PSYCHOTHERAPISTS' LIABILITY FOR THE RELEASE OF MENTALLY ILL OFFENDERS: A PROPOSED EXPANSION OF THE THEORY OF STRICT LIABILITY

On October 29, 1973, John Steven Gilreath, a twenty-two year old probationer with a history of sexual assaults and drug abuse, attacked and murdered Natalia Semler near the Madeira School in Fairfax County, Virginia. At the time of this tragedy, Gilreath was undergoing psychotherapy as an outpatient at the Psychiatric Institute of Washington, D.C. Natalia's murder brought the actions of Gilreath's psychiatrist and probation officer under judicial scrutiny in Semler v. Psychiatric Institute. In Semler, the Fourth Circuit considered whether the psychiatrist and the probation officer were liable in tort because they had released Gilreath from confinement in contravention of the procedure prescribed by a Virginia state court's order. The Fourth Circuit decided that such a breach of a court order was actionable under a theory of negligence per se and affirmed a lower court decision for the plaintiff, Natalia Semler's mother and administratrix. In deciding this case, however, the court was confronted with difficult questions concerning the treatment and release of mentally ill offenders.

This Comment will examine the basis for imposing tort liability upon psychotherapists who are under a judicial or statutory obligation to seek a court's approval for a change in their patient's status and whose failure to obtain such approval results in the release

1 538 F.2d 121 (4th Cir.), cert. denied, 429 U.S. 827 (1976).
2 "Release" will be used in this Comment to cover a wide spectrum of programs where mental patients are given a greater amount of freedom than that existing under a regimen of 24-hour confinement. These release programs include day-trips, holiday and weekend passes, day patient and outpatient treatment, placement in a "half-way" house, and other plans between absolute confinement and unconditional release that allow the patient to exercise a greater degree of freedom.

of a patient who later harms a third party. This Comment will illustrate that the imposition of tort liability under a theory of negligence per se may be tantamount to the imposition of strict liability. The rationales for the policy of strict liability and the policy's impact on mental patient release programs will be examined to demonstrate how the explicit application of a strict liability theory to release programs will achieve a more consistent and more desirable policy than the application of a theory of negligence per se.


3. Because the duty to consult the court before releasing a patient attaches principally to individuals who have been committed to mental hospitals through the criminal process, this Comment will deal only with the liability of practitioners treating patients who would still be in jail at the time of their release but for the fact that they were sentenced to treatment in lieu of incarceration, were found incompetent to stand trial, or were acquitted for reasons of mental disease. These individuals (hereinafter referred to as "mentally ill offenders") represent a peculiar subclass of those who are civilly committed. Once their penal sentences, which may be in fact spent in mental hospitals, have expired, they must be afforded the same procedural safeguards as those who are civilly committed. See Baxstrom v. Herold, 383 U.S. 107 (1966).

Although mentally ill offenders may be confined for an indeterminate length of time, the Baxstrom decision divides their incarceration into two parts: (1) the period when they would have been in jail but for confinement and treatment at a psychiatric facility, which might be called a "shadow sentence," and (2) the period after the shadow sentence expires when the patients are subject to the procedures of civil commitment. See Waite v. Jacobs, 475 F.2d 392 (D.C. Cir. 1973). Because those confined in civil commitment proceedings may generally be discharged without the approval of the court of commitment, see Developments in the Law—Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190, 1376-1398 (1974), the statutory requirement that judicial approval be sought for the release of mentally ill offenders should arguably extend only to releases effected during the shadow sentence. See generally Greenwald, Disposition of the Insane Defendant After "Acquittal"—The Long Road From Commitment to Release, 59 J. OF CRIM. L.C. & P.S. 583 (1968). It could be narrowly argued under Baxstrom, however, that a state may continue to confine an individual as a mentally ill offender and that his release must be approved by the court if the state can show that the patient "is so dangerously mentally ill" as to warrant lasting incarceration in a facility for mentally ill offenders. 383 U.S. at 115. In addition, the extension of civil commitment procedural safeguards to mentally ill offenders whose shadow sentences have elapsed does not mean that a state may not rationally distinguish between patients who were civilly committed and may be discharged in a discretionary manner, and patients who have committed a crime in the past and must be released by the court, albeit with procedural safeguards. See Humphrey v. Cady, 405 U.S. 504, 508 (1972). The best that Baxstrom does for a mentally ill offender, therefore, is to guarantee him procedural safeguards equivalent to those enjoyed by persons confined in civil commitment proceedings; these safeguards would apply only after the expiration of the shadow sentence. In effect, the narrower reading of Baxstrom serves to extend the duty to consult the court before releasing a mentally ill offender past the expiration of the shadow sentence.
I. The Semler Case: Defining a Cause of Action

A. Modern Trends in the Treatment of the Mentally Ill

A precipitous decline in the mental hospital population of the United States has occurred during the past several years. This trend has resulted from the theory that patients who no longer require inpatient treatment may be released into the community. Many mental patients participate in various forms of release programs, including partial treatment programs established by the hospitals that released them. The impetus for this trend comes from the widespread belief that these programs are a successful means for rehabilitating the mentally ill.

In time gone by, mental defectives were confined and kept under constant surveillance. Medical and psychiatric advances, demonstrating the inadvisability of that system, prompted the state to abandon it and adopt the modern and therapeutically approved method of allowing the [mental defective] a freedom of action without close and continual watching.

The implementation of these programs, however, has posed some serious difficulties for psychotherapists who treat mentally ill...
offenders eligible for release programs. As soon as a patient is freed, an uncontrollable risk of harm arises. Even the utmost precautions will not prevent the infliction of some harm by released patients, unless such patients are under constant supervision and surveillance. Such measures would undermine the very purpose of release programs.

These programs necessarily involve a degree of calculated risk that cannot be controlled by the exercise of even the highest care and therefore must be taken on balance. Because the Semler case illustrates the unique problems posed by release programs, a close examination of the facts is necessary to understand the Fourth Circuit's novel disposition of the case.

B. The Factual Setting of Semler

John Gilreath's case history is not an appealing one. In October 1971, he was arrested in Fairfax County for the abduction of Laurie Newbold, another young woman from Madeira. This apparently was not an isolated incident because Gilreath had been involved in similar assaults upon young women on at least two other occasions. Before he was tried for the Newbold abduction, Gilreath entered the Psychiatric Institute of Washington D.C. for treatment under the supervision of Dr. Ralph W. Wadeson, Jr. Dr. Wadeson diagnosed Gilreath as "a latent schizophrenic characterized by bizarre behavior, thought disorder and inability to articulate his thoughts and feelings." Gilreath's personality was also marked by aberrant and aggressively sexual behavior, a disorder that the plaintiff later termed "without a cure." When Gilreath first came under his care, however, Dr. Wadeson felt that the patient was not dangerous as long as he was furnished with an environment of structured therapy at the Psychiatric Institute.

In June of 1972, Dr. Wadeson met with Fairfax County Circuit Court Judge William Plummer, who was hearing the Newbold abduction case. Dr. Wadeson explained the Psychiatric Institute's

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10 The facts of the Semler case are set forth in 538 F.2d at 123-24. See text accompanying notes 17-32 infra.
11 Brief for Appellee at 4.
12 Gilreath previously had been treated by Dr. Fred Sabotka, who diagnosed the patient as an "emotionally unstable personality with passive aggressive features" and recommended close (i.e. 24-hour) treatment. Id.
13 Id. 4-5.
14 Id. 5.
15 538 F.2d at 123.
methods to the judge and recommended a regimen of twenty-four hour treatment for Gilreath. As a result of this conference with Dr. Wadeson, Judge Plummer agreed to commit Gilreath to the Psychiatric Institute for extended therapy. In August of 1972, Gilreath plead guilty to the charge of abduction and received a suspended sentence of twenty years, conditioned upon continued treatment at the Psychiatric Institute. The sentencing order stated in relevant part that Gilreath was "to receive treatment at and remain confined in the Psychiatric Institute until released by the Court." Dr. Wadeson, who agreed to be bound by this order, subsequently requested a clarification of its terms. This clarification and amplification of the sentencing order was supplied by Paul Folliard, Gilreath's probation officer, in a letter to Dr. Wadeson. Folliard's letter purported to set forth Judge Plummer's understanding of the sentencing order:

Execution of sentence was suspended and [Gilreath] was placed on probation for a period of twenty years with special conditions that (1) he remain at the Psychiatric Institute until it is mutually agreed upon by the court [Judge Plummer], you and the staff that John can be released and (2) he is to remain on the premises of the hospital.

After seven months of intensive treatment, Dr. Wadeson permitted, and Judge Plummer approved, several holiday and over-

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16 Id. The precise nature of Gilreath's therapy did not come to light during the Semler litigation.
17 Brief for Appellant Folliard at 10.
18 Dr. Wadeson apparently did not contest that he was bound by the sentencing order, even though he was not technically a party to the order. Some doubt existed in the plaintiff's mind whether the Virginia court had the power to bring Dr. Wadeson and the Psychiatric Institute under its jurisdiction because of their status as Washington, D.C. residents. See Brief for Appellee at 20. Because Dr. Wadeson did not dispute this point, the Fourth Circuit treated him as bound by the sentencing order in Semler; consequently, this Comment will do likewise. See 538 F.2d at 124-25.
19 Brief for Appellant Folliard at 11-12. A problem is raised by the vagueness of the court order, even as "clarified" by Folliard's letter, because it did not state explicitly who it intended to protect. The negligence per se analysis used in Semler requires that the class in whose favor a statute or a court order runs be defined in order to determine which plaintiffs can sue when a breach occurs. See text accompanying notes 54 & 68. The order could have been construed to protect Gilreath and thus to limit the psychiatrist's obligations under the order to Gilreath exclusively. This interpretation of the sentencing order would have been consistent with the requirements of treatment, and perhaps even confinement, if Gilreath were dangerous only to himself. The Semler court rejected this possibility, choosing instead to define the class of persons protected by the order as "the public, particularly young girls." 538 F.2d at 124. In view of Gilreath's case history, the court's interpretation is perfectly reasonable; nevertheless, Dr. Wadeson may have been completely unaware that he had a legal obligation to the public.
night passes for Gilreath. By February of 1973, the judge had authorized Folliard to issue weekend passes at his discretion. In May 1973, Dr. Wadeson recommended that Gilreath be transferred from close confinement to a day patient status, where Gilreath would remain in a therapeutic environment from eight o’clock in the morning until five in the afternoon; evenings and weekends were to be spent under his parents’ supervision. This recommendation was approved by Judge Plummer without any hearing or testimony from Dr. Wadeson or Folliard.  

After discussions with Dr. Wadeson, Folliard issued extended passes to Gilreath in July and September of 1973 for the purpose of investigating a move to Ohio. These passes were not submitted to Judge Plummer for approval. When the Ohio probation authorities rejected his application for a transfer, Gilreath returned to Virginia, but he was not restored to his former status as a day patient. Instead, Gilreath was enrolled by Dr. Wadeson as an outpatient in a semi-weekly therapy group. During this time, Gilreath lived first with his parents and then by himself; this change, however, was not reported to Judge Plummer. Two months later, on October 29, 1973, Gilreath killed Natalia Semler; almost two years had elapsed since Gilreath’s arrest for abduction, with sixteen months of that time spent under the care of Dr. Wadeson.

C. The District and the Circuit Court Opinions

Natalia’s mother instituted a diversity suit in the Eastern District of Virginia, naming Dr. Wadeson and the Psychiatric Institute as defendants; these defendants in turn impleaded Folliard. District Judge Albert Bryan, sitting without a jury, decided in favor of the plaintiff and handed down an extraordinary opinion. Judge Bryan expressly found that the psychiatrist had committed no malpractice because the evidence did not establish that Dr. Wadeson’s actions violated “a standard acceptable in this or similar communities.” Nevertheless, Judge Bryan reasoned that this suit presented more than a malpractice issue due to the existence of the sentencing order. He concluded that the mere violation of Judge Plummer's sentencing order, irrespective of any negligence, gave rise to a civil cause of action. Judge Bryan then added that the

20 538 F.2d at 123; Brief for Appellant Folliard at 13.
21 538 F.2d at 123-24.
23 Id. 1.
violation of the sentencing order in this case did constitute an act of negligence.

Although . . . it is no excuse to show that due care was exercised, I think that here there is negligence, and that negligence is the failure to get Judge Plummer's approval before changing the custodial status of Gilreath from that of "day-care" to "discharge" or from "day-care" to that of "out-patient." 24

Judge Bryan ultimately held for the plaintiff, and the defendants appealed to the Fourth Circuit.

No prior Virginia case had dealt with a claim that the breach of a court order creates a civil cause of action. Thus, in dealing with this case of first impression, the Fourth Circuit applied general principles of the Virginia law of torts: 25 "To constitute actionable negligence there must be a duty, a violation thereof, and a consequent injury. An accident which is not reasonably to be foreseen by the exercise of reasonable care and prudence is not sufficient ground for a negligence action." 26 Considering each of the elements separately, the court first found that the sentencing order "imposed a duty on the appellants to protect the public from the reasonably foreseeable risk of harm at Gilreath's hands that the state judge had already recognized." 27 Turning to the second element of actionable negligence, the court found that the defendants had "breached the duty imposed on them by the order of probation when they failed to seek the trial judge's permission to transfer Gilreath to out-

24 Id. The district court's opinion is a farrago of conflicting theories of liability. The district court's conclusion that the violation of the court order was actionable irrespective of negligence but that negligence was present in the failure to comply with the court order is both redundant and contradictory. A breach of a court order may indeed constitute negligence, but negligence cannot exist in the presence of the exercise of due care. If tort liability is imposed for this breach, then it can be recognized only under a theory of negligence per se, which in this situation is tantamount to the application of a strict liability theory. See text accompanying notes 78-87 infra. Perhaps the overt application of strict liability principles to this case seemed too harsh to the district court; yet the imposition of liability in the absence of negligence is by its own terms strict liability. In any case, the district court's opinion cited no authority to support the proposition that the breach of a court order constitutes actionable negligence.

25 538 F.2d at 124.

26 Id. (quoting Trimyer v. Norfolk Tallow Co., 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951)).

27 538 F.2d at 125. The court felt that the purpose of protecting the public was disclosed by the Virginia court order's requirement of confinement. Id. 124. The Fourth Circuit bolstered this conclusion by quoting Wadeson's testimony to the effect that Judge Plummer expressed "concern for the citizens of Fairfax County." Id. 125 n.2. However, Dr. Wadeson also testified that Judge Plummer "was concerned for John [Gilreath]." Id.
patient status." In dealing with the "consequent injury" requirement for the finding of actionable negligence, the court addressed the issue of proximate cause and held that the breach of the court order was a proximate cause of Natalia Semler's death. In affirming the district court's judgment for the plaintiff, the Fourth Circuit adopted the lower court's finding of no malpractice; nevertheless, it based its finding of defendants' liability upon their failure to meet the "standard of reasonable care" contemplated by the court order.

D. Analysis

By issuing his order sentencing John Gilreath to treatment and confinement at the Psychiatric Institute, Judge Plummer became the final arbiter of Gilreath's fate. Judge Plummer clearly anticipated exercising a significant degree of control with respect to even the smallest decisions about Gilreath's therapy and gradual ac-

28 Id. 126. The Fourth Circuit reasoned that, in view of the court order's requirement of approval by the judge, the decision to change Gilreath's status could not be a purely medical one; furthermore, by failing to obtain judicial approval for Gilreath's release as an outpatient, Dr. Wadeson and Folliard had substituted their judgment for Judge Plummer's in violation of the sentencing order. Id. 125.

29 Id. 126. The Fourth Circuit failed to consider the issue of cause-in-fact even though the cause-in-fact of the harm must be established before the question of proximate cause is reached. See W. Prosser, Law of Torts 236-44 (4th ed. 1971). The change in Gilreath's status from day patient to outpatient was arguably not the cause-in-fact of Natalia Semler's death in the sense that it might have occurred even if Gilreath's status had remained unchanged. Gilreath had opportunities to commit the crime as a day patient because he was no longer in the custody of the Psychiatric Institute after five o'clock in the afternoon. The district court dealt with this objection by asserting that the medication and therapy received by Gilreath as a day patient "would carry over during his periods away from the Institute . . . ." No. 99-74-A, slip op. at 2-3. Furthermore, even if the crime had been committed at a time when Gilreath would have been confined or in the therapy environment but for the switch from day patient to outpatient, it is not clear that Judge Plummer would not have approved such a transfer. The Fourth Circuit responded to this problem, however, by asserting that it was "reasonable to infer from the proven facts that the judge would not have granted his permission." 538 F.2d at 126.

30 538 F.2d at 126-27.

31 Id. 125.

32 Id. More precisely, the court order specified a standard of behavior rather than a standard of care. The finding of no malpractice implied that the doctors exercised reasonable care in treating and releasing Gilreath; however, the court order went beyond the delineation of a standard of care to prescribe certain procedures with which the doctor and the probation officer had to comply. This imposed a weightier obligation on Dr. Wadeson and Folliard than the more flexible standard of reasonable care under the common law. See text accompanying notes 85-87 infra.
climatization to society.\textsuperscript{33} The Virginia judge explicitly delegated to Folliard the discretion only to issue weekend passes to Gilreath.\textsuperscript{34}

Judge Plummer's sentencing order set forth three affirmative duties on Dr. Wadeson's part. Two of these duties, the duty to treat and the duty to confine, were explicitly set forth in the order. The third duty, that of obtaining the court's approval for any changes in Gilreath's status, arose from the phrase in the order that Gilreath was to remain confined "until released by the Court."\textsuperscript{35} Although this third duty resembles an obligation owed to the court itself rather than to Natalia Semler, the Fourth Circuit asserted that the sentencing order created a special relationship between Gilreath and his psychiatrist that required the psychiatrist to consult the court before releasing Gilreath as an outpatient. The duties to confine and to consult the court became the crux of the obligation Dr. Wadeson owed to Natalia Semler.\textsuperscript{36} Therefore, the obligations set forth in Judge Plummer's court order can reasonably be analyzed as an embodiment of two analogous common law duties: the duty to control a dangerous person, and the duty to warn potential victims of a patient's harmfulness.

According to section 315 of the Second Restatement of Torts, there is no duty to control a third party in order to prevent him from physically harming another unless a "special relationship" exists between the putative tortfeasor and the third party.\textsuperscript{37} Section 319 states that such a special relationship exists, for example, when an individual takes charge of a third party likely to cause harm if not controlled. This individual is "under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."\textsuperscript{38} A person likely to cause harm is defined by the Restatement as one "who has a peculiar tendency to act injuriously" of which the person charged with the duty is or should be aware.\textsuperscript{39} The Semler court cited section 319 in asserting that the court order put Dr. Wadeson in charge of Gilreath and thereby

\textsuperscript{33} Although this Comment argues that an independent panel of psychiatrists is the appropriate body for deciding issues regarding mental patient treatment and release, the fact remains that Judge Plummer did establish himself as the proper forum for reviewing decisions concerning Gilreath's regimen of treatment. The retention of jurisdiction by the committing court is unmistakably its prerogative in the case of mentally ill offenders. See note 3 supra.

\textsuperscript{34} 538 F.2d at 123.
\textsuperscript{35} Brief for Appellant Folliard at 10.
\textsuperscript{36} See 538 F.2d at 124.
\textsuperscript{37} \textsc{Restatement (Second) of Torts} § 315 (1965).
\textsuperscript{38} \textit{Id.} § 319.
\textsuperscript{39} \textit{Id.} § 319, Comment a.
imposed upon him the duty of confining Gilreath unless his release was approved by Judge Plummer.\footnote{538 F.2d at 125.}

Assuming that Gilreath had a “peculiar tendency to act injuriously” within the definition of section 319, the standard of care imposed upon Dr. Wadeson included a common law duty of confinement. In the absence of a court order as in \textit{Semler}, no unconditional duty to confine an individual who is likely to be dangerous exists at common law. One who assumes custody of a dangerous person has a duty only to exercise ordinary care in supervising such a person, taking into consideration his potentially dangerous characteristics.\footnote{Smart v. United States, 111 F. Supp. 907, 909 (W.D. Okla.) (dictum), aff’d, 207 F.2d 841 (10th Cir. 1953); Weils v. State, 267 App. Div. 233, 45 N.Y.S.2d 542 (1943).} No evidence was introduced in \textit{Semler} to indicate that Dr. Wadeson had not exercised ordinary care in supervising and confining Gilreath. Instead, the district court found no malpractice on Dr. Wadeson’s part in that the decision to release Gilreath as an outpatient was not itself negligent except for the fact that it violated the provisions of the sentencing order.\footnote{See note 24 supra.}

Absent the court order, even the underlying assumption that a duty to restrain Gilreath attached to Dr. Wadeson at all is questionable because the presence of this obligation turns on the asserted “dangerous propensities” of the patient.\footnote{See Restatement (Second) of Torts § 319 (1965).} The imposition of liability frequently requires that hospital authorities have knowledge that a patient has violent tendencies or has recently assaulted others.\footnote{See Jones v. United States, 399 F.2d 936 (2d Cir. 1968) (a mental patient threw an attendant out of a moving ambulance after having attacked other attendants prior to the trip); Homere v. State, 79 Misc. 2d 972, 361 N.Y.S.2d 820 (Ct. Cl. 1974), aff’d, 48 App. Div. 2d 422, 370 N.Y.S.2d 246 (1975) (a mental patient was released pursuant to a panel of psychiatrists’ recommendation even though a violent incident occurred shortly after such recommendation). \textit{See also} Jones v. State, 267 App. Div. 254, 45 N.Y.S.2d 404 (1943); Weils v. State, 267 App. Div. 233, 45 N.Y.S.2d 542 (1943). \textit{But cf.} Johnson v. United States, 409 F. Supp. 1283 (M.D. Fla. 1976) (no negligence in the failure of therapists to restrict to post army sergeant who had previously threatened his wife and brother-in-law and had exhibited erratic behavior, because of medical judgment that the symptoms were in remission).} No evidence was introduced in \textit{Semler} that Gilreath had demonstrated violent behavior while under treatment at the Psychiatric Institute. His improvement appeared to be steady; Dr. Wadeson himself, in a letter to Judge Plummer recommending greater freedom outside the hospital for the patient, indicated that Gilreath was “not a danger to himself or to others.”\footnote{Brief for Appellant Folliard at 5.} Judge Plummer
approved all of the doctor's requests to increase Gilreath's freedom. In proposing a transfer from close treatment to day patient status, Dr. Wadeson reported that there had been "no evidence of any break-through of [Gilreath's] aggressive or sexual impulses" while on weekend passes. Therefore, had Dr. Wadeson not been under a court order to confine Gilreath, no basis for imposing an absolute duty to restrain Gilreath would exist.

A similar analysis applies to the duty to inform the court and obtain its approval before changing Gilreath's status. This obligation may be analogized to the emerging notion that the duty to exercise reasonable care to protect threatened victims may require the therapist to warn the endangered party. The duty to warn requires not only warnings to individuals who have been threatened but also transmission of an adequate record of the patient's behavior to other therapists who should be informed of the patient's dangerous proclivities. Because Gilreath did not know Natalia

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46 Id. 6. Plaintiff disputed the value of any improvement on Gilreath's part, characterizing his illness as incurable. Brief for Appellee at 5. See also CAL. PENAL CODE §§ 1026, 1026.1 (West Supp. 1977) (amending CAL. PENAL CODE § 1026 (West 1970)). Although the California statutory scheme requires only a showing that a mental patient no longer be a "danger to the health and safety of others" before he can be released on probation as an outpatient, the mental health director of the county or his designee must convince the committing court that the patient has recovered his sanity before a patient can be released unconditionally. See note 75 infra. One California court has interpreted this requirement to mean that the patient has not merely recovered from the state of "not knowing right from wrong" experienced at the time of the crime, but has been fully restored to sanity. People v. Mallory, 254 Cal. App. 2d 151, 156, 61 Cal. Rptr. 825, 829 (1967). But see In re Jones, 260 Cal. App. 2d 906, 68 Cal. Rptr. 32 (1968).

47 Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In Tarasoff, psychotherapists failed to warn a young woman that during therapeutic sessions a patient had confided his intention to kill her. Subsequently, the patient murdered the young woman. Cf. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (there is a duty to warn parents of the homicidal tendencies of their foster child when these proclivities are not readily detectable by the parents). See also Fair v. United States, 234 F.2d 288 (5th Cir. 1956); Merchants Nat'l Bank and Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967).

The dissent in Tarasoff raised the possibility that the imposition on psychotherapists of a duty to warn would breach the bond of confidentiality between the therapist and his patient. The breakdown of trust that is engendered by a breach of the bond of confidentiality would, the Tarasoff dissent predicted, lead to an increase in violent behavior on the part of mental patients. 17 Cal. 3d at 462, 551 P.2d at 361, 131 Cal. Rptr. at 41 (Clark, J., dissenting). See also Stone, The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society, 90 HARV. L. REV. 358 (1976).

Semler and had never threatened her, Dr. Wadeson had no duty to warn her of Gilreath's impending change to outpatient status. In light of the fact that Judge Plummer ordered the doctor to consult him before changing Gilreath's status, the doctor's duty to warn extended to the judge as a surrogate for potential victims. In this sense, Dr. Wadeson arguably breached the duty to warn, as specified in Judge Plummer's sentencing order, when he released Gilreath without obtaining the court's approval.

In the absence of a court order, the obligation to warn, like the duty to confine, exists only if a patient has exhibited violent behavior in the past that must be communicated to the appropriate individual, or has threatened the person to be warned. No evidence was adduced indicating that Gilreath had recently threatened anyone. More importantly, no evidence existed to show that Dr. Wadeson failed to make complete reports to the Fairfax County Circuit Court with respect to Gilreath's mental condition. Judge Plummer's willingness to extend progressively greater degrees of freedom to Gilreath demonstrated the judge's confidence in the completeness of the record before him. Thus, in the absence of the court order, Dr. Wadeson's failure to warn could not support a finding of negligence.

The existence of the Virginia state court's sentencing order was essential to the Semler result because the order supplied the only ground for a finding of negligence on Dr. Wadeson's part. The Fourth Circuit held that the sentencing order set down an absolute standard of behavior for Dr. Wadeson and that any deviation from this standard, however reasonable, would suffice as a violation of the court order, thereby justifying a finding of negligence. As the Semler court stated: "[T]he standard [of reasonable care] has been delineated by the precise language of the court order. The appellants were to retain custody over Gilreath until he was released from the Institute by order of the court. No lesser measure of care would suffice." This ruling effectively applied a standard of negligence per se.

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49 See No. 99-74-A, slip op. at 2.

50 Cf. CAL. EVID. CODE § 1024 (West 1966) (indicating that the psychiatrist-patient privilege of confidentiality ceases only when the therapist has reason to believe that his patient is dangerous to himself or another and that disclosure of the communication is necessary to prevent the danger).

51 See Brief for Appellant Folliard at 10-13.

52 538 F.2d at 125.
II. THE FAILURE TO OBTAIN JUDICIAL APPROVAL FOR THE RELEASE OF MENTALLY ILL OFFENDERS

A. The Theory of Negligence Per Se

Negligence per se is a shorthand term for the judicial rule that a statutory violation may be the basis for a civil cause of action when the injured party is a member of the class for whose benefit the statute was enacted, when the harm resulting from the violation is of the type contemplated by the statute, and when the statutory breach is a proximate cause of the injury. The justifications for the theory of negligence per se vary greatly. For example, one view suggests that violations of statutes may be so socially undesirable that they should be penalized by civil as well as criminal liability. Another rationale for the theory of negligence per se declares that the violation of a statute imprints the stamp of culpability upon the offender and therefore colors the injury produced by the breach as negligent. A third view argues that in extracting a standard of care from the experience of the community, statutory pronouncements provide a formulated standard of universal wrongfulness for the courts to apply. Despite the disparate nature of these various rationales, they all rely upon a basic notion: the judgment of the legislature has sufficient legitimacy to justify the presumption that any action contrary to a legislative enactment necessarily warrants

54 E.g., Wright v. Carter Prods., Inc., 244 F.2d 53 (2d Cir. 1957).
55 E.g., Shafer v. Mountain States Tel. & Tel. Co., 335 F.2d 932 (9th Cir. 1964).
57 See Lowndes, Civil Liability Created by Criminal Legislation, 16 MAss. L. REV. 361, 370 (1932). Under this view, civil liability serves to buttress legislative policies by adding another disincentive to the contravention of the legislature's goals. Otto v. Specialties, Inc., 336 F. Supp. 1240, 1244 (N.D. Miss. 1974). The logic of this argument, however, is not compelling because the criminal penalty is presumably geared to punish the undesirable activity sufficiently to act as a deterrent in and of itself. Tort judgments may have a deterrent effect, but the purposes of tort liability go beyond a consideration of the disincentives needed to deter a defendant from undesirable activity; tort judgments are normally designed to compensate injured parties for their losses. The compensatory function may result in a judgment that has nothing to do with the amount needed to deter a defendant from his undesirable actions. See Morris, The Relation of Criminal Statutes to Tort Liability, 46 HARV. L. REV. 453, 474-75 (1933).
58 See Lowndes, supra note 57, at 371. See also Richardson v. Gregory, 281 F.2d 626 (D.C. Cir. 1960). This rationale, however, still does not explain why criminal sanctions are insufficient to punish a defendant's "culpability."
59 Clinkscales v. Carver, 22 Cal. 2d 72, 75, 136 P.2d 777, 778 (1943); Platt v. Southern Photo Material Co., 4 Ga. App. 159, 163, 60 S.E. 1068, 1070 (1908). Judge Traynor, however, warned in Clinkscales that the theory of negligence per se should not be applied when it serves to impose liability without fault. 22 Cal. 2d at 75, 136 P.2d at 778.
the imposition of tort liability upon the actor. A comparison of court orders and statutes is relevant to the question whether violations of court orders should serve as a basis for tort liability.

Statutes are often accepted as appropriate criteria of negligence partly because many courts assume that a statute "harnesses the technical knowledge that may have gone into [its] formulation." Statutes are often accepted as appropriate criteria of negligence partly because many courts assume that a statute "harnesses the technical knowledge that may have gone into [its] formulation." 60 Legislatures are able to hold hearings that permit a wide variety of interested parties to testify. The legislature's facilities for investigation are likely to be superior to those of a court because the judge must rely solely upon evidence presented to him by two parties who desire a resolution on the merits of a particular conflict.61 The broad range of interests and points of view that are represented in a legislature are absent in the courtroom, where the focus is not on the universality of application implied by a statute but rather on the particularity of the facts presented to the court. As a standard of negligence, a statute may be said to embody the experience of the community, whereas a court order represents the judgment of one individual with a narrow set of facts before him.

Nevertheless, a court order may have the same legitimacy as a statute and thereby serve to establish a standard of care. Courts traditionally make decisions concerning what is reasonable under the law of torts, and these decisions have the broad effect of proscribing certain kinds of behavior that have been deemed negligent. By definition, the standard of the ordinarily prudent man must reflect a community's experience; judges are presumably well versed in ascertaining and applying such a standard. A court order arguably has sufficient legitimacy to justify a finding of negligence per se if it is breached.

B. The Semler Model: Application of Negligence Per Se

The Semler court did not discuss the case in terms of the theory of negligence per se, nor did it explain why this theory should be extended to encompass violations of court orders. In fact, the Semler court failed to justify its analysis with any policy or theoretical arguments. The court simply treated the violation of the court order as if it were applying the traditional theory of negligence per se.

61 See Rudes v. Gottschalk, 159 Tex. 552, 555, 324 S.W.2d 201, 204 (1959); Morris, The Role of Criminal Statutes in Negligence Actions, 49 Colum. L. Rev. 21 (1949); Note, The Use of Criminal Statutes in the Creation of New Torts, 48 Colum. L. Rev. 458 (1948).
The standard of care that would usually attach to Dr. Wadeson in his treatment of a patient is that of the normally prudent psychiatrist exercising the same degree of skill as similarly situated practitioners. Under the Semler court's analysis, however, Judge Plummer's order established a higher standard of care. The sentencing order removed a large degree of discretion from Dr. Wadeson, prescribing a standard of conduct that largely foreclosed the psychiatrist's independent judgment. In effect, the Fourth Circuit considered only whether Dr. Wadeson breached the court order's literal terms, thereby foreclosing any further evaluation of the reasonableness of the doctor's conduct.

The Semler court then proceeded to the next step in a negligence per se type of analysis. Under this theory, a showing that a defendant breached a statute or a court order is insufficient. A plaintiff must also show that the statute or court order in question explicitly or implicitly gives him a cause of action. Because the court order did not explicitly give a cause of action to an injured person, the Fourth Circuit had to determine whether one arose by implication. Whether a cause of action should be implied "depends, at least in great measure, upon whether the duty is imposed for the special benefit of a particular group or class of persons."  

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63 It is not always easy to determine whether a [statute] establishes a standard of care or a standard of conduct. I am persuaded that if the statute leaves a person [room] to exercise his judgment such as, he may proceed when it is safe to do so, then the statute establishes a standard of care. However, if the statute provides that all persons shall stop in obedience to the red flashing light facing them at an intersection, it is one that leaves no discretion, nor does it leave an exercise of judgment on the part of the driver, and is therefore a standard of conduct statute.


64 See Morris, supra note 57, at 455; Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317, 325-26 (1914).


A statute "creates" no liability unless it discloses an intention express or implied that from disregard of a statutory command a liability for resultant damages shall arise "which would not exist but for the statute." . . . The statute may in express terms give to an injured person a cause of action for such damages. Difficulty arises only where the statute does not, in express terms, make any provision for such a cause of action. Then the problem is whether such a provision should be implied.

Id. at 305, 200 N.E. at 829 (quoting Shepard Co. v. Zachary P. Taylor Pub. Co., 234 N.Y. 465, 468, 138 N.E. 409, 410 (1923)).

66 Id. at 305, 200 N.E. at 829.
The Semler court had little difficulty with this requirement, asserting:

The order itself discloses that the state trial judge had a dual purpose in placing Gilreath on probation. The judge's willingness to allow Gilreath to continue his private psychiatric treatment shows concern for his welfare. At the same time, the requirement of confinement until release by the court was to protect the public, particularly young girls, from the foreseeable risk of attack.67

Under the court's reasoning, a doctor who relies solely upon his own judgment and non-negligently releases a mentally ill offender without judicial approval becomes liable to the outside public for harm committed by that patient.68 This reasoning poses problems by establishing competing interests that must be reconciled.

C. Problems Raised by the Semler Model

Although the violation of Judge Plummer's order provided the Semler court with the basis for a somewhat unconventional application of the theory of negligence per se, a more traditional approach is possible in those states where statutes require a treating psychiatrist to seek judicial approval for the release of a mentally ill offender.69 Yet even under a more traditional negligence per se

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67 538 F.2d at 124. The Semler court supported its conclusion that Judge Plummer had issued the sentencing order for the protection "of the public" by quoting from Dr. Wadeson's testimony: "Yes, [the judge] was very interested in the case. He seemed to have a thorough knowledge of John's situation, his past, his problems. He was concerned for the citizens of Fairfax County. He was concerned for John." Id. 125 n.2.

By the same token, the California courts have held that § 1026 of the Penal Code, which provides that mentally ill offenders are to be released only pursuant to the court of commitment's approval, is intended for the primary purpose of protecting the public. Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 255, 379 P.2d 22, 25, 28 Cal. Rptr. 718, 723 (1963) (en banc); accord, People v. Mallory, 254 Cal. App. 2d 151, 61 Cal. Rptr. 825 (1967). See note 75 infra. Nevertheless, the words of the sentencing order are at least equally susceptible to a conclusion that the order was designed to protect Gilreath rather than the public at large. The requirement that Gilreath was to remain confined may have been imposed to protect him from committing acts of violence or from having violence wreaked upon him because the court felt that Gilreath himself was especially vulnerable. See RESTATEMENT (SECOND) OF TORTS § 324 (1965); Zitrin, Hardesty, Burdock & Drossman, Crime and Violence Among Mental Patients, 133 Am. J. Psych. 142 (1976). The obligation imposed on Dr. Wadeson to consult the court before changing Gilreath's status could be construed simply as a desire to monitor his therapy in order to insure that Gilreath was receiving proper treatment.


69 Virginia enacted a statute requiring judicial approval for the release of mentally ill offenders. VA. CODE ANN. § 19.1-239 (Supp. 1960) as amended by 1966
analysis, the release of the mentally ill offender presents difficulties. For example, many of these statutes do not specify what is meant by the "release" of mentally ill offenders. Cases may arise where a treating psychiatrist reasonably decides to shift a person from twenty-four hour confinement to some status of limited freedom without consulting the court. In these circumstances, the patient is still under partial confinement; therefore, the treating psychiatrist may not believe that judicial approval for the release is necessary under the statute. If the patient subsequently harms a member of the public and courts read the word "release" broadly, then the breach of the statute may become actionable under the reasoning of Semler, notwithstanding the doctor's exercise of due care. The clear implication of this result is that psychiatrists could avoid the imposition of liability by seeking a court's approval for a broad range of release plans. After Semler, cautious psychiatrists who are under a statutory or judicial obligation to seek court approval for the release of a mentally ill offender are not likely to free the patient until they have submitted their plans to the court. Judges may be besieged by requests to approve various forms of release, even those as minor as a day trip to the zoo. Moreover, as court orders and statutes are drawn more broadly to require judicial ap-

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70 The New York statute is fairly typical in this respect: "If the court is satisfied that the committed person may be discharged or released on condition without danger to himself or others, the court must order his discharge, or his release on such conditions as the court determines to be necessary." N.Y. CRIM. PRO. LAW § 330.20(3) (McKinney Supp. 1976). "Released on condition" is nowhere defined. Presumably, the "on condition" language might be fleshed out by a court order pursuant to the statute; however, this solution assumes that a release warranting judicial approval has occurred in the first place, thereby affording a judge an opportunity to specify prospectively what "on condition" means for the particular patient before him. At least the New York statute puts a treating psychiatrist on notice of the requirement to obtain judicial approval for programs that are arguably conditional releases. The cryptic language of the corresponding statutes of other states provides little guidance for a treating psychiatrist to determine whether a change in a patient's treatment routine requires court approval. E.g., Wyo. STAT. § 25-75 (1967) ("No patient held on order of a court having criminal jurisdiction in any action or proceeding arising out of a criminal offense shall be discharged except upon order of a court of competent jurisdiction").

71 This possibility is not as extreme as it may appear. Rhode Island, for example, requires that "[a] person committed under this subdivision (providing for the treatment of committed offenders) shall not be paroled, furloughed, placed on outpatient status or released from a locked facility or otherwise released from the institution where he is being treated except upon petition to the court . . . ." R.I. GEN. LAWS ANN. § 36-4-4(e) (Supp. 1976) (emphasis supplied). As noted earlier, a broadly worded statute could be construed to require judicial approval for any release "from a locked facility." See notes 70 supra, 75 infra, & accompanying text.
proval for more forms of release, this problem becomes more acute. Consequently, the court would become deeply enmeshed in the time-consuming and frustrating task of reviewing decisions that are essentially the product of professional expertise. To require judicial approval of day-to-day decisions about the regimen of therapy afforded to mentally ill offenders would substantially burden a psychiatrist's exercise of discretion and might stifle any degree of inventiveness that is directed toward structuring controlled release programs. In fact, psychiatrists might stop releasing patients altogether, rather than submit themselves to such a degree of judicial scrutiny.

The problem of undue judicial interference in psychiatric decisionmaking could be alleviated by drafting statutes or court orders that specify in greater detail which kinds of release programs must be approved by the court. Greater specificity, however, makes it more difficult to accommodate two additional interests that are essentially contradictory: the rehabilitation of mentally ill offenders through progressively greater freedom, and the protection of the public from bodily assault. These purposes are not contradictory in the sense that most, or even many, released patients will necessarily harm members of the community. Nevertheless, as soon as any patients are released, some risk of harm arises. Statutes and court orders can only cover a limited number of situations. Persons harmed by patients in situations that fall outside the strictly defined ambit of a narrow court order or statute will not have the theory of negligence per se available to them. Although these plaintiffs may have other means of proving negligence, the crux of the Semler case is that the plaintiff was able to recover even in the absence of negligence because the court held that the violation of Judge Plummer's sentencing order was in and of itself actionable. Unlike the Semler plaintiff, members of the public who are injured by non-negligently released patients may not be able to recover unless they can rely on the theory of negligence per se. In order for a victim to rely on such a theory, however, he must show that the psycho-

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72 It would be an understatement to say that the psychiatric profession has resented judicial handling of psychiatric issues. See, e.g., Suarez, Psychiatry and the Criminal Law System, 129 Am. J. Psych. 293 (1972). On the other hand, judicial intervention in issues concerning the treatment of the mentally ill may be related to abuses that occurred when the psychiatric profession was not monitored. See, e.g., Szasz, The Right to Health, 57 Geo. L.J. 734, 740-46 (1969).


74 See text accompanying note 96 infra.
therapist in question failed to obey a specific statutory mandate or court order; without the occurrence of such a violation, a victim would be foreclosed from recovery.\textsuperscript{75}

The negligence per se approach creates a direct conflict between the desire to compensate individuals injured by released mental patients and the desire to avoid the institutional strains caused by judicial review of highly technical psychiatric decisions. An irregular and unpredictable pattern of recovery is likely to emerge from this struggle because courts will strive to avoid the equally undesirable results of denying recovery to an injured plaintiff or of undertaking a detailed review of psychiatric decisionmaking.

The problems generated by the \textit{Semler} model—the strains upon judicial resources, the deterrence of release as a technique of re-

\textsuperscript{75} An examination of the California approach to this problem illustrates that some serious difficulties arise even with a detailed statutory scheme for the release of a mentally ill offender. The California approach employs different statutory provisions for unconditional release and for conditional release as an outpatient. The procedure for both is the same: before the county mental health director or his designee, presumably the treating psychiatrist, can release a mentally ill offender either unconditionally or as an outpatient, the court of commitment must be notified. \textit{Cal. Penal Code} § 1026a (West Supp. 1977) (unconditional release); \textit{Cal. Penal Code} § 1026.1(a) (West Supp. 1977) (release as an outpatient). Judicial approval is also required when an outpatient is transferred back to close treatment or when the county prosecutor challenges the outpatient status of a previously released individual. \textit{Cal. Penal Code} §§ 1026.1(c)-(d) (West Supp. 1977).

In the case of a proposed release as an outpatient, § 1026.1 explains that, after being notified, the court may hold a hearing and approve or disapprove of the plan. If no action is taken by the court, the plan is considered approved. This section explains further that the decision to release a mentally ill offender as an outpatient must turn on whether the county mental health director or his designee is convinced that the patient is “not a danger to the health and safety of others.”

Section 1026a requires that before a mentally ill offender can be released unconditionally, he must “have been confined or placed on outpatient treatment for a period of not less than 90 days from the date of the order of confinement.” Only then may the patient or the superintendent of the hospital or other facility in which he is confined petition the court of commitment for a hearing to determine whether the patient’s “sanity has been restored,” a condition that is the prerequisite for absolute release.

Section 1026.1 does not define what is meant by “outpatient treatment.” As a result, even though the California statute places psychiatrists on notice of their obligations to a greater extent than many other state statutes that deal with the release of mentally ill offenders, serious problems remain. As an illustration, suppose that a treating psychiatrist in California makes a reasonably prudent decision to place a mentally ill offender in a “half-way” house, where the patient remains under the supervision of trained personnel but is somewhat free to come and go as he pleases. Whether this is a form of “outpatient treatment” that requires judicial approval or whether the patient is still under confinement remains unanswered.

This problem is exacerbated in a state with less detailed statutes than California. Suppose that a psychiatrist in such a state sends a patient, accompanied by supervisory personnel, on a day trip to the zoo. Although this trip is off the hospital’s premises, it is constructively within the psychiatrist’s control. Must the psychiatrist ask the approval of the court of commitment for this “release”? If the patient assaults a passerby strolling through the zoo, despite the exercise of care by the supervisory personnel, is the psychiatrist liable under a theory of negligence per se for releasing the patient without the court’s approval?
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habilitation, and the uncertain pattern of recovery by victims—are by no means insubstantial. These problems are caused by the inability of the negligence per se model to reconcile the three interests mentioned above under either broadly or narrowly drawn court orders and statutes. The negligence per se theory employed in Semler may be viewed as a mechanism of imposing liability without fault upon the psychiatrists. After explaining this concept, this Comment will explore the relative merits of directly applying a strict liability theory in this context as a viable alternative to the Semler approach.

III. EXPANSION OF STRICT LIABILITY THEORY TO THE RELEASE OF MENTALLY ILL OFFENDERS

A. Imposition of Liability Without Fault by the Application of the Negligence Per Se Theory

Although the justifications for applying the theory of negligence per se do not reveal how this theory is often tantamount to the application of strict liability principles, some authorities have recognized that in certain cases the theory of strict liability underlies the concept of negligence per se. The court will ordinarily weigh the reasonableness of a physician's action in light of the classic negligence formula set down by Judge Learned Hand in United States

76 Certain courts, however, have indicated that a higher standard of care might be applicable to those who treat and release the mentally ill. In Eanes v. United States, 407 F.2d 823 (4th Cir. 1969) (per curiam), the Fourth Circuit cautioned:

[It] is incumbent upon the attendant experts who are in charge of the mentally ill to exercise that degree of care, in diagnosing the illness of a patient and in calculating the possibilities that his assaultive tendencies may assert themselves, which is commensurate with the risks involved in opening the doors of the hospital to him for leaves of absence during which he will be free of professional care, supervision or restraint.

Id. 824 (emphasis supplied). The language in Eanes might have been influenced by the grave nature of the injury that occurred in the case; nevertheless, the court's language suggests that psychiatrists who release mental patients are subject to a higher standard than that of reasonable care. Cf. Weihs v. State, 267 App. Div. 233, 236, 45 N.Y.S.2d 542, 544-45 (1943) (the degree of care exercised by those in charge of mental patients should be in proportion to the illness of such patients).

77 See text accompanying notes 56-59 supra.

v. Carroll Towing Co.: 79 whether the burden of precautions exceeds the gravity of injury discounted by the probability of harm. 80 Although in many cases the statute in question concerns conduct that would be considered negligent even under the common law standard of reasonableness, 81 a statutory pronouncement that prescribes the precautions a physician must take nevertheless defines the standard of care conclusively because the legislature has declared its judgment concerning the means necessary to minimize the risks involved in medical treatment. 82 The legislative judgment may entail precautionary measures that exceed those called for by the common law; in fact, the theory of negligence per se would not be of much use to a plaintiff unless it created a standard of care that goes beyond the standard prescribed by the common law. 83 A plaintiff need only show that a defendant violated a statute giving him a cause of action in order to make out a prima facie case of negligence under a theory of negligence per se. A plaintiff is thereby relieved of the burden of demonstrating a defendant's failure to meet the elements of reasonableness under the common law standard. As a result, a plaintiff has a greater probability of victory under a theory of negligence per se than under the common law reasonableness standard. 84

The absolute nature of a statutory duty engenders an inchoate liability without regard to fault. Under the common law, an individual retains a measure of discretion in the kinds of precautions he may take as long as he fulfills the requirement of reasonableness. The theory of negligence per se, however, takes this exercise of judgment out of the individual's hands by mandating that the failure to comply with a particular precaution set forth in a statute is negligent, irrespective of whether the individual took other measures that would satisfy the common law reasonableness standard. 85 When a defendant's breach of a statute or a court order

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79 159 F.2d 169 (2d Cir. 1947).
80 Id. 173.
81 Rudes v. Gottschalk, 159 Tex. 552, 555, 324 S.W.2d 201, 204 (1959). This would be the case, for example, with a statute that proscribes driving at night without the use of headlights. However, the Rudes court, noting that certain violations of criminal statutes are sometimes not considered negligent under the "ordinarily prudent man test," implied that negligence per se may approach strict liability. Id.
82 See Williams, supra note 78, at 236.
83 Id. 254.
84 See text accompanying notes 89-91 infra.
leaves him "in no position to meet the test of the prudent man," a standard of liability without fault has been imposed. The violation of a statute “creates a liability per se” that approaches liability without fault. That negligence per se “approaches” liability without fault does not imply an absolute equivalence between these two concepts. The concept of strict liability is a broader theory of liability because it allows a plaintiff who is injured to recover for a harm, regardless of a defendant’s exercise of reasonable care in preventing such an injury. In contrast, a plaintiff relying on negligence per se must show that a defendant violated a statute or a court order that is designed to protect him. Although the negligence per se theory of liability similarly ignores the question whether the defendant proceeded in a reasonable manner, it operates to impose liability without fault when the statutory duty of care exceeds the quantum of reasonableness required by the common law, or when the statute’s specificity leaves little room for individual discretion. As a result, negligence per se approaches strict liability in the narrow sense that the application of either analysis to a given case could

87 See Amberg v. Kinley, 214 N.Y. 531, 535, 108 N.E. 830, 831 (1915). The tendency of the negligence per se theory to approach strict liability is mitigated in some jurisdictions by the rule that the violation of a statute is only evidence of negligence that may be rebutted. For a discussion of this version of negligence per se, see Lowndes, supra note 57, at 366 n.10. Other jurisdictions give a defendant the opportunity to present an excuse after a prima facie case of tort liability for the violation of a statute has been made by the plaintiff. These excuses include a showing that the statutory breach was due to either a cause outside defendant’s control or an emergency or that the violation was merely a “technical” one. The possibility of excuse is deemed to distinguish negligence per se from strict liability.
88 United States v. Burlington N., Inc., 500 F.2d 637, 640-41 (9th Cir. 1974). See also New Amsterdam Cas. Co. v. Novick Transfer Co., 274 F.2d 916 (4th Cir. 1960). Some courts follow the rule that if the evidence raises the issue of an excuse, then the common law standard of reasonableness will be considered along with the question of a statutory violation. E.g., Phoenix Ref. Co. v. Powell, 251 S.W.2d 692, 698 (Tex. Civ. App. 1952). But see Morris, supra note 78, at 147 (urging that jurisdictions in which a violation of a statute constitutes only “evidence of negligence” should instead adopt the rule that "breach of the criminal proscription is negligence as a matter of law").
As a mitigation of the strict liability tendencies of negligence per se, the possibility of excuse would not be a far-reaching defense because the arguments of “impossibility” and “technicality” are limited. The possibility of avoiding the rigors of negligence per se by pleading “some evidence” of excuse has been criticized for the illogical disparity of the standards that are applied to one who can find no excuse (negligence as a matter of law) and to another who can plead a plausible excuse (common law reasonableness standard), even though this excuse may not be ultimately provable. See Southern Pac. Co. v. Castro, 493 S.W.2d 491, 498-503 (Tex. 1973) (Walker, J., concurring).
88 See note 87 supra.
89 See text accompanying notes 83-84 supra.
result in the same finding of liability. Furthermore, if the negligence per se test gives a plaintiff a greater chance of success, then a strict liability approach will provide an even surer and more uniform result. A plaintiff need only show that his injury was caused by an enterprise or individual subject to strict liability.

Under a negligence per se analysis, the extent of a psychiatrist's liability in a case like *Semler* will depend upon the breadth of the class said to be protected by a court order or statute. The *Semler* court combined an expansive interpretation of the class protected by Judge Plummer's order with an inflexible standard of conduct under the order to create a liability that could extend to harms resulting from any infraction of the court order's literal terms. The realization that such an expansive definition of the protected class places a heavy burden of strict liability on a defendant may have produced those negligence per se cases where the rigors of strict liability were avoided either by the curious assertion that a statute is passed for the benefit of the public at large but not for any one individual or by the theory that the class protected by the statute excludes the particular plaintiff. If the *Semler* gloss is put on the state statutes requiring judicial approval for release plans, then the scope of psychiatrists' liability will be substantially widened to the extent that psychiatrists will essentially be insurers of the public.

The direct application of strict liability principles is necessary to avoid the problems caused by weaknesses in the *Semler* model.

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90 See text accompanying note 84 *supra*.

91 See *United States v. Burlington N., Inc.*, 500 F.2d 637, 640-41 (9th Cir. 1974) (under the theory of strict liability, a plaintiff may recover with a showing of injury but not of negligence, whereas under negligence per se the showing of a statutory violation is sufficient to constitute a prima facie case of negligence that the defendant may rebut with proof of an excuse).


93 *Pernetti v. State*, 44 Misc. 2d 582, 254 N.Y.S.2d 332 (Ct. Cl. 1964). In *Pernetti*, a plaintiff sued for injuries inflicted by a released mental patient and relied on a breach of N.Y. MENTAL HYGIENE LAW § 87(3) (McKinney 1951) (repealed 1973). This statute dictated that before a mental patient could be discharged from a state mental hospital, the director of the institution was required to ascertain that the release was not detrimental to the public welfare nor injurious to the patient; additionally, the official was required to satisfy himself that friends or relatives of the patient were able to care adequately for him. The *Pernetti* court commented:

The claimant then must further show that he is within the class sought to be protected and, further, that the harm to which he has been subjected is within the definition contemplated by the Legislature. The class of persons sought to be protected by sections 87 and 85 is limited to the patients involved, not the public at large.

44 Misc. 2d at 585, 254 N.Y.S.2d at 335.

94 See text accompanying notes 69-76 *supra*. 

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For example, the problem of the irregular pattern of recovery by victims will be ameliorated by providing a means of recovery when negligence per se is unavailable as a theory of liability. This would be the case when a particular release program was not within the ambit of a statute or court order or when a plaintiff was not within the class protected by such a statute or court order. The need for statutes and court orders that require judicial approval for release programs could be eliminated because under the theory of strict liability, plaintiffs need not demonstrate a violation of a statute or a court order in order to establish a prima facie case for a psychiatrist's liability. Judicial resources will be conserved and consistency will be achieved. Despite the desirable results obtained by the application of strict liability principles, the burden of justifying the imposition of liability without fault upon psychiatrists in these situations is considerable.

The practice of releasing mentally ill offenders as a therapeutic measure has considerable social utility because it aids in rehabilitating society's less fortunate members. In light of the Semler example, however, this practice will undoubtedly result in some losses. Assuming such tragedies are inevitable, the remaining issues are whether adequate reasons can be advanced to justify a finding of strict liability as a general policy in cases where a released mentally ill offender injures a member of the public, and, if so, the form in which the policy should be applied.

B. Policy Aspects of the Expansion of Strict Liability to the Release of Mentally Ill Offenders

Professor Fleming James has characterized the "typical modern accident" as one where the victims tend to fall into lower economic

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95 The interest in providing injured plaintiffs with a consistent pattern of recovery in products liability cases lead the California Supreme Court to hold that "the very purpose of our pioneering efforts in this field [of imposing strict liability for product defects] was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and thereby 'to insure that the costs of injuries resulting from defective products are born by the manufacturers . . . .'" Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

96 The loss in the Semler tragedy, as measured by the damages awarded to the plaintiff in the district court, was the $25,000 stipulated to by the parties. The Fourth Circuit found that the probation officer, Paul Folliard, was properly joined as a third party; consequently, Dr. Wadeson and Folliard each contributed equally to satisfying the judgment. 538 F.2d at 123 & n.1.
brackets and those enterprises held liable under strict liability principles are equipped with the means of spreading the losses among the beneficiaries of the enterprise. Professor James attributes society's willingness to impose liability without fault on a moral climate that countenances the application of liability when a defendant realizes a gain for himself through another's loss, even though the defendant is innocent of negligence. A person engaging in such an activity generally assumes the risk involved because he gains some personal benefit or stands to make an economic profit which outweighs the potential liability; thus, the individual who "commandeers another's interest in aid of his own necessities should pay for any damage done thereto." James hastens to point out, however, that when a defendant's conduct is designed to advance the interests of third parties rather than his own, this basis for liability ceases to exist.

Needless to say, a psychotherapist's interests are not greatly advanced by a program of releasing mentally ill offenders. Although the treatment of mentally ill offenders is of itself an activity producing a certain monetary gain, release programs entail no greater profit or discernible benefit for the psychiatrist. In fact, the release of a patient may have precisely the opposite effect by reducing the patient's dependence on his therapist. A psychotherapist arguably benefits financially from release programs to the extent that patients who find such therapies attractive will seek out a therapist who engages in release programs. Although this may be true of voluntary or civil committees, the commitment of mentally ill offenders does not include a solicitation by the judge of the patient's preferences for therapy. Psychiatrists, therefore, could not be said to derive so significant a monetary gain from the operation of release

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98 Id.
100 James, supra note 97, at 296.
101 Dr. Wadeson and the Psychiatric Institute were, for example, paid about $3,000 per month for treating Gilreath. Brief for Appellee at 5. The plaintiff in Semler intimates that Dr. Wadeson took the initiative in encouraging the Fairfax County Circuit Court to send Gilreath to the Psychiatric Institute, but there was no evidence that this suggestion was motivated by expectations of substantial financial return. See id.
programs as to justify imposing strict liability upon them for that reason alone.

The interests advanced by release programs are those of the patients themselves, and—more broadly—those of society in recovering balanced and productive individuals. A psychiatrist who non-negligently authorizes the release of a mental patient cannot be said to advance his own interests. In such cases, where the benefits of a dangerous activity are said to be purely societal, "there is no reason why one who acts as a champion of the public should be required to pay for the privilege of so doing." Consequently, in dealing with the problem of the release of mentally ill offenders, any application of a standard of strict liability must justify shifting the loss to a defendant-psychiatrist.

One such justification is a psychiatrist's superior risk-bearing capacity based on the fact that psychiatrists generally carry liability insurance. Although potential victims such as Natalia Semler might purchase insurance against random assault by mental patients, such a loss is so sporadic and unlikely that they cannot reasonably be expected to obtain insurance. Because the incidence of violence among released mentally ill offenders is predictable in an aggregate sense, a treating therapist is in a better position than potential victims to estimate his potential liability. He can best determine the appropriate amount of insurance needed to cover the risk he bears. Although a psychiatrist cannot predict precisely which of his patients will harm a member of the public upon release, he can at least anticipate that a few are likely to do so. The crux of this analysis is that a psychiatrist, as a professional enterprise, can estimate his liability, purchase insurance, and thereby spread the risk of loss among others in the insurance pool.

102 Bohlen, supra note 99, at 317-18. Bohlen's analysis extends only as far as the invasion of personality interests; injury to personal and real property are not relieved by the privilege of acting in the interest of society in general. Id. 321.

103 See Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453, 463-64 (1933).


106 See Note, supra note 53.

107 Cf. Morris, supra note 104, at 1177-78 (for purpose of insuring against harm caused by contractor's explosions, warehouse owner is better able to estimate insurance needs).
Although distributional considerations play a major role in determining that a Semler-type loss should be shifted to the non-negligent psychiatrist, the imposition of the loss on Dr. Wadeson can also be justified under formulations of the strict liability theory that do not primarily consider distributional factors. Professor George Fletcher has argued that "the paradigm of reciprocity accounts for the typical cases of strict liability. . . ." 108 In explicating this "paradigm of reciprocity" as a theory of liability, Fletcher states that:

[A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks. Cases of liability are those in which the defendant generates a disproportionate, excessive risk of harm, relative to the victim's risk-creating activity.109

According to this theory, which is better characterized as a "fairness" rationale for strict liability110 rather than a "mechanism of insurance,"111 "[t]he social costs and utility of the risk are irrelevant, as is the impact of the judgment on socially desirable forms of behavior."112 An individual has basic interests in his life, health, liberty, property, reputation, and privacy and "cannot fairly be expected to suffer . . . deprivation in the name of a utilitarian calculus."113 This theory requires that unless the excuses of compulsion or unavoidable ignorance114 are proven, a person who injures another, or permits a third party to injure another, must


109 Id. 542.

110 The different "manifestations of the paradigm of reciprocity . . . express the same principle of fairness: all individuals in society have the right to roughly the same degree of security from risk." Id. 550.

111 "Because of the market relationship between the manufacturer and the consumer, loss-shifting in products-liability cases becomes a mechanism of insurance, changing the question of fairness posed by imposing liability." Id. 544 n.24.

112 Id. 540-41.

113 Id. 568.

114 Id. 554.
absorb the loss inflicted on the other, even if the activity involved is socially useful, when the risks created are nonreciprocal.\textsuperscript{115}

The fairness rationale favors the imposition of strict liability upon a psychiatrist for a death caused by his patient rather than upon a victim who would otherwise bear the loss. Natalia Semler's case, for example, falls squarely within the Fletcher analysis: Dr. Wadeson exposed her to a nonreciprocal risk because the risk that Gilreath would attack her far exceeded any risk that she created in her daily activities. This formulation can be articulated by stating that, given an individual's inability to anticipate and prevent injuries inflicted by released mentally ill offenders, that individual should not have to bear the ultimate costs resulting from the risk involved. Therefore, although the release of mentally ill offenders has an overall societal benefit, the paradigm of reciprocity requires that strict liability principles apply to such programs.

Those concerned with efficiency considerations, such as Professor Guido Calabresi, advocate the imposition of liability on the party who is in the better position to judge "whether avoidance costs would exceed foreseeable accident costs and to act on that judgment."\textsuperscript{116} This test for strict liability depends upon the ability of the respective parties to perceive that they are in categories of great risk so that they may avoid the risk. Unlike the negligence analysis this test does not depend upon the judgment that a party should have avoided the accident costs because his avoidance costs were less than the foreseeable accident costs.\textsuperscript{117} Strict liability for Professor Calabresi thus centers around the problem of knowledge. The Calabresi approach also favors applying strict liability to the release of mentally ill offenders. For example, Natalia Semler was

\textsuperscript{115} See id. 568-69. This test differs from the test of negligence in that the risk created by the defendant, while greater than that created by the victim, may still yield sufficient utility to be called non-negligent under the conventional analysis.

\textsuperscript{116} Calabresi & Hirschoff, \textit{Toward a Test for Strict Liability in Torts}, 81 \textit{Yale L.J.} 1055, 1060 (1972) (footnote omitted). Calabresi and Hirschoff sum up their test for strict liability in the following passage:

\begin{quote}
Just as the employer may be in the better position to evaluate the costs and benefits of a piece of equipment given the likelihood of occasional employee negligence (defendant's strict liability), so a spectator at a baseball game may be best suited to evaluate the desirability of sitting in an unscreened bleacher given the likelihood of occasional negligent wild throws by the players during the game which may result in the spectator's being hit on the head (plaintiff's strict liability, or assumption of risk).
\end{quote}

\textit{Id.} 1065 (footnote omitted); \textit{cf.} Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 493, 150 P.2d 493, 441 (1944) (Traynor, J., concurring) (an injured party is not in a position to identify product defects).

\textsuperscript{117} Calabresi & Hirschoff, \textit{supra} note 116, at 1060.
in an inferior position vis-a-vis Dr. Wadeson with respect to her ability to perceive and avoid danger because she had neither notice of Gilreath’s release nor warning that he should be avoided under certain circumstances. In other words, Natalia Semler could not have known of the danger that she was exposed to on October 29, 1973.

The imposition of strict liability on psychiatrists insures that an injured plaintiff will be able to recover for the harm inflicted by a released patient. If psychiatrists must personally absorb the full increase in liability however, they will be less willing to continue to release mentally ill offenders because they realize that some harm, and thus some personal liability on their part, is inevitable.

Psychiatrists would be tempted “to revert to the outmoded and disadvantageous system of confining the mental defective, of keeping him under constant surveillance, while he is being trained to make those social adjustments essential to independent and successful living.” 118 Consequently, the imposition of strict liability could have the negative impact of denying to mentally ill offenders a treatment that could facilitate their recovery, thereby hampering their rehabilitation. Nevertheless, the disincentive that strict liability places on the release of mentally ill offenders can be alleviated by a tax-funded insurance plan that covers psychiatrists’ increased liability under a strict liability theory for damage perpetrated by released mentally ill offenders.

C. Mechanism for Implementing Strict Liability Principles in the Release of Mentally Ill Offenders

If release programs function as they have in the past and strict liability principles are applied instead of the negligence per se theory, psychiatrists will be exposed to a greater degree of liability. Consequently, the insurance premiums of psychiatrists will increase in order to cover this greater incidence of liability. The imposition of strict liability without implementing some form of tax-funded insurance for the additional liability might deter the socially desirable activity of releasing mentally ill offenders as a therapeutic measure.119 The deterrent effect would not be offset by other factors because a psychiatrist has no peculiar interest, in other than


119 See text accompanying notes 117-118 supra.
a professional or moral sense, in release programs that cause the loss. If the mentally ill offenders are viewed as the only beneficiaries of release programs the cost of such programs should be spread among them by including a pro rata portion of the extra premium charge in the psychiatric fees assessed to these patients. The application of strict liability, however, is also beneficial to society as well as to the participating patients.

The consistency of recovery for injured victims that is fostered by strict liability instead of the haphazard recovery for some under a negligence per se approach is a societal benefit. Furthermore, the conservation of judicial resources and the easing of other institutional strains also benefits society in general. These considerations dictate that the increases in insurance premiums resulting from the imposition of liability without fault on psychiatrists should be financed by the community through its taxing power. Fairness dictates that the public treasury bear the financial burden of a change that benefits the general public:

As a matter of abstract fairness it would seem, if the business is one which is essential to the good of the State as a community and yet is of a sort that would not attract private enterprise, if it were forced to bear, as part of its operating expense, the cost . . . of making good the harm which it causes to others, that the State itself should relieve the business of this burden, either by paying for the loss itself or by reimbursing the business which itself is to make the payment. In either event the payment would finally be made out of the public funds raised by taxation.

The overall societal benefit derived from release programs justifies the proposition that any additional liability incurred by psychiatrists as a result of the imposition of strict liability should be absorbed by society through a system of tax-funded insurance. On the other hand, the overall societal benefit may be viewed as too attenuated to justify an assessment of the total costs of release


121 Bohlen, supra note 120, at 444-45 n.136. One observer notes that strict liability is often imposed on public utilities because the rate structure, the vehicle for spreading losses, approaches the taxing power possessed by a municipality—a power that may be used to share the burden of losses incurred by carrying on a communally beneficial activity. Note, Absolute Liability for Dangerous Things, 61 Harv. L. Rev. 515, 523 (1948).
programs against the public treasury. Participating patients, as primary beneficiaries of the programs, should continue to bear a portion of the cost of the total liability. Under the present system of negligence liability, the cost of release programs is ultimately borne by the patients because they are assessed a pro rata portion of the psychiatrists’ liability insurance premium charge in their fees. The present system would not be changed under a system of strict liability because only the additional premium which psychiatrists must pay will be tax-funded.

Although the application of strict liability constitutes a sound policy in this area, it also limits the role of the courts in monitoring psychiatrists’ release decisions; nevertheless, the need for a reviewing forum endures to insure that mentally ill patients are not released in a perfunctory manner. The formality of review requires the treating psychiatrist to explicate his reasons for believing that a particular patient will benefit from release. It is difficult for a psychotherapist acting alone to ascertain whether to release a patient who may have latent anti-social tendencies. Great caution should therefore be exercised in the release of mentally ill offenders; the necessary degree of caution could be assured by requiring that the treating psychiatrist present his decisions to release to an independent panel of psychiatrists within the hospital where he practices rather than to a court.122

New York law presently provides that before a mentally ill offender can be released, the court to which the petition has been made may appoint up to two psychiatrists to examine the patient and make recommendations to the court.123 As a result, the court not only obtains additional expert advice on which to base a decision, but if the judge denies the petition for release, he is in a position to inform the treating psychiatrist in some detail of the technical issues prompting the denial. The judge’s articulation of a rationale is more helpful to the treating psychiatrist than is a refusal, to release which is founded on an amorphous and uninformed uncertainty as to the wisdom of releasing the patient in question. Likewise, direct review of a release decision by an independent panel of psychiatrists would enable the panel to advise the

122 Cf. Ohio Rev. Code Ann. § 2945.39 (Anderson 1975) (requiring that a mentally ill offender must be released by the majority decision of a panel composed of the common pleas judge sitting in the district where the patient is confined, the superintendent of the hospital, and an alienist, a person who specializes in the study of mental disease).

treating psychiatrist in order to confer the benefit of their combined expertise. The panel may be able to inform the treating psychiatrist of new diagnostic techniques or of technical information that will help him to sharpen his skills. The collegial atmosphere in which such exchanges are likely to take place is more conducive to instruction than is the atmosphere of a courtroom and will approximate the team-approach to treatment that is prevalent in most mental hospitals.

Such a panel of psychiatrists would be just as cautious as a judge in determining which patients should be released. Ethics and professional pride would check any over-enthusiasm for the release of mentally ill offenders. The prospect of defending an embarrassing lawsuit will undoubtedly exercise a moderating influence on the panel because the psychiatrists on the panel might be impleaded in a tort suit that ensues when a released patient harms a member of the public. Even if the liability that results is covered by a scheme of tax-funded insurance, such panels serve both to check the treating psychiatrist's diagnosis and to limit the need for judicial intervention in these issues.

One remaining problem under the strict liability approach is that of the duration of a psychiatrist's liability for injuries inflicted by his patients after release. It is unclear whether mentally ill offenders who commit acts of violence after release do so relatively soon after release or somewhat later. In any case, limitations on psychiatrists' exposure to liability are imposed, in a practical sense, through the inquiries of proximate cause: whether the harm is of the type that was reasonably foreseeable; whether intervening causes immunized the defendant from liability; whether the injury was sufficiently removed temporally from the risk-creating activity so as to terminate liability. These aspects of the inquiry into liability will remain unchanged.

D. Application of Strict Liability to State-Employed Psychiatrists

A final consideration is the extent to which the personal liability of a psychiatrist may be rendered nugatory by sovereign immunity. In cases where the psychiatrist is a state employee, the state's liability may be limited by its sovereign immunity.124 Of

course, it is possible for the state to waive sovereign immunity and thus become a financially attractive defendant because of its ability to assess directly the losses to the community through taxation. In that event, the tax-funded insurance scheme suggested above may therefore be unnecessary for publicly-employed psychiatrists. Nevertheless, this observation fails to resolve the issue of the public official's residual liability when a state has not consented to be sued. For example, California has provided for the situation presented by the *Semler* case by legislating an immunity that might cover the treating psychiatrist:

Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment . . . [w]hether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction.^{125}

Several other states have enacted similar immunities for public officials who release mental patients.^{126}

The broad rule concerning public officials' tort liability is that public officials "are not generally liable for the injurious consequences of discretionary action or non-action."^{127} The converse of a discretionary duty is one that is ministerial; a public official may be held liable if a ministerial duty is negligently performed.^{128} If the release of a mentally ill offender is considered a discretionary act, then immunity is conferred upon a publicly-employed psychiatrist. Professor James has aptly remarked that "discretion" is a very broad term; even the manner in which a nail is driven or the

^{125} CAL. Gov't Code § 856(a)(3) (West Supp. 1977) (amending CAL. Gov't Code § 856(a)(3) (West 1966)). See also Kravitz v. State, 8 Cal. App. 3d 301, 87 Cal. Rptr. 352 (1970). A California psychiatrist is under a statutory obligation to get court approval before releasing a patient. See note 75 supra. Thus, publicly-employed California psychiatrists who proceed as Dr. Wadeson did in *Semler* may fall outside the protection of § 856(a)(3) because they could not be said to have acted in accordance with any applicable enactment.


speed at which a post-office truck is driven involves discretion. The Supreme Court, in *Dalehite v. United States*, did little to narrow the scope of "discretionary" duties when it stated: "Where there is room for policy judgement and decision there is discretion." Nevertheless, the tendency has been to define "discretionary" broadly in favor of immunity.

In *Semler*, the probation officer argued that his basic duties were discretionary in nature rather than ministerial. The *Semler* court noted that the Virginia definition of a ministerial act is "one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." Folliard argued that because no specific duties were demanded of him by Judge Plummer, the probation officer could not be said to have acted in a ministerial capacity when he failed to obtain the judge's approval for Gilreath's release. The Fourth Circuit replied, however, that although Folliard was vested with the discretionary duty of issuing passes to Gilreath,


131 Id. 36. The *Dalehite* Court added that "the alleged 'negligence' does not subject the Government to liability" because "[t]he decisions held culpable were all responsibly made at a planning rather than operational level...." Id. 42. This lead to the claim in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), that negligence at an operational level was not immune from liability; the Supreme Court agreed. The implications of this holding are unclear because specifying what is meant by "operational" is about as problematic as defining "discretionary." See James, *supra* note 129. Not surprisingly, Paul Folliard requested in his petition for a writ of certiorari that the Supreme Court clarify the scope of "ministerial" and "discretionary" duties in the *Semler* situation. Petition for Writ of Certiorari at 15-20.

132 James, *supra* note 127, at 645. The policy justification for this tendency was articulated by Mr. Justice Harlan in *Barr v. Matteo*, 360 U.S. 564 (1959):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.


133 538 F.2d at 127 (quoting Dovel v. Bertram, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945)).

134 Reply Brief for Appellant Folliard at 3.
requirement that he request approval for changes in Gilreath's status was judicially mandated and therefore ministerial.\textsuperscript{136}

If Dr. Wadeson had been employed by the State of Virginia, his situation would have been similar to that of Folliard. Although some courts have held that the diagnosis and treatment of a patient\textsuperscript{136} and the selection of factual material to present to a court\textsuperscript{137} come within the scope of the discretionary function, the Fourth Circuit probably would have ruled that the judicial mandate requiring court approval for a change in Gilreath's status similarly made a state-employed psychiatrist's duty a ministerial function. The Semler analysis would probably expose a state-employed psychiatrist to substantial tort liability. A better solution in the case of publicly-employed psychiatrists is to reject an analysis based upon the discretionary duty/ministerial duty distinction and instead enact waivers of sovereign immunity altogether as to liability for injuries caused by mentally ill offenders released from state facilities. The taxing power here could be used expressly both to protect publicly-employed psychiatrists from the disincentive to release patients and to compensate victims for their losses. In that way, public reimbursement for a plaintiff's injuries in this situation would parallel the tax-funded insurance plan suggested for private practitioners.

The tax-funded insurance plan for private practitioners and the expanded waiver of sovereign immunity for publicly-employed psychiatrists represent compromise solutions for the imposition of strict liability on release programs. Nevertheless, despite the many benefits of these proposals, legislators may still be apprehensive that the waiver of sovereign immunity for release programs and the concomitant use of the taxing power to spread losses incurred by release programs may be too costly to implement. In making a cost-benefit analysis, however, legislators should recognize that the losses that may be inflicted by a certain percentage of released patients should be offset against the savings that result from the reduction in the mental hospital population.\textsuperscript{138} Although this consideration may fail to persuade state legislatures to widen the waiver of sovereign immunity to include tort liability for the re-

\textsuperscript{135} 538 F.2d at 127.


\textsuperscript{138} See Wolpert & Wolpert, The Relocation of Released Mental Hospital Patients Into Residential Communities, 7 Por'y Sci. 31 (1976).
lease of mentally ill offenders or to implement a subsidy for the increased insurance premiums of private practitioners, it should at least be taken into account.

IV. CONCLUSION

Release programs involving mentally ill offenders raise difficult issues concerning the discretion that psychiatrists may exercise in the treatment of the mentally ill, and the degree of care that the courts may legitimately demand from these professionals. The social benefit of release programs seems questionable in light of such tragedies as the *Semler* incident, although society is now committed to exploring new techniques of rehabilitating the mentally ill and cannot return to the solution of permanent confinement.

When the experiment goes awry, someone must pay the price. Because the justification for the imposition of tort liability depends upon the degree to which sound policy is advanced,139 the effect of imposing such liability must be considered with respect to the competing values of assuring the safety of the community and of rehabilitating the mentally ill. The strict liability approach, unlike the negligence per se approach of the *Semler* court, does not entangle the courts in professional decisions by psychiatrists concerning the treatment of their patients; yet the imposition of strict liability guarantees that victims will be compensated for injuries inflicted by released patients. The existence of independent panels of psychiatrists to review a treating psychiatrist's decision to release would insure that some check on the treating psychiatrist will be exercised. Treating psychiatrists, through the mechanisms of insurance and fee structures, are often able to spread losses that will occur despite the exercise of due care on their part; however, the burdens of increased premiums may deter the release of mentally ill offenders. Thus, the case for strict liability is greatly weakened unless government subsidy of these programs, in the form of tax-funded supplementary insurance premiums, is made available to psychiatrists who are subject to a scheme of strict liability.

In addition to the review panels of psychiatrists, another suggestion for mitigating the risks inherent in release programs is the improvement of community facilities for follow-up treatment of outpatients. Discharges conditioned on mandatory attendance at

139 Morris, *supra* note 61, at 22.
outpatient clinics will probably enable psychiatrists to intervene before a relapse into violent behavior occurs; efforts should be made to identify those patients who are in greatest need of follow-up services.\textsuperscript{140}

Because the purpose of release programs is to enable the mentally ill offender to deal with the problems of freedom and self-restraint himself, the imposition of strict liability on those who make the crucial decision whether to release must accommodate the interests of both the patient and the public.\textsuperscript{141} The attachment of strict liability to programs where mentally ill offenders are released into the community represents an effort to balance the interests of the mentally ill, the public, and the courts.
