Loyola of Los Angeles Law Review

Volume 13 | Number 2 Article 6

3-1-1980

California's Approach to Third Party Liability for Criminal Violence

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CALIFORNIA'S APPROACH TO THIRD PARTY LIABILITY FOR CRIMINAL VIOLENCE

I. INTRODUCTION

If the 1960s and early '70s can loosely be termed the era of criminal rights, then one might say we have recently entered the era of victims' rights. Concern for victims of crime and means of compensating them have increased steadily over recent years. Since 1965, when California became the first state to enact a statutory program for aiding the victims of violent crime,[1] compensation statutes have been enacted in at least thirteen other states.[2] Restitution programs, in which criminals work to repay their victims, have been established in a number of states, including California.[3] There is also increasing judicial recognition of potential civil liability of third persons for negligently failing to prevent the injuries sustained by victims of violent crime. In this situation a person or entity can be held civilly liable to the victim of a violent crime for either failing to control the criminal or failing to protect the victim.[4]

One commentator has attempted to justify civil liability of third persons by the following argument:

> [I]f a person has been victimized through the negligence of a non-immune third party, and if the elements of negligence (duty, breach and proximate cause) can be alleged and proved, then the crime victim, as plaintiff, should have the same status in our legal system as other parties, injured by the

1. Act of July 23, 1965, ch. 1549, § 1, 1965 Cal. Stats. 3641 (repealed 1967) (current program set forth in CAL. GOV'T CODE §§ 13959-13969.1 (West Supp. 1963-1979)). *See* H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 12-13 (1974).

2. McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URB. LAW. 346, 346 n.1 (1976) (listing Alaska, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York and Washington).

3. CAL. PENAL CODE § 1203.1 (West Supp. 1979). *See* note 21 *infra* and accompanying text.

4. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychotherapist's liability for patient's violent act); Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970) (school district's liability for student's violent act); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (state's liability for parolee's violent act); Vistica v. Presbyterian Hosp. & Med. Center, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (dicta) (hospital's liability for patient's violent act); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) (landlord's liability for violent acts against tenants).

negligence of others, have had for decades.[5]

Such a simple statement may arouse a jurisprudential righteousness in the reader, but what sounds good in theory may well have untoward results in practice. The California judiciary is heeding the call to arms issued by proponents of third party liability for criminal violence and is rushing in to find additional compensation for the victims of crime.[6] While the decisions imposing third party liability for criminal conduct are still few, they warrant analysis, for the results thus far have been unsatisfactory and show little hope of improvement.

Dean Roscoe Pound recognized the nature of the problem fifty years ago when he said:

> No legal machinery of which we have any knowledge is equal to doing everything which we might like to achieve through social control by law. Some duties which morally are of the highest moment are yet too intangible for legal enforcement.
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> . . . .
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> . . . In periods of transition or expansion, the tendency is especially strong to call upon the law to do more than it is adapted to do. The result is sure to be failure, and failure affects the whole legal order injuriously.[7]

If the current complexity of society and the increasing interdependence of human relationships constitute what Pound would call a period of transition or expansion, then perhaps a change in the law is required. Courts ought to tread carefully, if at all, however, when their justification is doubtful, their goal uncertain, and their method unsound. When responding to the need for change, decisions by the judiciary should at least do the following: (1) accord with current legislative policy; (2) significantly improve the undesirable condition; and (3) rest upon solid legal principles. California decisions supporting civil liability of third persons for negligently failing to prevent injury to crime victims fulfill none of these requirements. Instead, these decisions contravene recently established legislative policy that intentional acts causally supersede negligent acts when both contribute to a person's injury, allow the award of potentially large sums of money to only a small percentage of victims, and primarily rest upon unsound and unpersuasive principles of negligence law.

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5. Carrington, *Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447, 469 (1977).

6. *See* cases cited in note 4 *supra*.

7. R. POUND, CRIMINAL JUSTICE IN AMERICA 62, 69 (1930).

California courts permit third-party tort liability by either balancing policy considerations or finding a "special relationship" between the allegedly negligent third party and the victim or the criminal, *e.g.*, landlord-tenant, psychotherapist-patient, parole board-parolee. The courts usually rely upon the special relationship approach to create a duty in the third person to protect the potential victim or to control the would-be criminal. The courts, however, fail to define what makes a relationship sufficiently "special" to warrant imposing liability for the criminal acts of others. Without considering the proximate cause element of negligence, once the courts find a duty based upon a special relationship, and a breach of that duty, liability is imposed almost automatically.

The courts do not seem justified in creating a cause of action against negligent third parties for the criminal acts of others. If they choose, however, to continue pursuing this course, they should at least seize the opportunity to develop principles of negligence law that will clearly identify and crystallize these new legal responsibilities. The new principles should also impose rational limits to liability. This is supposedly the function of the proximate cause element of negligence, but it seems largely ignored by the courts today.[8] If third party liability is to be continued, the courts should differentiate between various relationships according to the third party's degree of control over the potential victim or the would-be criminal, that is, the extent to which a person has surrendered certain rights of self-protection or self-control to that third party. This approach could be integrated into the policy approach to duty currently being used and provide a focal point for the courts when balancing various policy considerations. Determining the extent of the third person's control is a more justifiable approach to the imposition of liability in certain relationships and avoids many of the problems found in the present decisional law.

II. CALIFORNIA DRAM SHOP LIABILITY: AN ANALOGUE

The burgeoning area of third party liability for criminal violence involves a fundamental, on-going conflict between California's legislature and judiciary. A similar conflict arose in the area of dram shop

8. "The questions of duty and proximate cause are sometimes the same." Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 347, 151 Cal. Rptr. 796, 798 (1979) (citing W. PROSSER, THE LAW OF TORTS 244-45, 325-26 (4th ed. 1971) [hereinafter cited as PROSSER]); Tara v. California State Auto. Ass'n, 93 Cal. App. 3d 227, 231, 155 Cal. Rptr. 497, 499 (1979); see Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).

liability,[9] and an examination of its resolution provides a useful analogue to this new area. The issue at the heart of the conflict is whether a third person who, while not directly inflicting injury, facilitates or contributes to the injury-producing activity, should be held legally liable for the victim's injury. While the California Legislature indicates "no," the judiciary answers "yes."

In the dram shop liability decisions, the California Supreme Court adopted the position that one who furnished alcoholic beverages to an intoxicated person who subsequently injured another could be liable for the resulting injuries.[10] The court justified the imposition of liability by (1) extrapolating a statutory duty,[11] (2) interpreting what it perceived as a state policy codified by the legislature in section 1714 of the Civil Code that "[e]veryone is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property,"[12] and (3) identifying a common law duty.[13] Conspicuous by its absence was any proximate cause analysis. The California

9. "Dram shop liability" is used in this comment to refer to the civil liability of a liquor dispenser for injuries caused by the intoxicated person. *See* "Dram Shop Act," BLACK'S LAW DICTIONARY 444 (5th ed. 1979). True dram shop liability is created by statutes, frequently called "Dram Shop Acts." California created similar liability by case law.

10. Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (social host held liable); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976) (out-of-state tavern owner held liable); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (tavern owner held liable).

11. In Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), the court fashioned a rule of liability from two statutes that it decided were interrelated. Section 669(a) of the California Evidence Code provides:

> The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

CAL. EVID. CODE § 669(a) (West Supp. 1979). The court decided that former § 25602 of the California Business and Professions Code brought the plaintiff, a person injured by the negligence of an intoxicated individual, within the class of persons to be protected by § 669. 5 Cal. 3d at 166, 486 P.2d at 160, 95 Cal. Rptr. at 632. Section 25602 stated: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25602 (West 1964) (amended 1978).

12. CAL. CIV. CODE § 1714(a) (West Supp. 1979). *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 325, 546 P.2d 719, 726, 128 Cal. Rptr. 215, 223, *cert. denied*, 429 U.S. 859 (1976) (quoting Rowland v. Christian, 69 Cal. 2d 108, 118-19, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968)).

13. Coulter v. Superior Court, 21 Cal. 3d 144, 154, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978).

Supreme Court disregarded the voluntary conduct of the intoxicated person as a causal factor when assessing liability and stated:

> Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication.[14]

The California Legislature recently amended section 1714 of the Civil Code,[15] abrogating almost all of the recent dram shop liability cases.[16] Amended section 1714 explicitly states that the consumption, rather than the furnishing, of alcoholic beverages is to be regarded as the proximate cause of injuries inflicted by intoxicated persons.[17] The legislature thus has clearly established a policy that an individual who becomes intoxicated shall be held responsible for his voluntary or intentional acts and that the facilitating act of a third party in furnishing alcohol to the intoxicated person is not as blameworthy as the intoxicant's voluntary consumption; voluntary or intentional acts causally supersede negligent acts.

Judicial expansion of any third party liability seems to contravene the legislative policy set forth in amended section 1714 of the California Civil Code. Just as in the dram shop decisions, the focus of the courts in the criminal violence cases is on duty rather than proximate cause; the courts thus side-step the difficult question of whether legal liability should be directly related to the willfullness of the wrongful

14. Vesely v. Sager, 5 Cal. 3d 153, 164, 486 P.2d 151, 158, 95 Cal. Rptr. 623, 630 (1971).

15. The legislature designated the original text of § 1714 as subdivision (a) and added subdivisions (b) and (c), which read as follows:

> (b) It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313), and Coulter v. Superior Court (— Cal. 3d —) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing of alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.
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> (c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

CAL. CIV. CODE § 1714(b)-1714(c) (West Supp. 1979).

16. *But cf.* Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978), decided before the amendment, which was not abrogated. In that case, it appears that the decedent's intoxication, facilitated by the defendant, was not voluntary, and thus would not fall within the boundaries of amended § 1714.

17. *See* note 15 *supra.*

conduct.[18] When imposing third party liability for criminal violence, courts have relied on original section 1714 of the Civil Code as support for the finding of a duty.[19] The amendment of section 1714 should be considered by the courts as a legislative warning against this type of liability. Although it might be said that the legislature addressed itself only to the narrow area of dram shop liability when reinstating the common law rule that voluntary or intentional acts are the proximate cause of injuries in third party cases, such an interpretation is unduly restrictive. In dram shop liability, it is the negligence of the voluntarily intoxicated person that results in injury to another. In the criminal violence situations, however, it is the violent act of the criminal that intentionally causes injury to the victim. The legislature's statement that a person's voluntary act in becoming intoxicated is the proximate cause of any reasonably foreseeable consequences, therefore, should apply with greater weight to the willful acts of criminals and the intended consequences of their acts.

The dram shop liability area represents extreme judicial expansion met with rare and radical legislative curtailment. Although the legislature's amendment of Civil Code section 1714 weighs heavily against judicial expansion of any third party liability, the uniqueness of the legislature's action intimates that a well-reasoned approach to third party cases that imposes rational limits to liability could escape legislative scrutiny. Thus, the lesson to be learned from California's experience in dram shop liability is that the courts should be very reluctant to extend third party civil liability for criminal violence. If extensions are warranted, the court's decisions should be legally sound, persuasive, and limited in scope.

III. CURRENT APPROACHES TO VICTIM COMPENSATION: AN OVERVIEW

In California, there are presently several means of compensating victims of violent crimes for their injuries. As discussed below, these means include (1) obtaining restitution from the criminal by court order in the criminal case, (2) obtaining state aid through the victim com-

18. *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

19. *E.g.*, Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 802, 142 Cal. Rptr. 487, 489 (1977).

pensation program, (3) obtaining civil damages from the criminal, and (4) obtaining civil damages from a third party.[20]

A close examination of these approaches to victim compensation demonstrates that third party liability for criminal violence, although potentially providing large compensatory awards to some seriously injured victims, conflicts with legislatively created victim compensation programs. Moreover, almost all victims of violent crime who need compensation can receive aid in some form without recourse to third party liability.

Of the four compensation methods, court-ordered restitution and victim compensation programs are legislatively created, while both civil damages from the criminal and third party liability are judicially created. This dichotomy represents, in part, a legislative-judicial conflict as to who ought to be held responsible for crime; the legislature permits either the criminal or the state to be liable, while the judiciary identifies a potentially broader liability base. To evaluate the effectiveness of each of the compensation methods and to determine the role of third party civil liability in victim-compensation, it is necessary to consider the source, basis, and scope of compensation for each method.

A. Restitution

In restitution programs a court that finds the criminal guilty may order the criminal to monetarily compensate the victim for his losses, either as a part of the criminal's sentence or as a condition of probation.[21] Restitution is based on the intentional wrongdoer's fault; the criminal caused the victim's injuries and is thus held financially responsible. The principle that responsibility for restitution should fall upon the person who is criminally culpable is logical and comports with traditional beliefs that retribution is a primary function of punishment

20. Other methods of compensation not specifically discussed in this comment include victim self-help (e.g., privilege of self-defense or privilege to recapture chattels), insurance, charity and welfare.

21. In California the trial judge may make restitution by the criminal a condition of probation. If the victim is granted assistance through the victim indemnification program the judge *must* determine whether restitution by the criminal will be a condition of probation. CAL. PENAL CODE § 1203.1 (West Supp. 1979).

Currently pending in the California Legislature is a bill that would make it mandatory for courts to impose restitution by the criminal as a condition of probation in all burglary or robbery cases. S.B. 122, 1979-80 Regular Sess., 169 *Senate History* 79 (1979). This bill also would make it mandatory for courts, at the time of sentencing, to order that as much as 50% of any compensation received by the convicted burglar or robber for labor performed while a prisoner be given to the victim as restitution.

and that the punishment should fit the crime.[22] Restitution thus might be considered a form of retributive punishment.

Restitution also serves to rehabilitate both the victim and the criminal. It provides the victim with a catharsis for his victimization, ensuring that the criminal does not "get away with it,"[23] and allows the victim to regain his sense of personal dignity. At the same time, restitution is uniquely effective in restoring the criminal's sense of social and personal responsibility. Unlike most state-funded compensation programs, restitution by the criminal represents a "correctional goal" rather than a "welfare goal."[24] The scope of restitution, however, is limited by the state's ability to apprehend and convict the criminal. Only the victims of those criminals who are convicted can be compensated by restitution.

B. State-Funded Compensation Programs

The state is the source of compensation under state-funded compensation programs. An example is California's program to indemnify victims of violent crimes.[25] The original justification for California's program was that the state was obligated to provide welfare to those in need.[26] As amended, however, the program's justification seems to have changed to the indemnification and rehabilitation of victims,[27]

22. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 24 (1972). For an early discussion of retribution, see generally ARISTOTLE, THE NICOMACHEAN ETHICS, Book V, Ch. V (J. Thomson trans. 1953).

23. Lamborn, *Remedies for the Victims of Crime*, 43 S. CAL. L. REV. 22, 27 (1970).

24. Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55, 65 (1970).

25. CAL. GOV'T CODE §§ 13959-13969.1 (West. Supp. 1963-1979).

26. Act of July 23, 1965, ch. 1549, § 1, 1965 Cal. Stats. 3641 (repealed 1967). Originally under the auspices of the California Department of Social Welfare, the program appeared to be a welfare project. The language of the act itself carried the implication of welfare, providing as follows:

> Section 1. Section 1500.02 is added to the Welfare and Institutions Code to read:
>
> 1500.02. Aid shall be paid under this chapter, upon application, to the family of any person killed and to the victim and family, if any, of any person incapacitated as the result of a crime of violence, if there is need of such aid.
>
> The department shall establish criteria for payment of aid under this chapter, which criteria shall be substantially the same as those provided for aid to families with dependent children, provided, however, that aid shall be paid regardless of whether or not the applicant meets the property qualifications prescribed for that program. In no event shall expenditures under this section for the 1965-1966 fiscal year exceed one hundred thousand dollars ($100,000).

"Aid" is defined as "the act of helping . . . help given: . . . tangible means of assistance (as money or supplies)." WEBSTER'S NEW COLLEGIATE DICTIONARY 24 (1979).

27. CAL. GOV'T CODE § 13959 (West Supp. 1963-1979). This section provides: "It is in the public interest to indemnify and assist in the rehabilitation of those residents of the State of California who as the direct result of a crime suffer a pecuniary loss which they are

suggesting that the state believes it has a duty to compensate injured victims of crime because the state failed to prevent the crime.[28]

The scope of compensation under the state-funded program is undoubtedly the broadest of all the present compensation methods in terms of the number of victims that can be compensated. There is a $23,000 limitation on the amount a single victim can receive for each occurrence, and while some might view this as a substantial limitation on recovery,[29] such a criticism does not provide justification for a new, judicially-created compensation method, but rather argues for increas-

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unable to recoup without suffering serious financial hardship." "Indemnify" is defined as "to secure against hurt, loss, or damage." WEBSTER'S NEW COLLEGIATE DICTIONARY 579 (1979).

The program is now administered by the State Board of Control, rather than the Welfare Department. *See* CAL. GOV'T CODE § 13960(c) (West Supp. 1963-1979).

28. *See* Lamborn, *Remedies for the Victims of Crime*, 43 S. CAL. L. REV. 22, 24 (1970).

29. CAL. GOV'T CODE § 13965 (West Supp. 1963-1979). This section provides:

> (a) If the application for assistance is approved, the board shall determine what type of state assistance will best aid the victim. The board may take any or all of the following actions:
>
> (1) Authorize a cash payment to or on behalf of the victim equal to the pecuniary loss attributable to medical or medical related expenses directly resulting from the injury but not to exceed ten thousand dollars ($10,000);
>
> (2) Authorize a cash payment to the victim equal to the pecuniary loss resulting from loss of wages or support directly resulting from the injury, but not to exceed ten thousand dollars ($10,000);
>
> (3) Authorize cash payments not to exceed three thousand dollars ($3,000) to or on behalf of the victim for job retraining or similar employment-oriented rehabilitative services.
>
> (b) Assistance granted pursuant to this article shall not disqualify an otherwise eligible victim from participation in any other public assistance program.
>
> Cash payments made pursuant to this article may be on a one time or periodic basis. If periodic, the board may increase, reduce, or terminate the amount of assistance according to need, subject to the maximum limits provided in paragraphs (1), (2), and (3) of subdivision (a).
>
> (c) The board may also authorize payment of attorney's fees representing the reasonable value of legal services rendered to the applicant, but not to exceed 10 percent of the amount of the award, or five hundred dollars ($500), whichever is less.
>
> No attorney shall charge, demand, receive, or collect any amount for services rendered in connection with any proceedings under this article except as awarded under this section.

Thus, under the present program, any given individual who has been criminally injured and who otherwise qualifies can receive as much as $10,000 for medical expenses, $10,000 for loss of wages, and $3,000 for job retraining or employment rehabilitation.

Section 13960 sets forth the qualifications for receipients of compensation under the program:

> As used in this article:
>
> (a) "Victim" shall mean:
>
> (1) a person who sustains physical injury or death as a direct result of a crime of violence;
>
> (2) Anyone legally dependent for his support upon a person who sustains physicial injury or death as a direct result of a crime of violence; and
>
> (3) In the event of a death caused by a crime of violence, any individual who

ing the maximum amount that can be recovered for a single injury under the existing program.

C. *Civil Liability of the Criminal*

As in restitution, the criminal is the source of compensation in a civil suit for damages brought by the victim against the criminal on such causes of action as assault, battery or infliction of emotional distress. The theoretical justification for compensation is essentially the same for the civil suit as for restitution. Civil liability, unlike restitution, however, does not depend on criminal liability, and therefore a lighter evidentiary burden of proof is required to obtain compensation through civil litigation.[30]

The scope of compensation provided by civil liability is relatively narrow because it requires identification and location of the criminal. Most criminals, furthermore, are judgment proof, either because they are indigent or because they are deprived of their earning capacity if incarcerated.[31] Nevertheless, the victim as plaintiff in a civil suit can plead, prove and ultimately be awarded an amount representing general damages, medical expenses, and loss of earnings and earning capacity which could greatly exceed amounts possible under restitution or the state-funded indemnification program.[32] In this respect, civil liability of the criminal significantly augments the legislatively-created restitution and indemnification programs.

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legally assumes the obligation, or who voluntarily pays the medical or burial expenses incurred as a direct result thereof.

. . . .

(d) "Pecuniary loss" shall mean the amount of medical or medical related expense and loss of income or support that the victim has incurred or will incur as a direct result of an injury or death to the extent that the victim has not been or will not be indemnified from any other source. Said loss shall be in an amount of more than one hundred dollars ($100) or shall be equal to 20 percent or more of the victim's net monthly income, whichever is less.

CAL. GOV'T CODE § 13960 (West Supp. 1963-1979).

30. For a discussion of the relative burdens of proof required in civil and criminal trial settings, see B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 45.2 (1972).

31. *E.g.*, McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URB. LAW. 346, 347-48 (1976); Comment, *Rehabilitation of the Victims of Crime: An Overview*, 21 U.C.L.A. L. REV. 317, 319-23 (1973).

As a practical matter, even when alleged criminals have assets and are not incarcerated because of dismissal prior to trial, evidentiary obstacles or collateral estoppel principles may still preclude recovery through civil litigation.

32. *See* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 3169-72 (8th ed. 1974) [hereinafter referred to as WITKIN].

D. Civil Liability of Third Parties

Unlike any of the methods discussed above, the source of compensation under third party liability is some person or entity other than the state or the criminal, whose alleged negligence permitted or facilitated the injury-producing conduct. The victim, as plaintiff, files a lawsuit against the third party on a negligence cause of action. The theoretical justification for recovery is that the third party knew or should have known that he was providing an opportunity to the criminal and/or failing to protect the victim from foreseeable criminal conduct by his negligent act or omission.

Liability is based on the breach of a duty that is either premised on policy or found to exist in various "special relationships" formed between the third party and the victim or the criminal.[33] In California, such civil suits have been brought against the following third parties: a common carrier,[34] an innkeeper,[35] a landlord,[36] a psychotherapist,[37] a hospital,[38] a school district,[39] a parole board, and a probation department.[40]

Compensation obtained by a civil suit against a third party depends upon the victim's ability to establish a legal duty and prove that a breach of that duty resulted in his injuries. Both apprehension and conviction of the criminal are irrelevant to this method of compensation.

Civil suits against negligent third parties are not an augmentation

33. *See* subsections IV A & B *infra* for a discussion of duty and special relationships.

34. Terrell v. Key System, 69 Cal. App. 2d 682, 159 P.2d 704 (1945) (common carrier liable to passenger for failing to protect him from dangerous conduct of others).

35. Kingen v. Weyant, 148 Cal. App. 2d 656, 307 P.2d 369 (1957) (innkeeper liable to guest for failing to protect him from dangerous conduct of others).

36. O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

37. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychotherapist may be liable for failing to warn potential victim that a patient has expressed violent proclivities toward him or her).

38. Vistica v. Presbyterian Hosp. & Med. Center, 67 Cal. 2d 465, 469, 432 P.2d 193, 196, 62 Cal. Rptr. 577, 580 (1967) (dictum suggests hospitals may be liable to those whom a patient harms for failing to prevent such harm).

39. Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970) (school districts may be liable to pupils or others for failing to prevent injuries to pupils while on school grounds).

40. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 353, 73 Cal. Rptr. 240 (1968); Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979) (parole and probation agencies may be liable in some instances to those with whom parolees or probationers are placed for failing to warn such persons of latent dangerous propensities of the released parolee or probationer).

of the legislatively created compensation methods, as are civil suits against the criminal. Rather, third party liability seems inconsistent with the multi-faceted approach to victim compensation adopted in California. This is because negligent third parties are not a legislatively sanctioned source of compensation, and compensation through third party liability is based neither on the fault of the criminal nor on the failure of the state to prevent crime and apprehend criminals. Furthermore, existing compensation methods socially and morally rehabilitate both the victim and the criminal, while third party liability rehabilitates only the victim's pocketbook. Another policy consideration arguing against third party liability is that it shifts the focus away from the criminal's intentional misconduct. In the absence of concurrent criminal or civil proceedings against the criminal, a successful civil suit for damages against a negligent third party has the effect of creating a "vicarious criminal."[41] When the allegedly negligent third party is the only defendant made to answer in court for injuries to the victim arising largely out of criminal conduct, it becomes easy to view him as the criminal.[42]

IV. THIRD PARTY LIABILITY FOR CRIMINAL VIOLENCE AND NEGLIGENCE LAW

The negligence principles that California courts use to justify third party liability for criminal violence are unsound and unpersuasive. Because the issue of duty is often the same as the issue of proximate cause,[43] the paramount problem is to find a rational and workable approach to duty. One approach proposed by courts to decide whether a duty exists is to balance competing policy considerations, but the courts have rarely done any actual balancing.[44] The more frequently used approach to duty in the area of third party liability involves identifying special relationships out of which the duty is said to arise. This approach, however, has presented difficulties for the courts.[45] An alterna-

41. Thus, the negligent third party "stands in the shoes" of the criminal for purposes of victim compensation, especially when the criminal has not been apprehended or is judgment proof.

42. There are instances when a failure to control the conduct of another so imperils public safety that it rises to the level of criminal conduct. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 186 (1972). If the courts continue to recognize civil liability of third parties for criminal violence, the legal principles upon which they rely must be capable not only of distinguishing negligence from non-negligence but also of differentiating tortious negligence from criminal negligence. Such principles have not yet emerged.

43. *See* note 8 *supra.*

44. *See* notes 49-58 *infra* and accompanying text.

45. *See* notes 72-81 *infra* and accompanying text.

tive approach that courts have not considered is to distinguish between various relationships on the basis of the degree to which the potential victim or would-be criminal has surrendered control of his well-being to the third party.

A. Duty as Policy

California decisions on third party liability for criminal violence focus almost exclusively on duty.[46] Reliance on duty as the primary determinant of liability is unsatisfactory in part because it makes liability depend upon judicially formulated policy considerations that may conflict with legislative policies. Judicial policy-making is not based on public input and legislative fact-finding and, therefore, does not necessarily represent predominant social values. In the area of third party liability for criminal violence, when courts impose liability for a victim's injuries on a negligent party, judicially formulated policy conflicts with the legislative policies expressed both in amended section 1714 of the California Civil Code[47] and in the restitution and state indemnity compensation programs.[48]

California appellate opinions often present duty as an issue to be determined by balancing multiple considerations.[49] Although a true balancing of various policy considerations would weigh such factors as the moral blameworthiness of defendant's conduct and the closeness of the connection between the defendant's conduct and the injury suffered

46. The traditional form of pleading a negligence cause of action is to allege five elements: (1) a *duty* requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks, (2) *breach* of that duty, or failure to conform to the required standard, (3) breach as the *actual cause* of the plaintiff's injury, (4) breach as the *proximate cause* of plaintiff's injury, that is, a reasonably close causal connection between the breach of duty and the resulting injury; and (5) *actual injury* or damage to the plaintiff. PROSSER, *supra* note 8, at 143; WITKIN, *supra* note 32, at 2749-50; Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 345-46, 151 Cal. Rptr. 796, 797 (1979).

Of these five elements, duty and proximate cause receive the most attention from the courts because these elements are questions of law rather than of fact. *See* PROSSER, *supra* note 8, at 324; Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d at 347, 151 Cal. Rptr. at 796.

47. *See* notes 15-17 *supra* and accompanying text.

48. *See* notes 21-29 *supra* and accompanying text.

49. The policy considerations listed for balancing by one court were:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

against each other, this has not been the practice. Rather, the courts rely almost exclusively upon foreseeability to determine duty.[50] Thus, while a balancing of policy considerations might be a workable test for duty, California courts have disregarded it.

An example of this *un*balanced approach to duty is found in the majority opinion of *Tarasoff v. Regents of the University of California*.[51] After first reciting the list of policy factors to be balanced,[52] and then stating that foreseeability was the most important of these,[53] the court found that the relationship between a therapist and his patient was a sufficient basis for the imposition of liability on the therapist for foreseeable harm done to another by his patient.[54] Only Justice Clark, dissenting, after candidly admitting that "[p]olicy generally determines duty," applied the prescribed balancing test of policy considerations to the facts of the case.[55] Clark found that "[o]verwhelming policy considerations weigh against imposing a duty on psychotherapists to warn a potential victim against harm," explaining that "[w]hile offering virtually no benefit to society, such a duty will frustrate psychiatric treatment, invade fundamental patient rights and increase violence."[56]

In the landlord-tenant area, there also has been no balancing of policy considerations. In *O'Hara v. Western Seven Trees Corp.*,[57] for example, the court of appeal merely stated that "[a]n analysis of the factors set forth in *Rowland v. Christian* . . . shows that there is potential liability here," because "[t]he existence of the most important factor, foreseeability, was alleged."[58]

In one case, *Beauchene v. Synanon Foundation, Inc.*,[59] when the California Court of Appeal undertook a true balancing of policy considerations, the court found the third party not liable. The court concluded that a private drug rehabilitation center had no duty to protect a person who was shot by an escapee from the center. The court stated that it was necessary to balance " 'the public interest in safety from violent assault' against the public policy favoring innovative criminal

50. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).
51. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
52. *Id.* at 434, 551 P.2d at 343, 131 Cal. Rptr. at 23.
53. *Id.*
54. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.
55. *Id.* at 458, 551 P.2d at 358, 131 Cal. Rptr. at 38 (Clark, J., dissenting).
56. *Id.*
57. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).
58. *Id.* at 804, 142 Cal. Rptr. at 490 (citation omitted). *See* note 49 *supra*.
59. 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979).

offender release and rehabilitation programs."[60] It found that the grant of absolute immunity by the legislature to public entities or employees for the release and rehabilitation of criminals indicates a public policy of encouraging innovative criminal offender release and rehabilitation programs. The court justified extension of this policy to the private rehabilitation center on the basis that private centers receive referrals of convicted criminals in need of rehabilitation from the state courts, and it would be "incongruous" to impose a duty on the center while the state is immune.[61]

It appears that the majority of courts have used the duty balancing test in an incorporation-by-reference manner that allows them to make *ad hoc* policy decisions without due consideration of the conflicting values and competing interests that the courts themselves recognized originally in promulgating their balancing test. If the courts were to undertake a true balancing of policy considerations that took into account the particular relationship out of which a duty is alleged to arise, the result might be a test for duty that is both sound and workable.

B. The Restatement Approach: Special Relationships

The analysis used most frequently by courts to determine duty and proximate cause in the area of third party liability for criminal violence in based on the rules found in the Restatement (Second) of Torts sections 315,[62] 302B,[63] 449[64] and 448.[65] Essentially, these rules create duties under certain circumstances to control the conduct of a potential

60. *Id.* at 347, 151 Cal. Rptr. at 798-99 (quoting Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26, and Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 716, 141 Cal. Rptr. 189, 199 (1977)).

61. *Id.* at 348, 151 Cal. Rptr. at 799.

62. Section 315 of the Restatement (Second) of Torts sets forth the general rule that there is no duty to control the conduct of another:

> There is no duty to so control the conduct of a third person as to prevent him from causing bodily harm to another unless,
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965).

63. Section 302B provides:

> An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

RESTATEMENT (SECOND) OF TORTS § 302B (1965).

64. Section 449 of the Restatement provides:

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent,

criminal[66] and to protect a potential victim from reasonably foreseeable risks of criminal violence.[67] The breach of these duties constitutes negligence whenever it can be established that there exists a special relationship between the allegedly negligent third party and the would-be criminal or the potential victim.[68]

The major problem with this approach is that what constitutes a special relationship and which special relationships give rise to duties of control and protection is as difficult to determine as is what policy considerations should give rise to a duty. An early critic of the Restatement approach to third party liability for criminal violence stated, "Taking the whole title on superseding cause as it appears in the Restatement, the reader is left in greater confusion than if he had not read it."[69]

Moreover, the history of the special relationship concept suggests that it was employed to identify a duty on the basis of occupational or professional status. Prosser observes that in the early English law, "there is little trace of any notion of a relation between the parties, or an obligation to any one individual, as essential to the tort [of negli-

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negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

RESTATEMENT (SECOND) OF TORTS § 449 (1965).

When §§ 302B and 449 are read together, as suggested by the authors of the Restatement, they establish the following rule as to negligence liability for failure to protect another:

> [T]he mere possibility or even likelihood that there may exist such [intentional or criminal] misconduct is not in all cases sufficient to characterize the actor's conduct as negligence. It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent.

RESTATEMENT (SECOND) OF TORTS § 449, comment a (1965).

65. Section 448 of the Restatement provides that a person's intentional or criminal conduct will not be deemed a cause superseding the actor's negligence under §§ 302B and 449.

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS § 448 (1965).

66. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

67. *Id.* § 449, comment a.

68. *Id. See* note 64 *supra.*

69. Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 644 (1940).

gence]."[70] The concept of a duty arising out of a special relationship can be traced to the concept of a "duty arising from a public calling," whereby the alleged tortfeasor who professed a public calling and subsequently showed a lack of reasonable skill in it could be held negligent.[71] Included under the rubric of a "common" or "public" calling have been the innkeeper, common carrier, apothecary or surgeon, attorney and veterinarian.[72] Liability for negligence by members of these occupations was premised on a pre-existing duty of care arising out of their professional *status*. This liability based upon occupational status seems analogous to contemporary professional malpractice theory,[73] and, therefore, is not a particularly appropriate justification for imposing civil liability on a third party for the injurious acts of a criminal.

The California Supreme Court in *Tarasoff*[74] suggested that the appropriate analysis by which to find a duty to control the conduct of another is "not by direct rejection of the common law rule [of nonliability] but by expanding the list of special relationships which will justify departure from that rule."[75] The appellate courts, however, have found this unworkable. In *Whitcombe v. County of Yolo*,[76] for example, persons who were assaulted and severely injured by a probationer brought suit against the county, county probation department, and certain probation officers, alleging that the defendants had breached a duty arising from a special relationship between themselves and plaintiffs in failing to warn plaintiffs that the probationer was about to be released. Public entities and employees are immune from liability for the negligent release of prisoners under the California Tort Claims Act.[77] The plaintiffs argued that a finding of a special relationship between themselves and the governmental agency would supersede the immunity doctrine and allow them to recover against the defendants.[78] The court decided that to permit an exception to sover-

70. PROSSER, *supra* note 8, at 324, quoting Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934).

71. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 44 (1934).

72. *Id.* at 44-45.

73. *See* WITKIN, *supra* note 32, at 2783-84.

74. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

75. *Id.* at 435 n.5, 551 P.2d at 343 n.5, 131 Cal. Rptr. at 23 n.5.

76. 73 Cal. App. 3d 698, 141 Cal. Rptr. 189 (1977).

77. CAL. GOV'T CODE §§ 810-996.6 (West Supp. 1979). In Martinez v. California, 100 S. Ct. 553 (1980), the United States Supreme Court held that the California Tort Claims Act is not unconstitutional when applied to defeat a tort claim arising from the alleged negligence of state officials in releasing a parolee from prison who subsequently murdered a person.

78. 73 Cal. App. 3d at 704, 141 Cal. Rptr. at 192.

eign immunity based on a special relationship between the plaintiff and defendant would create "an unresolvable paradox." It stated that "the special relationship exception [to the claim of immunity] is without persuasive precedent," and it ultimately rejected the theory "in its entirety" as applied to governmental immunity.[79]

Even when the releasing agency is a non-governmental entity and, therefore, sovereign immunity is inapplicable, the court of appeal has refused to find a special relationship that gives rise to a duty. In *Beauchene v. Synanon Foundation, Inc.*,[80] the plaintiff had been intentionally injured by an escapee from a private rehabilitation center. He argued that the defendant center's acceptance into its program of a person with a known history of criminal and antisocial behavior created a special relationship between it and the person, which in turn created a duty in the center to control the person's behavior so as to prevent him from escaping or leaving the program without authorization. The court rejected consideration of the special relationship argument, however, and decided against liability by balancing policy considerations and finding no duty.[81] Thus, the special relationship approach as currently applied by the courts seems neither to clarify the conditions or situations that will give rise to a duty nor to be adaptable to every situation.

C. An Alternative Approach

A mere expansion of the list of special relationships ignores important distinctions that could make a finding of liability compelling in one situation but not in another. Likewise, a mere lumping together of policy factors onto each side of the scale in a balancing test overlooks the possibility that a pivotal principle may be applicable to all third party situations. The approach proposed here is to distinguish between various relationships. This approach both limits liability and crystallizes the basis for holding third parties liable for criminal violence in certain situations. If, as the California Supreme Court said in *Tarasoff*, "[o]ur current crowded and computerized society compels the interdependence of its members,"[82] then any determination of duty in a particular context should reflect the degree of dependence between the would-be criminal or the potential victim and the third party.

This alternate approach is suggested by *Kline v. 1500 Massachu-*

79. *Id.* at 705-06, 141 Cal. Rptr. at 192-93.
80. 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979).
81. *Id.* at 348-49, 151 Cal. Rptr. at 798-99.
82. 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

setts Avenue Apartment Corp.,[83] a United States Court of Appeals decision that became the watershed for the California Court of Appeal decision in *O'Hara v. Western Seven Trees Corp*,[84] regarding the liability of landlords for failing to protect their tenants from foreseeable criminal violence. In holding that a landlord is under a duty to protect tenants from foreseeable criminal acts committed by third parties, the United States Court of Appeals acknowledged the general rule that a private person has no duty to protect another from the criminal attack of wrongdoers, but it asserted that "the rationale of this very broad general rule falters when it is applied to the conditions of modern day urban apartment living . . . [and] . . . has no applicability to the landlord-tenant relationship in multiple dwelling houses."[85] The court in *Kline* reasoned that the landlord has a duty to protect his tenants because he is the only one who has control of the areas of common use and common danger in a large apartment complex, and only he has "the *power* to make the necessary repairs or to provide the necessary protection."[86]

Unlike the approaches to third party liability advanced by the California courts thus far, the dependence/control approach seems fairly consistent with the notion of criminal culpability based on voluntariness: "if one voluntarily and gratuitously assumes responsibility for a helpless person . . . he has a duty thereafter to act to protect the other from harm."[87] Similarly, "[o]ne may stand in such a personal relationship to another that he has an affirmative duty to control the latter's conduct."[88] This more closely resembles what was meant by "special relations" as originally applied to this type of liability than the list-expanding approach suggested in *Tarasoff*.[89] For example, although a tenant may not be exactly "helpless" when it comes to self-protection, the degree to which he relinquishes control of his physical well-being to his landlord while on leased premises probably renders his residual rights of self-protection inadequate for the most part. Of course, the amount of control which the landlord has over his tenant's safety is greatest when the tenant is criminally assaulted while in the common areas of leased premises, as discussed in *Kline*. When the tenant is at-

83. 439 F.2d 477 (D.C. Cir. 1970).
84. 75 Cal. App. 3d 798, 802-03, 142 Cal. Rptr. 487, 489-90 (1977).
85. 439 F.2d at 481.
86. *Id.*
87. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 185-86 (1972).
88. *Id.* at 186.
89. Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 645 n.21 (1940).

tacked within his or her own apartment, however, the degree of tenant dependence on the landlord for safety diminishes and the tenant's right and power of self-protection increases. A tenant can generally equip himself with lights, locks, and telephone. It is easy to imagine a situation similar to that in *O'Hara* but in which there were no representations by the landlord as to the safety of the premises from criminal intruders. When a tenant rents such an apartment, and is assaulted subsequently in his apartment, it does not seem that the landlord should be liable; the landlord has little control over the apartment and the tenant seems to have the greater right and power of self-protection. Thus, under a dependence/control approach, it would be erroneous for a court to say, as did the court in *O'Hara*, that "[f]ailure to take reasonable precautions to safeguard common areas under [the landlord's] control could have contributed substantially . . . to [the tenant's] injuries."[90]

Clearly the principle of control has a much broader application than merely to common areas of multiple unit dwellings or even to the landlord-tenant relationship. The court in *Kline* analogized the duty of a landlord to his tenant to the duties arising out of the relationships of innkeeper-guest, common carrier-passenger, and others. Because each involves a relationship of dependence in which "the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other,"[91] the court reasoned that one who possesses control and the power to act should have a duty "to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated."[92]

School districts have been held liable for negligent supervision of students in failing to protect one student from another.[93] The California Supreme Court in *Dailey v. Los Angeles Unified School District*[94] suggested one way in which the dependence/control approach could be applied to a school district's liability for criminal violence against students. It stated, "High school students may appear to be . . . more capable of self-control than grammar school children. . . . Consequently, less rigorous and intrusive methods of supervision may be re-

90. 75 Cal. App. 3d at 803, 142 Cal. Rptr. at 490.

91. 439 F.2d at 483.

92. *Id.*

93. Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); Beck v. San Francisco Unified School Dist., 225 Cal. App. 2d 503, 37 Cal. Rptr. 471 (1964).

94. 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970).

quired."[95] Although a student's dependence upon school authorities for protection diminishes as the student becomes older, his dependence upon school authorities for protection varies with other factors as well. One might assume, for example, that college students would be the least dependent of all students upon the school administration for their personal security against criminal attack; but a student who is required to live on campus would be much more dependent upon the college for his protection than a student who commuted to and from the campus daily. Therefore, the college would have a greater duty to protect resident students than non-resident students. When a school "campus" is little more than a building, as is often the case with smaller professional or trade schools, and there is no lounge, cafeteria facility, or library, the degree of student dependence upon school administration for personal security is even further reduced. In such a situation, holding the school liable for an assault in a classroom upon one student by another seems unwarranted. When the school induces students to spend more time or engage in more activities on school premises than merely attending classes, however, the student may have a greater right to rely on the school administration for personal security against criminal assault.

Applying the dependence/control approach to the situation presented in *Tarasoff* probably would not have changed the result reached in that case because of the provisions of section 5150 of the Welfare and Institutions Code that give psychiatrists discretion to place manifestly dangerous persons suffering from a mental disorder in custody for 72-hour observation.[96] In private rehabilitation programs like the one in *Beauchene*, the rehabilitation center may have no right to

95. *Id.* at 748, 470 P.2d at 364, 87 Cal. Rptr. at 380.

96. Section 5150 provides:

> When any person, as a result of mental disorder, is a danger to others, or to himself, or gravely disabled, a peace officer, member of the attending staff as defined by regulation, of an evaluation facility designated by the county, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.
>
> Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he knows to be false.

CAL. WELF. & INST. CODE § 5150 (West Supp. 1979). *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d at 477-49, 551 P.2d at 351-52, 131 Cal. Rptr. at 31-32.

control the comings and goings of its enrollees, and therefore should not be liable for an "escape" and subsequent criminal acts of the "escapee"; but in its capacity as landlord or as provider of room and board, it may have a duty to protect its enrollees from the criminal acts of others.

The dependence/control approach, therefore, offers a means of analyzing third party civil liability that is more consistent with principles of criminal liability than the approaches advanced thus far by the California courts. At the same time, this approach sets forth rational limits to liability, and may thus avoid the legislative curtailment or abrogation that occurred in the judicial creation and expansion of dram shop liability.

V. CONCLUSION

An examination of the California decisions on third party liability for criminal violence reveals that the analysis used in such decisions: (1) contravenes the legislative policy set forth in the recent abrogation of the dram shop decisions that intentional acts causally supersede negligent acts when both contribute to a person's injury; (2) conflicts with legislatively-sanctioned sources and bases of victim compensation and may undermine the theoretical justification of existing compensation programs; and (3) rests primarily upon unsound and unpersuasive principles of negligence law. The California Supreme Court's decertification for publication of several recent third party decisions may be an indication of its own uneasiness with the expansions in this area of liability.[97] Although the approach of the California courts to third party liability for criminal violence appears to be premised on unsound and unpersuasive negligence law, the intent to compensate some injured victims is a worthy one. The dependence/control approach to duty in the third party area suggested in this comment is an alternative approach that resolves many of the problems created by the analyses presently used.

A recent appellate opinion attempted to characterize the expansion of third party civil liability as a "growth process."[98] Let us hope that

97. *E.g.*, Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979) (landlord-tenant) (decertified for publication by the California Supreme Court); Anderson v. State, 83 Cal. App. 3d 188, 147 Cal. Rptr. 729 (Adv. Sh. 1978) (prisoner released on a 72-hour pass raped prison employee's wife) (decertified for publication by the California Supreme Court).

98. Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727, (1979) (decertified for publication by the California Supreme Court).

this growth does not become a tumor on what some regard as the already ailing corpus of negligence law, for excision is much more painful than prevention.

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