 537 (1943). The defendant is permitted to appeal either the criminal or civil aspects of the prosecution and private action. The prosecutor is only permitted to appeal the criminal aspects of the proceedings.

\textsuperscript{160} The same procedure for proving the private action applies as if the defendant is found not guilty initially. \textit{See} text accompanying notes 144-147 \textit{supra}.

\textsuperscript{161} \textsc{cal. penal code} § 118 (West 1970).

\textsuperscript{162} Under California law, a complainant is liable for costs if the prosecution is found to be malicious and without probable cause. \textsc{cal. penal code} § 1447 (West 1970). This could be amended to cover private actions as well.

\textsuperscript{163} This procedure is adopted from the French system. \textit{See} text accompanying note 83 \textit{supra}.

\textsuperscript{163} \textsc{cal. civ. code} § 43 (West 1954) states that an individual is entitled to "the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations."
that the proper procedures were not followed in doing so.\textsuperscript{164} The motion of irreceivability is brought in the same manner as any other pre-trial motion.\textsuperscript{165}

While the private action may not prove a panacea for all the damage Mr. Public has suffered, it certainly provides a more exhaustive remedy than do the current procedures available in California. Pursuing a private action is more cumbersome than filing a claim with the State Board of Control, but the relief, both monetary and psychological, is also more complete.

\textbf{CONCLUSION}

The longevity of the \textit{action civile} and its adoption by both continental Europe and its former colonies speak for the feasibility of adopting such a procedure in the United States. As evidenced in the foregoing section, the adoption of the \textit{action civile} in any state would not be as difficult as it might appear at first glance. Over the years, the \textit{action civile} has developed a strong foundation, and in those areas where it remains weak, \textit{e.g.}, the inability of the victim to recover damages when the wrongdoer is not found or is indigent, a state could supplement the \textit{action civile} by providing for direct financial reimbursement from state funds when the wrongdoer goes undetected or is impoverished.

We have learned much from our European ancestors, and we can learn even more.\textsuperscript{166} The adoption of the \textit{action civile} would ruffle some feathers, particularly those of the prosecutor who is used to wielding his discretion with impunity, but with some shaping to adapt it to a given state's idiosyncracies, the \textit{action civile} could prove just as equitable a system here as it is in France.

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\textsuperscript{164} This determination parallels the concept of irreceivability as it has developed in the interpretation of the \textit{action civile}. C. PR. PEN. arts. 87, 423.
\textsuperscript{165} A motion to dismiss the private action can be brought under California Penal Code, \textsc{Cal. Penal Code} § 1385 (West 1970). This section can be invoked to dismiss a criminal case initiated by the victim for want of prosecution if the victim fails to appear at the criminal proceedings.
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