Developing a Victims' Suit for Injuries Caused by a Compulsorily Released Prisoner

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DEVELOPING A VICTIMS' SUIT FOR INJURIES CAUSED BY A COMPULSORILY RELEASED PRISONER

In the last decade, overcrowding in American prisons has reached critical levels. A number of courts have held that current overcrowded conditions constitute an imposition of cruel and unusual punishment. Accordingly, some courts have accompanied their decisions with orders mandating the reduction of prison populations. Due to the unavailability of additional space and the lack of funding required to construct additional facilities, these orders to reduce the prison population have

1. Since 1969, the number of persons held in state and federal prisons has increased by sixty-eight percent to 328,695 in 1980. Sixty-five percent of all state and federal inmates and sixty-eight percent of all local prisoners are housed in cells and dormitories that provide less than 60 square feet per person. In 1980, because of overcrowding in 16 states, almost 6,000 persons were being held in local jails. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, VIOLENT CRIME IN THE UNITED STATES 49 (1982) [hereinafter cited as VIOLENT CRIME STATISTICS]. By 1981, federal and state prisons exceeded their capacity by nearly 100,000 inmates. Gest & Solorzano, Bulging Prisons Bracing for New Disorders, U.S. NEWS & WORLD REP., June 8, 1981, at 31. By May of 1982, there were 369,009 inmates in state and federal prisons — an increase of approximately 12% over the prior year. Full House in America's Prisons, U.S. NEWS & WORLD REP., May 17, 1982, at 17.


4. In 1978, it cost an average of $50,000 to build a single maximum security cell. In 1982, that cost rose to approximately $70,000. VIOLENT CRIME STATISTICS, supra note 1, at 43. Alaska reported $130,000 as the average cost of prison construction per cell. Although, by July of 1980, state correctional agencies had begun new construction of more than 60 institutions or additions, several states found the process so costly that they could not complete their efforts or have vacant facilities because they could not afford staffing or operations. U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 76 (1981) [hereinafter cited as VIOLENT CRIME REPORT]. In addition, citizens have begun to exhibit their dissatisfaction with prison-building as a preventative of crime. For example, in November 1981, New York State voters defeated a $500 million prison bond issue. Specter, The Untried Alternative to Prisons, 234 NATIONAL 300 (1982). In response to this dilemma, the Attorney General's Task Force on Violent Crime recommended that the federal government provide funds to assist state prison-building projects, and donate abandoned facilities (e.g., military bases) for use as state prisons. VIOLENT CRIME REPORT, supra, at 75. Even assuming, however, that states could circumvent the economic obstacles, a strong ideological strain opposes the construction of additional prisons. See, e.g., N. MORRIS, THE FUTURE OF IMPRISONMENT 5-6 (1974) ("From John Barlow Martin to Jessica Mitford a popular prison abolitionist literature has grown, and scholars have been hardly less critical. . . . There is widespread advocacy of a swift abatement if not an abolition of imprison-
often compelled state officials to release large numbers of inmates.\(^5\) Although such compulsory prisoner releases alleviate overcrowding, they may also accelerate the rate of recidivism and increase the overall level of crime.\(^6\) Moreover, while the state may be responsible for this increased crime, the injured victims have no effective legal means of holding the state liable or recovering for the harm imposed upon them.\(^7\) State victim compensation funds provide only inconsistent and incomplete relief.\(^8\) Victim restitution statutes allow for relief only if the criminal has been apprehended and the state provides work sufficient to cover the costs of restitution.\(^9\) Finally, civil suits directly against the criminal provide relief only in those rare instances in which poverty does not prevent the criminal from paying the judgment.\(^10\) More comprehensive, more consistent relief is necessary.

This Note advocates the development of a tort remedy for victims

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6. The actual effects of compulsory prisoner releases upon the rates of recidivism and crime remain rather speculative. For example, a preliminary study by the Michigan Department of Corrections found that 117 prisoners granted early release under the Michigan Prison Overcrowding Emergency Powers Act, *Mich. Comp. Laws Ann.* §§ 800.71-.79 (1982), were arrested before their original minimum sentence would normally have expired. The 117 crimes committed by these prisoners consisted of 2 homicides, 4 sexual assaults, 9 robberies, 24 assaults, and 78 burglaries, auto thefts, and larcenies. Detroit News, Sept. 26, 1982, § B, at 1, col. 4 (citing study by the Michigan Department of Corrections). Still, as observed by Michigan Deputy Corrections Director William Kane, such an increase might have occurred without the emergency release, because those inmates would have been freed within a matter of weeks anyway. *See id.* Nonetheless, the Michigan Act specifically provides that all prisoners to receive early parole would otherwise have been paroled within ninety days — a safeguard not incorporated into most court-ordered releases. *But see Lane v. Sklodowski*, No. 58601 (Ill. July 12, 1983) (prohibiting the Corrections Department from granting more than ninety days of meritorious good time for each inmate).

A study of the recidivism rate of inmates released pursuant to the retroactive order of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that counsel is required in felony cases) suggested that such releases did not have a statistically significant impact on the crime rate. R. Goldfarb & L. Singer, *After Conviction* 179-80 (1973). Nonetheless, the *Gideon* releases are distinguishable from compulsory releases. *Gideon* releases are ordered because of a constitutional error in the judicial process — an error that might result in an erroneous finding of guilt. Compulsory releases, however, are ordered because of a constitutional error in the correctional process — an error that does not affect the probability of the inmate's guilt or innocence. Thus, the small impact of the *Gideon* releases may imply that faulty judicial proceedings resulted in the erroneous conviction of a large number of innocent and nondangerous individuals.

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7. *See infra* notes 17-34 and accompanying text.
8. *See infra* notes 18-19 and accompanying text.
10. *See infra* notes 25-26 and accompanying text.
injured by a compulsorily released prisoner. This remedy would be based on existing tort theory permitting suits against third parties whose negligence causes or facilitates a criminal act. The victim would bring suit against both the state and third parties who aided in the criminal release determination. To support his claim, the victim would allege: (1) that state officials negligently selected the offending inmate for early release; and (2) that the state negligently maintained the unconstitutional prison conditions which precipitated the release.

Part I of this Note discusses the history, causes, and results of compulsory prisoner releases. Part II demonstrates the inadequacy of existing remedies available to the victims of compulsorily released prisoners. Part III applies the principles of tort theory to develop a more effective remedy. Finally, Part IV addresses governmental immunity as a potential obstacle to such a suit, and advocates the waiver of immunity to ensure victim compensation and to encourage thoughtful prisoner releases.

I. COMPULSORY PRISONER RELEASES

In recent years, American prisons have become grossly overcrowded. Several courts have held that such overcrowded conditions are unconstitutional, and have remedied this overcrowding by ordering the release of a portion of the inmate population. Moreover, several states have enacted laws automatically providing for the release of inmates when overcrowding becomes intolerable. Unfortunately, although many courts and legislatures have found the compulsory release of prisoners the only viable solution to overcrowding, this "solution" exacts significant social costs. Compulsory releases may increase crime by prematurely freeing dangerous inmates, and by encouraging disrespect for the laws by converting the imposition of punishment into a haphazard and unpredictable process. A greater recognition of vic-

11. See supra note 1 and accompanying text.
12. See supra note 2 and accompanying text.
13. See supra notes 3 & 5 and accompanying text.
15. See supra note 6.
16. Prison overcrowding prevents many judges from imposing any sentence at all, and early releases prevent imposed sentences from being served. See TWENTIETH CENTURY FUND, TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 13-14 (1976) ("Those whom the judge decides should be imprisoned are often given sentences with relatively high maximums, on the understanding that the parole board will release them earlier if the circumstances warrant it."). This haphazard imposition of punishment may reinforce the prisoner's conception of the
tims' rights would limit the detrimental effects of compulsory releases and would help preserve public safety.

II. VICTIMS' RIGHTS AND REMEDIES

Largely as a result of the victims' rights movement, several legal recourses have become available to the victims of crime. Yet, none of these alternatives would provide adequate compensation to a victim for injuries caused by a compulsorily released prisoner.

First, the victim might try to recover from a state victim compensation fund. A growing number of state statutes provide for compensation funds. Unfortunately, such funds never apply to every...
tim of crime, and rarely provide full compensation to any victim of crime.¹⁹

Alternatively, the victim might attempt to recover damages under a restitution program.²⁰ Under a typical victim restitution statute, the

incomplete, overview of the administration, budget, and limitation of these funds, see Hoelzel, A survey of 27 victim compensation programs, 63 JUDICATURE 485 (1980).

A number of criminologists and legal scholars have advocated the development of a federal victim compensation act. See, e.g., N. MORRIS & G. HAWKINS, LETTER TO THE PRESIDENT ON CRIME CONTROL 70 (1977) ("the federal government [should intervene] to rectify a manifest injustice and fulfill a need that is not being met by the few state-administered compensation schemes"). Recently, the Attorney General's Task Force on Violent Crime recommended that a study of various crime victim compensation programs be conducted. VIOLENT CRIME REPORT, supra note 4, at 91. Consequently, a federal victim compensation act has been proposed. See S. 2433, 97th Cong., 2d Sess. 128 CONG. REC. 3861-63 (1982). For a history of the numerous aborted attempts to enact federal victim compensation legislation, see Edelhertz, Compensating Victims of Violent Crime, in VIOLENCE AND CRIMINAL JUSTICE 82-83 (D. Chappell & J. Monahan eds. 1975).

¹⁹. See generally R. RIEFF, supra note 17, at xii ("Token state compensation laws are enacted that are bureaucratically rationed by failing to provide public information about them, restricting eligibility to paupers, and instituting application and investigative processes that may take as much as seven months before an award can be made."); J. BARKAS, supra note 17, at 183-91; see also Compensation to Victims of Crimes of Personal Violence: An Examination of the Scope of the Problem, 50 MINN. L. REV. 211 (1965); Compensation for Victims of Criminal Violence, 8 J. PUB. L. 191 (1959) (symposia exhaustively analyzing the philosophical, sociological, and practical aspects and difficulties of victim compensation). For model victim compensation plans, and discussions of their scope and limitations, see Childres, Compensation for Criminally Inflicted Personal Injury, 39 N.Y.U.L. REV. 444 (1964); D. CARROW, CRIME VICTIM COMPENSATION: PROGRAM MODEL (1980).

court may condition a criminal’s probation upon the timely payment of restitution to the victim. Unfortunately, numerous difficulties surround such programs. First, abuses of conditional probation have prompted some states to narrow the powers of the court in this area. Second, courts can order restitution only if the criminal has been apprehended. Third, public ignorance of restitution has prevented its extensive and effective implementation. Finally, the probationer may be unable to locate work sufficient to cover both the costs of restitution and personal expenses.

work release or through creation of execution lien on defendant’s property). Two states have statutes which do not specifically provide for restitution, but which are sufficiently broad to accommodate an order of restitution. See N.M. STAT. ANN. § 31-21-2-1 (1981); S.C. CODE ANN. § 24-21-430 (1976). One controversial form of restitution allows the victim to bring an action to compel the criminal-turned-author to disgorge profits. See generally Note, Criminals-Turned-Authors; Victims’ Rights v. Freedom of Speech, 54 IND. L.J. 443 (1978-1979). New York has enacted a statute requiring restitution by criminals-turned-authors, N.Y. EXEC. LAW § 632-a (McKinney Supp. 1978), and the federal Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 7, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1248, provides that the Attorney General shall report to Congress “regarding any laws that are necessary to ensure that no Federal felon derives any profit from the sale of the recollections, thoughts, and feelings of such felon with regards to the offense committed by the felon until any victim of the offense receives restitution.”

21. See, e.g., MICH. COMP. LAWS ANN. § 771.3 historical note (1982). Indeed, a number of statutes direct the focus of the court on the ability of the probationer to pay. See supra note 20. People v. Gallagher, 55 Mich. App. 613, 223 N.W.2d 92 (1974), probably exemplifies the type of abuse which prompted the narrowing of probation conditioned upon restitution. In Gallagher, the defendant was convicted of receiving only a stolen automobile cowl. Nonetheless, the court conditioned the defendant’s probation upon his restitution of the full value of the automobile.

Abuses of judicial discretion unrelated to restitution have also limited the use of conditional probation. For example, in People v. Blankenship, 16 Cal. App. 2d 606, 61 P.2d 352 (1936), the California court granted probation to a twenty-three-year-old man, infected with a social disease and convicted of statutory rape, conditional upon his submission to an operation for sterilization. Justice Smith of the Michigan Supreme Court, commenting on Blankenship, sardonically observed that “[t]he condition was upheld on appeal but the report does not tell us of the choice made.” People v. Becker, 349 Mich. 476, 488, 84 N.W.2d 833, 839 (1957).

22. This limitation renders restitution useless in a large number of cases. In 59.5% of violent crimes, the criminal is not apprehended. Forty-one percent result in an arrest, but only 23% result in a trial and only 14.2% result in a conviction. VIOLENT CRIME STATISTICS, supra note 1, at 47.


24. See R. REIFF, supra note 17, at xii (“Token restitution programs are launched and immediately founded on the corrections system’s failure to provide work at realistic pay rates that would make restitution payments possible.”); see also R. GOLDFARB & L. SINGER, supra note 6, at 235 (“An installment plan may aid the offender in making payments, but in many cases only partial restitution is possible.”). For a variety of reasons, victims rarely receive full restitution. See Miller, Consequences of Restitution, 5 LAW & HUM. BEHAVIOR 1, 15 (1981) (“[M]any crime victims are not fully recompensed for their tangible losses; . . . about 14% of crime victims
As a third option, the victim might pursue a civil action against the criminal. While few legal obstacles preclude such a suit, the criminal's poverty will often make obtaining payment of any judgment a practical impossibility. Indeed, many civil suits against criminals result in nothing more than some minimal psychological solace to the victim.

Finally, the victim might bring an action against a third party whose negligence caused or facilitated the criminal act. Such suits, typically predicated upon the third party's breach of its custodial duty, have included actions against hospital superintendents, members of a temporary release committee, psychiatrists and psychiatric hospitals, employees of a military base hospital, members of a parole board, and

... received no monetary restitution even though its payment was ordered by the judge. Overall, victims can expect to receive about two-thirds of the restitution ordered at sentencing.

25. See J. Barkas, supra note 17, at 178-80.

There is, however, the possibility of increasing the effectiveness of civil suits by imprisoning the criminal for failure to pay debts arising from the tort suit. The victim might pursue such a civil suit because (1) he or she would only bear the burden of proving the case by a preponderance of evidence, and (2) "many states statutorily provide for imprisonment for failure to satisfy liability resulting from tortious conduct, fraud, or breach of fiduciary relationship." D. Epstein & J. Landers, Debtors and Creditors: Cases and Materials 77 (1982). Adequate analysis of the costs, benefits, and constitutional implications of such an action require discussion beyond the scope of this Note.


28. See, e.g., Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577 (1923) (holding superintendent liable for fire damages caused by a negligently paroled mental patient); Cappel v. Pierson, 15 La. App. 524, 132 So. 391 (1931) (finding superintendent's release of acutely paranoid mental patient, who murdered plaintiff's husband the day of release, did not constitute the proximate cause of the decedent's death).


31. See, e.g., Underwood v. United States, 356 F.2d 92 (5th Cir. 1966) (holding immunity inapplicable to federal hospital for failure to warn Air Force psychiatrist of mental patient's past record); Fair v. United States, 234 F.2d 288 (5th Cir. 1956) (holding immunity inapplicable to Air Force hospital that failed to warn potential victims upon release of mental patient).

32. See, e.g., Estate of Armstrong v. Pennsylvania Bd. of Probation & Parole, 46 Pa. Commw. 33, 405 A.2d 1099 (1979) (holding immunity did not obstruct a tort action against members of a parole board for releasing the inmate who raped and murdered the plaintiff's seven-year-old daughter); Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) (holding parole board members liable for releasing an inmate who shot the plaintiff's son in
probation officers, police officers, and many other public and private individuals and institutions.

This type of suit — although it has not yet been used by the victims of compulsorily released prisoners — provides the best possible basis for effective relief. By proving that (1) state parole board officials negligently selected the offending prisoner for release, or (2) that the state negligently maintained the unconstitutional prison conditions precipitating the release of a dangerous individual, the victim could establish a strong framework for tort liability. If the compulsory nature of the release renders it difficult to prove that the parole board acted negligently in releasing the prisoner, then the victim could allege negligence in the state's maintenance of its prison facilities. Unfortunately, sovereign and official immunity might prevent the victim from imposing liability upon the state. Yet, as the next two sections demonstrate, this problem may be overcome through the careful application and minor modification of tort and immunity principles.

III. A VICTIM'S SUIT FOR INJURIES CAUSED BY A COMPULSORILY RELEASED PRISONER: THE ELEMENTS OF TORT

A. Duty

Perhaps no element of tort law entails as many moral implications as does the concept of duty. The creation of an affirmative legal duty establishes a moral norm and imposes upon individual liberty. Therefore, most courts have been reluctant to create new legal duties, particularly if such a duty would obligate any individual to act as a "Good Samaritan."


34. See, e.g., Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (holding that plaintiff stated a cause of action by asserting that the police had failed in their duty to protect the plaintiff's decedent (an underworld informant) from harm). But see Evett v. Inverness, 224 So. 2d 365 (Fla. 1969) (holding police officer — who stopped an intoxicated driver, but allowed him to continue — not liable for driver's subsequent collision with the vehicle of the plaintiff's decedent), cert. dismissed, 232 So. 2d 18 (Fla. 1970).

35. An established exception to this rule arises when an individual has caused the other individual's harm. See RESTATEMENT (SECOND) OF TORTS § 322 (1977). Also, several states have
An increasing number of courts, however, have imposed a duty upon certain individuals to aid, warn, or protect certain other individuals, and have based this duty upon the "special relationship" between the parties involved. 36 For example, courts have held that a common carrier has a duty to protect passengers from the dangerous conduct of others, 37 that a landlord has a duty to provide his tenants with a minimum level of security from crime, 38 that a psychiatrist or psychiatric hospital has a duty to warn potential victims of outpatients, 39 and that a parole board has a duty of reasonable care in determining which prisoners to release. 40

In cases involving compulsorily released prisoners, this same type of "special relationship" is created between the parole board, the state and the victim. Accordingly, courts could rely on these cases to uphold a duty of the parole board and state to protect potential victims.

1. Parole board duty—A growing body of authority has recognized the duty of parole boards to restrain or supervise potentially dangerous prisoners. 41 Most courts have held that the parole board's assumption of responsibility for dangerous prisoners creates the "special relationship" giving rise to this duty. 42 These courts have varied the
precise scope of this duty in relation to the circumstances of each case, and have bound release officials to a duty to restrain the prisoner, to notify the court, and/or to warn potential victims. Although several factors may influence the nature of the duty imposed, courts generally require a duty of care that corresponds to the relative foreseeability of the inmate's recidivism.

The special circumstances surrounding compulsory prisoner releases would not significantly affect the nature of this parole board duty. The mandatory nature of such releases would not affect a parole board's ability or duty to notify the court or warn potential victims. At worst, the compulsory element in such releases might affect the parole board's ability and duty to retain the prisoner in custody. Indeed, it would seem inconsistent for a court to order the release of inmates, and then hold the parole board to a duty to maintain control over those inmates. Yet, as courts generally impose a duty to restrain only those prisoners presenting particularly high risks, this incongruity would probably arise infrequently.

2. State duty— The state, having assumed responsibility for the preservation of public safety and the maintenance of a correctional system, should rest under a similar duty to prevent negligent and compulsory releases. This duty seems so axiomatic as not to require valida-. 

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46. For example, in Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964), the officers had specifically agreed to warn the victim upon the arrestee's release.
48. Although violent crime touches six percent of all U.S. households, VIOLENT CRIME STATISTICS, supra note 1, at 5, only 57% of prison inmates are violent offenders, id. at 35. Thus, nonviolent offenders constitute a large portion of the prison population, and even some portion of the violent offenders probably present a low risk of recidivism. Indeed, some prison officials claim that between 75-90% "of the prison population could be freed tomorrow without danger to the public or increase in the rate of crime." J. MITFORD, KIND AND USUAL PUNISHMENT 285 (1973).
49. Like the parole board, the state has assumed control over persons having dangerous tendencies. Hence, under the RESTATEMENT (SECOND) OF TORTS § 319 (1977), the state owes a duty of protection to its citizens. See supra note 36.

Analogously, a number of cases establish that the state may be held liable for injuries caused by escapees. See, e.g., State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970) (holding governmental immunity unavailable to state when escapee from an honor camp forcibly raped plaintiff). The escape cases raise a particularly relevant issue. The victim of an escapee might buttress his or her tort claim by arguing that the state, by maintaining unconstitutional prison conditions, actually provoked the prisoner's flight. This argument finds support in a string of recent cases in which courts have excused inmates from liability for the crime of escape, if the escape was prompted by extraordinarily oppressive and potentially life-threatening prison conditions. See,
tion. Indeed, as the Supreme Court recently suggested, "[o]ne of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task." Therefore, when the state fails to maintain adequate prison facilities, and thereby creates conditions which precipitate a compulsory release, the state breaches a duty to the public.

Still, the constant flux of economic conditions, sentencing policies, and population composition may render it difficult for the state to predict the adequacy of its prison facilities. Thus, just as the duty of the parole board may vary in relation to the foreseeability of a prisoner's additional criminal activity, so the duty of the state may vary in relation to the foreseeability of the inadequacy of its prison facilities. Therefore, the nature of the duty imposed upon the state and the parole board depends upon the variables affecting the foreseeability of inmate recidivism and prison overcrowding.

B. Foreseeability

A number of courts have held parole board officials liable for damages resulting from the foreseeable acts of negligently released inmates. In response to the potential for liability established by these cases, and as a general measure to protect the public, parole boards rely on a number of indicators to increase the precision of their release determinations. Accordingly, parole boards typically consider such diverse factors as the applicant's citizenship, education, marital and family status, employment record, military service, firearm licenses, arrests, convictions, imprisonments, probation, parole, and financial assets. Although some statutes direct parole boards to assign

e.g., People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

Indeed, some courts and scholars have argued that merely "intolerable" prison conditions should excuse an inmate's escape. See, e.g., United States v. Bailey, 585 F.2d 1087 (D.C. Cir. 1978); 13 GA. L. Rev. 300, 305 (1978) ("In several recent cases . . . courts have admitted evidence of prison conditions and have not required a threat of immediate harm as a prerequisite for the defense of duress."); see also Fletcher, Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?, 26 U.C.L.A. L. Rev. 1355, 1367 (1979) ("[Assume] the defendant escapes from prison to avoid a persistent problem of unsanitary conditions . . . the ongoing threat of disease might generate a desperate response in the form of an escape, and if . . . the defendant's reaction to the danger is sufficiently free from fault, he might well be excused."). If the inmate commits additional criminal acts upon escape, the impact of unconstitutional prison conditions has again extended beyond the prison walls.


51. See supra note 32.

52. This list of factors appears in the Rules of the United States Board of Parole § 4.4 (1961). Though the U.S. Parole Board currently employs a more complex, more objective
various levels of significance to different factors, most parole decisions result from broad exercises of discretion and intuition.\textsuperscript{53}

Predictions based on these factors, however, have not proven very accurate,\textsuperscript{54} and parole boards can only rarely foresee the exact consequences of a given inmate's release. To compensate for this inaccuracy, courts have adopted a flexible foreseeability test that does not demand predictability of "the precise events which occurred," but that requires "only that the events were within the scope of the foreseeable risk."\textsuperscript{55} This test prevents the parole board from avoiding liability by asserting that the exact actions of an inmate were unforeseeable. Consequently, victims can recover without facing insurmountable problems of proof, and the courts hold the parole board to a standard rigorous enough to guarantee reasonably accurate release determinations. Because of its flexibility and effective balancing of the interests of the victim and the parole board, courts could appropriately apply this foreseeability test to compulsory release suits.

Even this more flexible foreseeability test, however, might not seem to allow for all of the complexities of the compulsory release context. For example, the state's maintenance of overcrowded prison facilities may adversely affect the parole board's ability to determine the scope of foreseeable risk. Prison overcrowding may limit the opportunity of officials to observe closely individual inmates.\textsuperscript{56} In addition, the compulsory release context increases this danger by limiting the period of time during which the officials could monitor an inmate's behavior.\textsuperscript{57}

set of factors, most parole boards continue to apply discretionary factors similar to those enumerated in the 1961 Rules.


\textsuperscript{54} Indeed, one study "found that experts were no better than students at predicting parole violations and both groups were worse than chance." J. Carroll, Judgment of Recidivism Risk: The Use of Base-Rate Information in Parole Decisions, in New Directions in Psychological Research 69 (P. Lipsitt & B. Sales eds. 1980).


\textsuperscript{56} See, e.g., St. George v. State, 203 Misc. 340, 118 N.Y.S.2d 596 (1953) (suggesting that overcrowding in an institution may prevent administrators from reaching an informed decision), rev'd, 283 A.D. 245, 127 N.Y.S.2d 147, aff'd, 308 N.Y. 681, 124 N.E.2d 320 (1954). Similarly, Richard Dunn, chief judge of the Wayne County Circuit Court in Detroit, has suggested that release under the Michigan Overcrowding Emergency Powers Act, supra note 6, adversely affects the parole board's objective assessment of cases. See Silas, supra note 5, at 1352 ("The parole boards) know they have to meet a quota, and they don't screen in a normal way.").

\textsuperscript{57} An inmate's behavior in prison may serve as a valuable indicator of the likelihood of his recidivism, and parole boards typically consider this factor carefully. See generally A. Smith & L. Berlin, supra note 53, at 63-64. Prison overcrowding, by increasing the difficulty of tracing violent acts to individual inmates, may render this valuable information unavailable. But see N. Morris, supra note 4, at 16 ("Prison behavior is not a predictor of community behavior. . . . (O)bservation of the behavior of prisoners while in prison is of little assistance . . . .")
Thus, the state’s economic misallocations and negligent correctional policies could significantly aggravate the difficulty of the parole board’s already difficult task. As a result, a court might hold parole board officials liable for erroneous determinations arising from state policies beyond their control.

Nevertheless, the flexible foreseeability test accommodates the exigencies of the compulsory release context. Courts will only hold the parole board liable for events within “the scope of foreseeable risk.” If parole board officials can demonstrate that state prison administration rendered it impossible to determine that an inmate’s postrelease actions fell within the scope of foreseeable risk, they will escape liability. Therefore, in all probability, the parole board will not suffer any unjust liability.

Although demonstrating the foreseeability of inadequate prison facilities presents complex factual issues, two observations illustrate that such a demonstration does not demand any unduly intricate form of analysis. First, although numerous factors may affect the adequacy of prison facilities, the probable impact of those factors may be relatively easy to gauge. Economic conditions, the rate of crime, and the composition of the population all affect prison overcrowding, and all follow relatively consistent and predictable developmental patterns. Second, the state need not be able to foresee the precise consequences of maintaining inadequate prison facilities in order to be held liable for those consequences. Rather, a finding of state liability only requires that those consequences fall within the scope of foreseeable risk. 58

Although foreseeability affects the level of duty imposed upon the state and its agents, it does not determine the level of liability imposed for the breach of that duty. For plaintiffs to establish the defendant’s appropriate level of liability, it is necessary that they establish, first, that the breach of duty caused the victim’s injuries and, second, that policy considerations do not confer immunity from liability upon the state and its agents.

C. Proximate Causation

A widely accepted definition of proximate causation states that “conduct is a cause of the event if it was a material element and a substan-
tial factor in bringing it about." 59 Because the negligent decisions of release officials play a key role in enabling prisoners to commit crimes, a number of courts have identified negligent releases as the proximate cause of victims' injuries. 60 Thus, if a parolee's criminal actions fall within the scope of foreseeable risk, the negligent release constitutes the proximate cause of the victim's damages.

The state's maintenance of overcrowded prison facilities may directly affect the causal relationship between the parole board's erroneous decisions and the victim's damages, rendering it difficult for the victim to establish parole board liability. Ordinarily, a parole board may elect to release as few or as many eligible prisoners as it believes present a low threat of recidivism. Where overcrowding results in compulsory releases, however, the board must grant parole to a specified number of prisoners within a specified period of time. Because this denial of discretion, coupled with the adverse effects of overcrowding on the accuracy of recidivism predictions, renders it difficult to establish parole board liability, the victim may be forced to sue the state.

Nonetheless, two principal arguments might obstruct a victim's suit against the state. First, the compulsory nature of the release might not significantly accelerate the date of the inmate's parole 61 and might not prevent the parole board from making an informed decision. In such a case, the state's maintenance of inadequate prison facilities would probably bear no causal relationship to the victim's injuries. Yet, the magnitude and urgency of most compulsory releases suggest that very few decisions are made in such a vacuum. 62 Second, if citizens refuse to provide a tax base sufficient to support state prison-building


60. Semler v. Psychiatric Inst., 538 F.2d 121, 126 (4th Cir. 1976) ("The breach of... duty, followed by the foreseeable harm on which it was predicated, in itself demonstrates proximate cause."); cert. denied, 429 U.S. 827 (1976); see, e.g., Williams v. United States, 450 F. Supp. 1040 (D.S.D. 1978) (hospital's failure to notify authorities of release of mental patient constituted negligence that proximately caused the patient's murder of the plaintiff's decedent); cf. Comiskey v. State, 71 A.D.2d 699, 418 N.Y.S.2d 233 (1979) (holding that state's negligence in inadequately supervising a mental patient proximately caused his suicide). But see Rivers v. State, 133 Vt. 11, 328 A.2d 398 (1974) (holding that inmate's criminal acts and reckless driving broke the causal chain between his release and his collision with the plaintiff's decedent). The court in Rivers, however, failed to recognize that, even if the intervening acts break the chain of proximate cause, a finding of the foreseeability of such acts still establishes negligence. See Prosser, supra note 59, at 272.

61. See supra note 6.

62. Indeed, it strains credulity to suggest that the court-ordered release of hundreds of inmates within several months proves conducive to cautious, detached reflection. See supra note 56 and accompanying text. Nonetheless, states with statutorily prescribed, objective parole standards might preserve such caution. See infra note 93.
projects, then it seems inaccurate to assert that the state caused the compulsory prisoner releases. This argument, however, erroneously assumes that the only alternative to compulsory releases is prison construction. Instead, states may develop sentencing policies and establish systems of community corrections in order to insure prison capacity for high-risk and repeat offenders. Moreover, in most instances the state maintains control over the allocation of funds to the correctional system, and remains capable of improving prison conditions. Thus, the state cannot claim that it is not responsible for current prison policy and its consequences.

IV. IMMUNITY

To establish tort liability, a compulsory release victim suing either the parole board or state must overcome the defenses of official and sovereign immunity. These immunity principles derive from a variety of authorities. Courts have based parole board immunity upon the eleventh amendment, state constitutional provisions, state statutes, and the common law maxim that "the King can do no wrong." Nonetheless, courts and legislatures have subjected the doctrine of im-

63. See supra note 4.

64. High-risk offenders probably constitute a relatively small portion of the inmate population. See supra note 48. Moreover, "[s]ome [criminals] account for a disproportionately large number of violent offenses." N. Morris, supra note 4, at 86. Thus, a number of criminologists have advocated the exclusive use of prisons for violent, high-risk offenders. See generally N. Morris, supra note 4, at 85-121. Such approaches preserve public safety and comply with the demands of budgetary restrictions. Indeed, states may change sentencing policies at no significant expense, may use existing facilities to house the limited number of high-risk offenders, and may develop community corrections programs for low-risk offenders at considerably less cost than that entailed in the construction of a prison. R. Goldfarb & L. Singer, supra note 6, at 558.

65. See Smith, Prison Reform Through the Legislature, in The Politics of Punishment (1973) (citing the low political influence of prisoners as a cause of the neglect of correctional facilities); N. Morris, supra note 4, at 37 ("By and large, the public is uninterested in prison matters, except morbidly at times of riots ... [and most politicians] are well aware that there are no votes to be gained in penal reform.").


68. For three cases precluding the liability of release officials, decided under a California immunity statute, see Buford v. State, 104 Cal. App. 3d 811, 164 Cal. Rptr. 264 (1980); Thompson v. County of Alameda, 27 Cal. 2d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); State v. Superior Court, 37 Cal. App. 3d 1023, 112 Cal. Rptr. 706 (1974).

69. Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478 (M.D. Ala. 1976), aff'd, 548 F.2d 354 (5th Cir. 1977), predicated immunity upon the eleventh amendment and upon the common law doctrine of sovereign immunity. For a general history of the common law doctrine of sovereign immunity, see Prosser, supra note 59, at 971.
munity to numerous exceptions and interpretations, and the immunity of the state has been caught in a tide of abolition. Consequently, applying the doctrine of immunity requires the manipulation of complex, often inconsistent standards, several of which apply to a victim’s suit for injuries caused by a compulsorily released prisoner. This complexity and inconsistency may work capriciously in denying victims relief. In such instances, existing immunity law should be modified to grant victims a more effective remedy.

A. Official Immunity

In order to obtain a personal judgment against a public official, the victim must overcome the defense of official immunity. Courts and legislatures have generally conferred a broad immunity from personal liability upon individual members of a parole board. Such immunity protects the ability of parole board members “to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations.” Indeed, some courts have reasoned that parole board members require the same absolute immunity from tort liability afforded to high public officials. Jurisdictions that provide such comprehensive immunity ostensibly eliminate any victim suits against parole board members.

Some courts, however, have granted parole board members only the qualified immunity from tort liability afforded to low public officials, thus immunizing their “discretionary” — though not their “ministerial”

70. PROSSER, supra note 59, at 977.
71. Many victims’ suits against third parties for manifestly negligent releases fail because of immunity. See, e.g., Lloyd v. State, 251 N.W.2d 551 (Iowa 1971) (holding that director of bureau of adult corrections was immune from suit for negligently releasing dangerous inmate who attacked a man and sexually assaulted a woman upon release); Burg v. State, 147 N.J. Super. 316, 371 A.2d 308 (1977) (holding state immune from suit for releasing dangerous felon who assaulted plaintiff while on release); Taylor v. State, 36 A.D.2d 878, 320 N.Y.S.2d 343 (1971) (immunity held applicable to parole board for releasing prisoner — a prior sexual offender — who, upon release, killed the plaintiff’s daughter), motion to dismiss appeal denied, 33 N.Y.2d 937, 309 N.E.2d 128 (1971).
Discretionary acts include those requiring “personal deliberation, decision and judgment,” while ministerial acts include those requiring only “an obedience to orders, or the performance of a duty in which the officer is left no choice of his own.” Unfortunately, the dichotomy between discretionary and ministerial acts has proven particularly difficult to apply to parole board actions. For example, a split in authority renders it unclear whether a parole officer’s supervision of a parolee constitutes a discretionary or a ministerial act. Many courts, however, concur in labeling the actual release decision as discretionary, and the parole officer’s notification of release to the court or to potential victims as ministerial. Thus, in a number of states, unless the parole officer erred in neglecting to notify the court or to warn a potential victim, immunity will shield his acts from personal liability.

The artificiality of the distinctions between high and low government officials, and between discretionary and ministerial acts, has led some courts to create standards for personal immunity predicated upon more straightforward, more equitable considerations. For example, in Grimm v. Arizona Board of Pardons & Paroles, the Arizona Supreme Court concluded that “immunity deprives individuals of a remedy for wrongdoing and should be bestowed only when and at the level necessary.” Therefore, the court abolished unqualified immunity, and instituted a standard allowing “liability only for the grossly negligent or reckless release of a highly dangerous prisoner.” Similarly, in Estate of Armstrong v. Pennsylvania Board of Probation & Parole, the Commonwealth Court of Pennsylvania eschewed the common law distinctions, and held that the immunity of public officials should rest upon

76. PROSSER, supra note 59, at 988-89.
78. See, e.g., Smart v. United States, 207 F.2d 841 (10th Cir. 1953); Thompson v. County of Alameda, 27 Cal. 2d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); Lloyd v. State, 251 N.W.2d 551 (Iowa 1977).
79. See supra notes 44-45 and accompanying text.
80. Courts have recognized some other exceptions to this broad grant of immunity. First, immunity does not embrace the malicious acts of parole board members. Second, immunity does not apply to officials acting outside of their authority (though it does apply to officials merely acting in excess of their authority). See generally PROSSER, supra note 59, at 989, 991. Still, these exceptions apply only rarely, and do not significantly affect the general scope of official immunity.
82. Id. at 265, 564 P.2d at 1232.
83. Id. at 268, 564 P.2d at 1235.
the case-by-case consideration of four factors: (1) "whether public policy would be promoted in shielding the defendant from liability"; (2) whether the "actions complained of could be measured against a predictable standard of care"; (3) "whether, but for the defendant's status, a right of action would lie under analogous rules of law," and (4) "whether the plaintiff [had] improperly failed to avail himself of other available remedies." 85 Such clear and cogent standards evince the unnecessary complexity of the common law rules, 86 and hopefully signal the direction of the future in the law of official immunity.

Without such stabilizing reform, however, the success of a victim's attempt to impose personal liability upon negligent members of parole boards would remain uncertain. In jurisdictions applying the common law, victims must both persuade the court to classify parole board members as low government officials, and prove that their injuries resulted from the negligent performance of a board member's ministerial act. As these preliminary elements may be difficult or impossible to prove under the law of some states, the victim's suit could be defeated even before evidence was introduced on the substantive tort issues. Conversely, in those jurisdictions that apply standards similar to those of Grimm87 or Armstrong, 88 the victim's primary obstacle would be satisfying the elements of tort. These standards would permit more consistent and equitable relief and offer models of the type of reform necessary in this area.

B. Sovereign Immunity

1. Sovereign immunity in actions against the parole board— In order to obtain a judgment against the parole board as a governmental agency, the victim must overcome the defense of sovereign immunity. Although the eleventh amendment confers absolute immunity on the state and its agencies, 89 most jurisdictions have either limited or abrogated that immunity. 90 Consequently, a number of courts have

85. Id. at 36, 405 A.2d at 1101. Actually, Armstrong merely implemented the standards established by the Pennsylvania Supreme Court in DuBree v. Commonwealth, 481 Pa. 540, 393 A.2d 293 (1978).
86. Numerous legal scholars have criticized the complexity and ambiguity of the common law rules. See generally Prosser, supra note 59, at 991.
89. See supra note 66 and accompanying text.
90. See B. Schwartz, Administrative Law 569 (1976) ("Not too long ago a survey of the [judicial attack on sovereign immunity] . . . could assert that 'the doctrine of sovereign immunity has never been expressly repudiated by an American court.' Such a statement would now be very far from accurate."); Littlejohn & Kotch, Torts, 24 Wayne L. Rev. 655, 658-59 (1978) (observing that, as of 1977, 9 states had retained immunity, 5 states waived immunity in cases
held states liable for the negligent release decisions of their parole boards. 91

Unfortunately, the scope of sovereign immunity, like the scope of official immunity, varies significantly from state to state. Some states, such as California, have implemented immunity standards similar to those of the Federal Tort Claims Act. 92 Those states provide a general waiver of immunity, while preserving an exception for the discretionary acts or functions of governmental officials. Thus, in some jurisdictions, the victim would encounter the same difficult distinction between ministerial and discretionary acts encountered in attempting to impose personal liability upon the individual members of the parole board. 93 Some states, however, such as New York, have completely abolished sovereign immunity, 94 consenting to have liability "determined in accordance with the same rules of law as applied to actions . . . against individuals or corporations." In those states, if the victim establishes the elements of tort, sovereign immunity will not obstruct the action. Thus, the survival of the victim's action may be predicated upon the nature and extent of the state's waiver of immunity.

2. Sovereign immunity in actions against the state—Sovereign immunity would also apply to the victim's action against the state for

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of insurance, 8 states retained only partial immunity, and 19 states had either judicially or statutorily abolished immunity); see also RESTATEMENT (SECOND) OF TORTS § 895B (1977) ("[t]he modern rule is that the state and its agencies are subject to liability in tort").

91. See supra note 32.


93. A victim's action against the United States Parole Board, however, might not encounter this obstacle. In 1979, the United States Parole Board established a system of guidelines to aid in the decision-making process. The board contrived a matrix system with two axes: one rating different offenses on a scale of one through six (as determined by the Parole Board according to the facts of each case), and one rating the inmate's prognosis on parole. The two indicators interact to form a table, which the Parole Board employs to set a release date. 28 C.F.R. § 2.20 (1982).

In Payton v. United States, 636 F.2d 132 (5th Cir. 1981), the Fifth Circuit Court of Appeals held that release decisions made under these guidelines were sufficiently "mechanical" to render them "ministerial." Therefore, the court held that the Federal Tort Claims Act immunity for discretionary functions did not protect the Parole Board's negligent release determination. In response to Payton, the Attorney General's Task Force on Violent Crime suggested the implementation of a specific statutory exception to the Tort Claims Act that would allow for Parole Board liability for the results of grossly negligent release decisions. See VIOLENT CRIME REPORT, supra note 4, at 90. Such an amendment was included in S. 2420, 97th Cong., 2d Sess. 128 CONG. REC. S3853-63 (daily ed. Apr. 22, 1982) (statement of Sen. Heinz), but did not survive into the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1248. The actual impact of federal statutes governing parole liability might be fairly negligible, in any event, as only seven percent of all adult inmates are located in federal prisons. VIOLENT CRIME STATISTICS, supra note 1, at 45.

94. See N.Y. JUD.-CT. CL. ACT LAW § 8 (McKinney 1963).

95. Id.
failure to maintain adequate prison facilities and to prevent the compulsory release of dangerous inmates. Yet, the application of sovereign immunity to such an action entails additional, more complex considerations. Moreover, these difficulties become apparent regardless of how the victim structures the suit. For example, if suit is brought against a governmental agency such as the board of corrections, a court would probably apply standards of sovereign immunity identical to those they would apply in suits against the parole board. Consequently, the jurisdiction's immunity standards might again block the victim's action by requiring him to address the difficult distinction between discretionary and ministerial acts.

Still, decisions concerning the operation of a state’s prison system seem to reflect broader policy and administrative considerations than are entailed in decisions concerning the release of individual inmates. Thus, the victim may not be able to attribute the maintenance of unconstitutional prison facilities to a particular governmental agency, but may only be able to attribute such conditions to the state's long-standing, broadly based neglect of its correctional institutions. Unfortunately, courts may prove reluctant to interfere with such fundamental policy and administrative determinations. Consequently, even in states that have wholly abrogated immunity, the court's refusal to intervene in certain state functions might preclude the victim's recovery.

Nonetheless, judicial respect for state administrative autonomy has not led courts to defer to every state policy decision. Indeed, courts have frequently nullified unconscionable state policies — particularly those that impose upon individual constitutional rights. For example, in a number of prisoners' rights cases, courts have insisted that insufficient funding does not excuse unconstitutional prison conditions.

96. The variety of officials and entities named as defendants in prisoners' rights cases reveals the difficulty of determining the parties responsible for the maintenance of inadequate facilities. Named defendants have included commissioners of corrections, captains of police departments, members of boards of corrections, governors, state treasurers, states, counties, penitentiary superintendents, prison wardens, and directors of divisions of corrections.

97. See RESTATEMENT (SECOND) OF TORTS § 895B comment d (1977):

Determinations of priorities in the allocation of available funds or facilities or manpower, with the result that certain purely governmental services may not always be available to everyone, are often treated as types of fundamental administrative decisions that the court should not attempt to second-guess.

98. Note the abrogation of the "hands off" doctrine, as manifested in the cases cited supra note 2.

99. Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972) ("the court [below] did not abuse its discretion in requiring defendant sheriff to make certain specified changes in his budget and in his deployment of manpower"); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 201 (8th Cir. 1974) ("lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration"); see, e.g., Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976) ("a state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within
Although victims' rights probably do not rise to the constitutional level, courts should not defer to the autonomy of a state that has exhibited such manifest disregard for the rights of prisoners and the safety of the public. As the Supreme Court recently asserted in *Rhodes v. Chapman*, prison overcrowding arises "from neglect rather than policy. There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within limits of decency."

The success of a victim's suit for injuries caused by a compulsorily released prisoner may largely depend upon such formalities as naming the correct governmental and individual defendants, and upon the fortuity of the jurisdiction in which the injuries occurred. Although the abolition of immunity represents the current trend, the remnants of that doctrine cause an unsettling element of unpredictability. In order to insure that victims may recover for their injuries, states should limit or abrogate immunity, and should implement clear and equitable standards by which to determine the scope of liability. At present, however, the doctrine of immunity produces inconsistent, often capricious results.

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100. The issue of whether victims' rights rise to the constitutional level evokes questions of great complexity and controversy. Some advocates of civil liberties have observed that the Constitution contains no explicit guarantees of victims' rights, as contrasted with its explicit guarantees of arrestees' rights, defendants' rights, and prisoners' rights. Therefore, these individuals conclude that the victim's primary role in the justice system is to act as a witness for the prosecution. See, e.g., F. Carrington, supra note 17, at 77 (citing Washington Star-News, July 8, 1975, at 1, col. 1 (interview with Alan Goldstein, legal staffer of the Maryland affiliate of the A.C.L.U.; Goldstein arguing that victims are principally witnesses for the prosecution)). *But see id.* at 80-81 (discussing civil libertarian Sidney Hook's advocacy of victims' rights).

Advocates of victim's rights have responded by arguing that this omission merely reflects an assumption by the framers of the Constitution that the rights of victims so obviously inhere within the general language and spirit of the Constitution as not to require a specific guarantee. *See* Carrington, supra note 26, at 450. As Carrington has observed, "it might be difficult to get across to a young woman who has just been gang-raped that the document upon which our government is premised relegates her to the status of a mere 'witness for the prosecution.'" *Id.*

The resolution of this controversy lies beyond the scope of this Note and, in any event, the controversy presents questions primarily of academic interest. The essential point is that victims' rights — whether or not they rise to the constitutional level — merit protection. As Justice Goldberg has commented:

> Even though I cannot with propriety postulate that the Constitution requires compensation for victims of violence, I can state my opinion that the victim of crime has, in a fundamental sense, been denied the 'protection' of the laws, and that society should assume some responsibility for making him whole. What the equal protection clause of the Constitution does not command, it may still inspire.


102. *Id.* at 362.
CONCLUSION

Although compulsory prisoner releases provide the most immediate, most economically feasible solution to prison overcrowding, states should avoid such releases whenever possible. If, however, a state must grant early release to a portion of the inmate population, such releases should result from the thoughtful review of each eligible inmate. To ensure cautious state action, and to prevent state agents from acting recklessly, state laws should permit victims to pursue actions for injuries caused by compulsorily released prisoners. Courts could base such a remedy on existing tort theory permitting suits against third parties whose gross negligence or recklessness causes or facilitates a criminal act.

The law of immunity presents the single major obstacle in creating such a cause of action. The limitation of governmental officers’ personal liability may enhance the accuracy and objectivity of release decisions, but official immunity is tolerable only if governmental tort liability provides a substitute source of reparation.\textsuperscript{103} Nonetheless, although most states have limited or abrogated sovereign immunity, the remnants of that immunity prevent the effectuation of a nationally consistent policy of victim reparation. Victim compensation statutes currently offer some alternative relief. Still, until those statutes provide a greater level of compensation for a greater number of victims, courts and legislatures should continue to limit the doctrine of immunity and encourage the development of suits for injured victims. The state should not impose the costs of its own negligence upon the victims of violent crime.

\textit{—Leonard M. Niehoff}

\textsuperscript{103} B. Schwartz, \textit{supra} note 90, at 563.