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Civil Liability of Parole Officials for Releasing Dangerous Prisoners: Martinez v. California

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NOTES AND COMMENTS

CIVIL LIABILITY OF PAROLE OFFICIALS FOR RELEASING DANGEROUS PRISONERS: *MARTINEZ v. CALIFORNIA*

I. INTRODUCTION

The recent decision of the United States Supreme Court in *Martinez v. California*[1] examined the practice of granting state parole officials unqualified immunity from civil suit.[2] After *Martinez*, states may continue to immunize their parole officials from causes of action based on state law that are generated by decisions to parole prisoners who later kill or injure other persons. Nevertheless, the Court qualified its ruling by intimating that actions brought under section 1983 of the Civil Rights Act[3] may preclude state official immunity, even though such immunity would otherwise be effective against state law actions.[4] This recharacterization of section 1983 may pave the way for victims of

1. 444 U.S. 277 (1980).

2. *See* generally Johnson v. Wells, 566 F.2d 1016, 1018 (5th Cir. 1978) (parole officials immune from suit under the Civil Rights Act); Franklin v. Shields, 569 F.2d 784, 798 (4th Cir. 1977) (parole board members who perform a quasi-judicial function immune from suit for damages under Civil Rights Act), *cert. denied*, 435 U.S. 1003 (1978); Thompson v. Burke, 556 F.2d 231, 236-40 (3d Cir. 1977) (qualified immunity held to protect parole officials acting in good faith); Pope v. Chew, 521 F.2d 400, 405 (4th Cir. 1975) (parole board members who perform a quasi-judicial function immune from damages under Civil Rights Act); Diaz v. Ward, 437 F. Supp. 678, 688 (S.D.N.Y. 1977) (application of eleventh amendment immunity); Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478, 479 (N.D. Ala. 1976) (parole officials absolutely immune from suit under the Civil Rights Act); Palermo v. Rockefeller, 323 F. Supp. 478, 484 (S.D.N.Y. 1971) (parole boards not immune from suit based on Civil Rights Act); Paige v. Pennsylvania Bd. of Parole, 311 F. Supp. 940, 941 (E.D. Pa. 1970) (parole board members are immune from suits based on Civil Rights Act).

3. 42 U.S.C. § 1983 (Supp. IV 1980).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

4. 444 U.S. at 284 & n.8. The Supreme Court noted in dictum:

crimes committed by parolees to seek federal statutory redress against state parole officials.

This note traces the development of official immunity in the wake of *Martinez* and similar decisions that have criticized the application of that doctrine to state parole officials.[5] Particularly significant is a recent state supreme court ruling that eliminates absolute immunity for parole officials who are grossly negligent or reckless in their decisions to release prisoners.[6] In addition, the effectiveness of tort actions against state parole officials[7] is contrasted against the effectiveness of suing parole officials under section 1983. That section's possible importance in undermining official immunity is assessed in the context of an analysis that plaintiffs might use in formulating viable actions against negligent parole officials. Finally, this note explores the difficult issue of legal duty typically associated with litigation involving the release of mentally disturbed offenders[8] and which is applicable in suits against parole officials.[9]

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . *cannot be immunized by state law*. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . . The immunity claim raises a question of federal law.

Id. (dictum) (citations omitted) (emphasis added).

5. Although this note uses the terms parole board and parole official interchangeably, the exact language of § 1983 provides for civil redress only when the constitutional violation complained of is perpetrated by a *person*. Many courts have thus refused to extend the section to violations allegedly perpetrated by a parole *board*, interpreting the section to be inapplicable to entities. *See, e.g.*, Diaz v. Ward, 437 F. Supp. 678, 688 (S.D.N.Y. 1977); Paige v. Pennsylvania Bd. of Parole, 311 F. Supp. 940, 941 (E.D. Pa. 1970); Gallagher v. Pennsylvania Bd. of Probation & Parole, 287 F. Supp. 610, 610-11 (E.D. Pa. 1968). Nevertheless, the Supreme Court recently reemphasized that the term person is sufficiently broad to include governmental entities and applied the section accordingly. *See* Owen v. City of Independence, 445 U.S. 622, 635 (1980) (citing Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)). Before *Monell*, the distinction between a parole board and parole officials was significant because complaints framed against parole boards were subject to dismissal in jurisdictions subscribing to the less expansive interpretation of the word "person." *See, e.g.*, Paige v. Pennsylvania Bd. of Parole, 311 F. Supp. at 941 (parole board not a person within the meaning of the Civil Rights Act).

6. *See* Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977).

7. While this note makes references to the federal parole system and compares state and federal systems, no attempt is made to address the additional issues and complications raised in actions against federal parole officials.

8. *See generally* RESTATEMENT (SECOND) OF TORTS § 319, Comment a, Illustration 2 (1965).

9. *Id.* § 448, Comment a, Illustration 1, referring to the situation in which an actor is held liable for the criminal act of a third party where that actor created the condition giving rise to the harm and either knew, or should have known, that the third party would cause the harm. *Id.*

II. STATEMENT OF THE CASE

After a California court convicted Richard Thomas of forcible rape in 1969, therapists labeled him a mentally disordered sex offender not amenable to treatment.[10] He was sentenced to prison for a maximum term of twenty years. Five years later, parole officials released Thomas on the condition that he regularly report to a parole out-patient clinic. Thomas subsequently kidnapped, tortured, and brutally murdered fifteen year old Mary Ellen Martinez.

Survivors then sued the State of California and the parole officials who released Thomas for numerous civil rights violations,[11] basing the actions on section 1983 of title 42.[12] They also alleged that the parole decision was reckless, and requested damages for the alleged wrongful death of the decedent.[13]

The parole officials argued that they were specifically protected from liability for their parole decision by a California immunity statute.[14] They filed a demurrer which was sustained at trial, without leave to amend, on the basis of the immunity statute.[15]

The United States Supreme Court noted probable jurisdiction after the California Supreme Court denied the plaintiffs' petition for a hearing.[16] Justice Stevens, speaking for the majority, rejected the argument that the immunity statute deprived the decedent of her right to life protected by the due process clause.[17] According to Justice Stevens, the statute had only an incremental impact on the probability of her death and neither authorized nor immunized deliberate killing. He noted that all parole systems involve a basic risk of recidivism and that immunity merely increases that risk.[18] Without proof of direct causa-

10. 444 U.S. at 279.

11. *Id.* at 281-82.

12. *Id.* See note 3 *supra* and accompanying text.

13. 85 Cal. App. 3d 433, 434, 149 Cal. Rptr. 519, 522 (1978).

14. CAL. GOV'T CODE § 845.8(a) (West 1980). This section provides: "Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release." *Id. See also id.* § 820.2.

15. 444 U.S. at 280.

16. 441 U.S. 960 (1979).

17. 444 U.S. at 281.

18. The Court acknowledged the existence of a causal relationship between the California immunity statute and the risk of recidivism, but rejected the plaintiffs' argument that the immunity statute had contributed directly to the decedent's death. The Court stated:

> The statute neither authorized nor immunized the deliberate killing of any human being. It is not the equivalent of a death penalty statute which expressly authorizes state agents to take a person's life after prescribed procedures have been observed. This statute merely provides a defense to potential state tort liability. At most, the availability of

tion, the Court found no state action depriving the decedent of a right secured by the Constitution and laws of the United States.[19]

The Court also rejected the argument that the immunity statute unconstitutionally deprived the plaintiffs of a property right to a wrongful death claim allegedly protected by the due process clause. Even if it were assumed that the wrongful death claim were property within the meaning of the fourteenth amendment, Justice Stevens noted that deprivations are not necessarily unconstitutional.[20] Here, California's interest in encouraging uninhibited decisionmaking by parole officials was thought to be rationally related to an immunity policy that reasonable lawmakers might favor.[21] Consequently, the immunity statute was held to be a complete defense against state law actions, absolutely shielding parole officials from personal liability for their release decisions.[22]

In considering the claim that section 1983 afforded the plaintiffs a cause of action, Justice Stevens emphasized that section 1983 was latent until triggered by the violation of a constitutionally protected personal right.[23] In order to raise a constitutional issue, the violation must stem from state action.[24] In the Court's view, although "the decision to re-

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such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might. But the basic risk that repeat offenses may occur is always present in any parole system.

Id.

19. *Id.* at 283.

20. Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

Id. at 281-82 (footnote omitted). Nevertheless, the Court's concern with protecting state autonomy diminished when the question was presented whether California's immunity statute barred recovery under § 1983. *Id.* at 283-88. *See* note 23 *infra* and accompanying text.

21. 444 U.S. at 283.

22. *Id.*

23. Justice Stevens distinguished between state law actions and actions based on the United States Constitution or on federal statutes. While state official immunity was held to be an affirmative defense to state law actions, Justice Stevens suggested that state official immunity may be totally or partially ineffective against federally derived actions. 444 U.S. at 284 & n.8. This position, even though dictum, is markedly opposed to the many cases that have carved exceptions into § 1983. *See, e.g.*, Thompson v. Burke, 556 F.2d 231, 236 (3d Cir. 1977), which rejected the argument that § 1983 defeats official immunity. "It seems almost unnecessary to state that very numerous exceptions [to liability] have been carved out of the apparently absolute terms of § 1983." *Id.* at 236 (citation omitted).

24. 444 U.S. at 284.

lease Thomas . . . was action by the State, the action of Thomas five months later [could not] fairly be characterized as state action."[25] Hence, the constitutional violation required to invoke section 1983 was not established.[26] This prompted the Court to affirm the judgment of the California Court of Appeals that had dismissed the complaint.

Although *Martinez* expressly permits states to immunize their parole officials from liability for reckless or negligent decisionmaking, the decision also suggests that there might be limits to that power. The Court stressed, for example, that official immunity might be barred from use in suits in which the elements of section 1983 are established.[27] Once that section is triggered, official immunity might fold under the weight of the supremacy clause.[28] State parole officials would then be subject to personal liability for negligent release decisions.[29]

III. THE DOCTRINE OF OFFICIAL IMMUNITY BEFORE *MARTINEZ V. CALIFORNIA*

Because *Martinez* declined to question the propriety of state official immunity, the decision typifies the deference historically accorded state law by the federal bench after the demise of substantive due process in 1948.[30] Under *Martinez*, states may legitimately immunize their parole officials from state law actions brought by victims of parolees.[31] Nevertheless, the possibility that section 1983 actions can undermine state official immunity implies that state interests that conflict with federal interests may today enjoy less judicial deference than has tradi-

25. *Id.* at 285.
26. *Id.*
27. *Id.*
28. The Court's conclusion that the supremacy clause precludes immunity of officials from actions based on alleged violations of § 1983 was dictum, since § 1983 was not found to have been violated by the decision to grant parole. Nevertheless, the conclusion represents a clear departure from strong precedent that had imposed numerous exceptions upon § 1983. See cases in note 2 *supra*.
29. 444 U.S. at 284 & n.8. *Martinez* stressed that state immunity statutes are subject to preemption under the supremacy clause, but it is unclear whether total preemption is necessary. Instead, the Court expressly reserved "the question of what immunity, if any, a state parole officer has in a § 1983 action where a constitutional violation is made out by the allegations." *Id.* at 285 n.11. Had such a violation been established, the Court could have elected to afford absolute immunity or, in the alternative, qualified immunity. Finally, it could have elected to deny any immunity. For an excellent discussion of the various alternatives in granting official immunity, see McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 RUT.-CAM. L.J. 65 (1976).
30. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7 (1978).
31. 444 U.S. at 282.

tionally been true. An examination of the development and policies of judicial and quasi-judicial immunity confirms this point, and evidences in the context of parole decisionmaking a shift in the division of powers away from unbridled state autonomy.

A. *Judicial Immunity and the Emergence of Quasi-Judicial Immunity*

Judicial immunity is a product of the belief that liability for faulty judicial decisions would cripple the judiciary.[32] The doctrine absolutely immunizes judges from personal liability for acts committed by them in pursuit of official duties.[33] For the most part, judicial immunity is perceived as a catalyst of vigorous and efficient judicial action, protecting judges from suits which might otherwise undermine informed, responsible, and judicious decisionmaking.[34]

Several cases highlight the successful incorporation of judicial immunity into American jurisprudence. In 1810, the New York Court of Appeals held in *Yates v. Lansing*[35] that judges were immune from actions attacking official decisions.[36] Sixty years later, the United States Supreme Court endorsed *Yates* in *Bradley v. Fisher*,[37] thereby immunizing judges from suit for their official acts, even if committed in the wake of malice or corruption.[38]

As the size and complexity of government increased, many administrators assumed highly discretionary responsibilities which, as was true with judges, required a forceful application of professional judgment.[39] With increasing frequency, this development precipitated the

32. *See* Jennings, *Tort Liability for Administrative Officers*, 21 MINN. L. REV. 263, 271 (1937).

33. Judicial immunity is usually absolute, applicable in all instances without qualification. The only recognized exception is when a judge exceeds the clear scope of his jurisdiction. *See, e.g.*, Gilbert v. Corcoran, 530 F.2d 820, 821 (8th Cir. 1976); Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970). Older cases limited the doctrine by suggesting that it would not protect a judge whose conduct had been corrupt or malicious. *See, e.g.*, Randall v. Brigham, 74 U.S. (6 Wall.) 523, 535-36 (1868). But this exception failed to attract support and has been almost universally abandoned. *See, e.g.*, Duba v. McIntyre, 501 F.2d 590, 591-92 (8th Cir. 1974); Cadena v. Perasso, 498 F.2d 383-84 (9th Cir. 1974); Burgess v. Towne, 13 Wash. App. 954, —, 538 P.2d 559, 562 (1975).

34. In recent years judicial immunity has been increasingly attacked. For a survey of the literature, see Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978); Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity*, 27 CASE W.L. REV. 727 (1977); Note, *Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench*, 30 U. FLA. L. REV. 810 (1978).

35. 5 Johns. 282 (N.Y. 1810).

36. *Id.*

37. 80 U.S. (13 Wall.) 335 (1871).

38. *Id.* at 347; *see* note 33 *supra* and accompanying text.

39. *See* Jennings, *supra* note 32, at 269. In Jennings' view, "modern economic, industrial, technological, and social forces have increased the complexity of the problems with which govern-

extension of immunity to persons who were not judges but who required the protection of immunity in order to make their decisions effectively.[40]

The applicability of immunity to nonjudges soon turned on the scope of the official discretion exercised by the government official.[41] Judges today remain absolutely immune from suit because of the wide scope of their discretion.[42] Conversely, officials whose duties are predominantly ministerial enjoy no immunity from suit.[43] Between these extremes are officials whose administrative responsibilities require moderate discretion in decisionmaking.[44] This is the level at which official immunity emerged and to which it is still applied today.

The doctrine of official immunity was extended to federal parole officials as early as 1937. In *Lang v. Wood*,[45] parole officials were sued for revoking the plaintiff's parole without granting a prior hearing. The court held that parole officials should be immune from suit under the doctrine of official immunity.[46] Later, in *Silver v. Dickson*,[47] the plaintiff brought a section 1983 action against California parole officials on the ground that they had illegally denied his petition for parole. The Ninth Circuit held that state parole officials performed a quasi-judicial function when processing parole applications and that they were immune from suits challenging their official decisions.[48]

After the doctrine of official immunity attracted support at the federal level many states followed suit. In Connecticut, for example, state employees enjoy statutory immunity from actions based on the performance of official duties.[49] Other states have enacted statutes specifically immunizing parole officials from suits based on injuries inflicted by paroled prisoners.[50]

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ments have to deal, and largely as the consequence thereof, modern public law evolution has . . . thrust upon the administrative branch a fusion of the threefold governmental functions." *Id.* (footnote omitted).

40. *Id.*

41. *See, e.g.*, Barr v. Mateo, 360 U.S. 564, 573-74 (1959).

42. *See* note 33 *supra* and accompanying text.

43. *See, e.g.*, Johnson v. State, 69 Cal. 2d 782, —, 447 P.2d 352, 362, 73 Cal. Rptr. 240, 250 (1968).

44. *Id.*

45. 92 F.2d 211 (D.C. Cir.), *cert. denied, 302 U.S. 686 (1937).*

46. *Id.* at 212.

47. 403 F.2d 642 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1969).

48. *Id.* at 643.

49. CONN. GEN. STAT. ANN. § 4-165 (West 1969 & Supp. 1980).

50. *See, e.g.*, CAL. GOV'T CODE § 845.8(a)-(b) (West 1980). The Law Revision Commission comment states that the purpose of this section is to protect public officials from liability so that

Despite the swift extension of official immunity to parole officials, there are valid reasons for criticizing its application to parole decisionmaking. The extension of the doctrine to parole officials is attributable to superficial comparisons between parole officials and judges.[51] Very few courts predicated their findings of immunity on a coherent and articulate analysis of the relationship between the policies of parole and the impact of immunity on the implementation of those policies. Only recently have courts seriously questioned the validity of the proposition that parole officials are the analogue of judges.[52]

B. *Parole Decisionmaking as an Exception to the Doctrine of Absolute Immunity*

1. The Distinction Between Judges and Parole Officials: The *Grimm* Decision

Parole decisionmaking closely resembles judicial decisionmaking,[53] but there are important distinctions which dictate that parole officials not be accorded the same unqualified immunity. It would be preferable if parole officials enjoyed a qualified immunity under which liability would be possible if the official acts recklessly in releasing a potentially dangerous prisoner. Support for this position is found in *Grimm v. Arizona Bd. of Pardons & Paroles*.[54] In that case, Arizona parole officials released a prisoner who later robbed a Tucson tavern, murdered one man, and critically injured another. The decedent's parents, together with the injured man, sued Arizona parole officials for gross negligence and recklessness in releasing the prisoner. The trial judge rendered summary judgment for the parole officials on the ground that quasi-judicial immunity precluded relief. The intermediate court of appeals affirmed.

The Arizona Supreme Court reversed the decision under a theory of qualified immunity. Parole officials, reasoned the court, were subject to personal liability if the release decision was grossly negligent or reckless.[55] Four considerations prompted this conclusion. First, the court

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they will be "unfettered by any fear that their decisions may result in liability." *Id.* Law Revision Commission Comment.

51. *See* Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, —, 564 P.2d 1227, 1231 (1977).

52. *Id.* at —, 564 P.2d at 1231-32.

53. *See* Silver v. Dickson, 403 F.2d 642, 643-44 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1969). *But see* United States *ex. rel.* Harrison v. Pace, 380 F. Supp. 107, 111 (E.D. Pa. 1974).

54. 115 Ariz. 260, 564 P.2d 1227 (1977).

55. *Id.* at —, 564 P.2d at 1232.

stated that parole officials are not judges and intimated that they do not always share a judge's duty to act in the public interest.[56] Second, although parole decisions involve wide official discretion, it was felt that parole proceedings are not judicial proceedings.[57] Absolute immunity, said the court, should only protect those officials who are required to make decisions without reasonable criteria in circumstances under which vigorous decisionmaking is essential.[58] Only judges, not parole officials, were deemed to satisfy this rigorous standard.[59] Third, the court stressed that the extension of unqualified immunity to parole and other administrative officials was marked by a dubious judicial evolution of questionable logic and reasoning. It criticized past tendencies to equate the acts of administrators with the decisions of judges.[60] Finally, the court held that although parole officials normally owe a duty of care only to society and not to particular persons, that broad duty narrows when officials take charge of a dangerous person.[61] This meant that parole officials were under a legal duty of care to particular persons, not just to society as a whole, to act reasonably when deciding whether to release a potentially dangerous individual.[62]

The *Grimm* decision illustrates one method of testing the applicability of immunity to nonjudges. This method subjects to close scrutiny the points of similarity between judges and adjudicative administrators such as parole officials. If those points of similarity are absent, then immunity is denied or, as was the case in *Grimm*, its potency is qualified. An alternative method to the *Grimm* approach would ask whether

56. *Id.* (by implication).

57. The court found that the decision to grant or to deny parole is made in proceedings that do not entail the procedural protections available in judicial proceedings. In parole decisions, the court stressed that certain due process requirements may be inapplicable. It was also emphasized that "the major judicial safeguard of appellate review is often totally lacking." *Id.*

58. *Id.*

59. *Id.*

60. The court criticized the application of official immunity to public officials as a "perversion of earlier reasoning." *Id.* at —, 564 P.2d at 1231. It also criticized the development for having occurred "in the context of logical inconsistencies and often with only cursory reasoning." *Id.* (citation omitted). The most significant aspect of *Grimm* was not its attack on parole officials, but its attack on the American administrative bureaucracy, an attack which permeated the court's opinion. At one point, the court admitted that it had reached its conclusion "because of the increasing power of the bureaucracy—the administrators—in our society. The authority wielded by so-called faceless bureaucrats has often been criticized." *Id.* at —, 564 P.2d at 1233.

61. *Id.* at —, 564 P.2d at 1234.

62. In finding that the defendant had been under a legal duty of care in its parole decisions, the court relied on the *Restatement (Second) of Torts* § 319. Section 319 provides that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." RESTATEMENT (SECOND) OF TORTS § 319 (1965).

the decision to grant parole is in itself sufficiently discretionary to warrant the broad protection of official immunity.

2. Parole Decisionmaking Examined

Experts disagree on the definition of parole, but generally it is defined as "the release of an offender from a penal or correctional institution after he has served a portion of his sentence, under the continued custody of the state and under conditions that permit his reincarceration in the event of misbehavior."[63] The validity of parole is conditioned largely on the accuracy of three assumptions: (1) that offenders can be rehabilitated;[64] (2) that offenders will not be released if they constitute a threat to the safety of others,[65] and; (3) that parole boards have the ability to predict when an offender is no longer dangerous.[66]

In considering whether immunity should be granted to parole officials, it is significant that numerous studies have challenged the accuracy of the above assumptions.[67] Moreover, the proponents of absolute official immunity for parole officials rely specifically on the view that consistently accurate prediction has not been realized.[68] They argue

63. O'Leary, *Parole Administration*, in D. GLASER, HANDBOOK OF CRIMINOLOGY 909 (1974).

64. *See* F. EVRAD, SUCCESSFUL PAROLE 106 (1971).

65. *Id.*

66. *See, e.g.*, L. CARNEY, PROBATION & PAROLE, LEGAL & SOCIAL DIMENSIONS 182 (1977). The precise meaning of prediction is unclear. In the context of parole, prediction has been defined as "an estimate of the probability of violation or nonviolation of parole by an offender on the basis of experience tables . . ." Legins, *Parole Prediction—An Introductory Comment*, in B. KAY & C. VEDDER, PROBATION & PAROLE 125 (1963). Other experts have been hesitant to formulate any definition, arguing that parole prediction is susceptible to varied meaning: "If the term prediction means anything, it cannot refer to a method of analysis. The predictions that may be made are made by inference . . . on a basis of evidence of varying quality and type, and the methods for dealing with these types of data may vary widely." L. WILKINS, EVALUATION OF PENAL MEASURES 61 (1964).

67. For a brief discussion of the view that rehabilitation has failed, see L. CARNEY, *supra* note 66, at 215-17. *See also* Citizens' Inquiry on Parole and Criminal Justice, *Report on New York Parole: A Summary*, 11 CRIM. L. BULL. 273 (1975):

> Parole is generally viewed as an idealistic concept. Its announced purposes seek simultaneously to protect the public and to give the criminal offender a new chance. These noble purposes have not been realized, and the most basic finding of the study reported here is that [parole] renders American treatment of those who break society's rules irrational and arbitrary.

Id. at 274 (footnote omitted). Added to the concern that rehabilitation has failed is the concern that prediction has failed, and that parole prematurely releases dangerous prisoners. *Id.* at 287-88.

68. In Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychotherapist liability for failure to warn foreseeable victim), the principal thrust of the amicus argument, representing the American Psychiatric Association, was that the imposition of a duty of care upon psychotherapists is unreasonable because "therapists cannot accurately predict whether or not a patient will resort to violence." *Id.* at —, 551 P.2d at 344, 131 Cal. Rptr. at 24. The argument relied upon studies indicating that "therapists, in the present state of the art, are

that release decisions are discretionary because they involve many intangibles, and that parole officials should be immunized from suits that challenge their decisions.[69]

Although predictions of dangerousness are sometimes inaccurate, it does not necessarily follow that release decisions are always discretionary or that parole officials are incapable of negligent or reckless parole decisions. The role of discretion in parole decisionmaking can be clarified only by examining the process of determining parole suitability. The results reveal that the question whether parole officials should be granted immunity is hinged on the nature of the parole decision process and on the particular circumstances that surround a release.

Parole is intended to accelerate the release of individuals from prison based upon a measurement of the risk of recidivism and the subsequent justification of that risk.[70] This process entails two steps. First, the parole board must calculate the seriousness of the risk of recidivism. That is, it must determine whether the parolee might commit

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unable reliably to predict violent acts; their forecasts . . . tend consistently to overpredict violence, and indeed are more wrong than right." *Id.* Hence, the argument requested that the court "not render rulings that predicate the liability of therapists upon the validity of such predictions." *Id.* at —, 551 P.2d 345, 131 Cal. Rptr. at 25. The California Supreme Court, in rejecting this argument, stated:

> The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.

Id.

Another frequently used argument against the imposition of liability for negligent parole release decisions is that too many factors are involved in such decisions. The argument thus assumes that reasonable minds might always differ in the decision whether to grant or deny parole. *Cf.* Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478, 479 (N.D. Ala. 1976) (parole release decision is similar to judge's decision to sentence or to grant or deny probation).

69. *See, e.g.*, Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478 (N.D. Ala. 1976). In *Pate*, the district court held that parole officials were immune from suit under the doctrine of official immunity and the eleventh amendment's immunity provision. *Id.* at 479. It also found that parole officials "bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal." *Id.* Such a responsibility "imposes far greater moral burdens and requires far more difficult legal choices than those met by the average administrative officer." *Id. But cf.* Rieser v. District of Columbia, 563 F.2d 462, 475 (D.C. Cir. 1977) (parole officer's failure to warn employment placement service of parolee's conviction for rape held to be a ministerial act to which immunity did not attach), *modified*, 580 F.2d 647 (1978) (ancillary issue).

70. *See* National Advisory Commission on Criminal Justice Standards, *Report on Corrections* (1973), in G. KILLINGER & P. CROMWELL, JR., CORRECTIONS IN THE COMMUNITY 249-52 (1974).

a crime or an infraction of parole conditions that could precipitate the revocation of parole.[71] There must, in addition, be a calculation of the seriousness of the crime that might be committed.[72] For purposes of making the release decision, the inmate who has on previous occasions demonstrated a propensity for violence would probably be treated differently than the inmate convicted of a nonviolent offense such as embezzlement.[73] Second, the parole board must determine whether a decision to release, actually an assumption of the risk calculated in the previous step, would be socially justified.[74]

Many commentators have ignored the implications of these distinct steps which together comprise the ultimate decision to release. The result is that the steps are mistakenly commingled by parole officials and by courts called upon to review parole decisions. This is unfortunate since, for the purpose of determining whether parole officials should be granted official immunity,[75] it conceals the fact that each step requires an independent exercise of discretion. Courts, therefore, should not grant immunity to parole officials until each step in the decisional process is independently reviewed and evaluated in accord with separate judicial standards tailored to the uniqueness of each step.

In many parole decisions, the calculation of the risk of recidivism is a ministerial and not a discretionary task.[76] Such a calculation is ministerial where the record reveals that, if the prisoner is paroled, there is a high risk that he or she will return to a life of crime.[77] Argua-

71. *Id.* at 250.

72. *Id.*

73. *See* National Council on Crime & Delinquency, *Guides for Parole Selection* (1963), in L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT—THE CORRECTIONAL PROCESS 427, 427-28 (1973).

74. Social justification in release decisionmaking requires the consideration of many issues. The following list is by no means complete: whether the prisoner would benefit from further institutionalization; whether further institutionalization would make the prisoner a worse risk; whether sufficient punishment has been imposed; and whether the prisoner's family would be adversely affected by the decision. *See Report on Corrections*, *supra* note 70, at 250.

75. Ministerial and discretionary acts are best conceptualized as points along a single judgmental continuum. For this reason, confusion results when they are treated as separate concepts. *See* Note, *Torts—Parole Board Members Have Only Qualified Immunity for Decision to Release Prisoner*, 46 FORDHAM L. REV. 1301, 1303 & n.24 (1978). The question, in this light, is not whether an act is ministerial or discretionary. The inquiry should address the entire continuum—how much discretion is being used and should that discretion be used? *See, e.g.*, Johnson v. State, 69 Cal. 2d 782, —, 447 P.2d 352, 357, 73 Cal. Rptr. 240, 245 (1968) (distinction between discretionary and ministerial acts is determined by policy considerations).

76. The determination whether an act is ministerial or discretionary depends on the test used. One test makes an act discretionary if it formulates policy, and ministerial if it implements policy. *See* Thompson v. Burke, 556 F.2d 231, 237-38 (3d Cir. 1977). It can be argued that in many instances parole officials do not formulate policy when they predict whether a prisoner will or will not commit a serious crime if paroled.

77. It is also follows that where reasonable minds might differ in determining the risk of

bly, parole officials abuse their discretion when a high risk prisoner is released unless, despite the high risk, the board determines that the value of the release outweighs the risk. But such determinations, really the second step in the parole process, are possible only through deliberate and informed analysis of social benefits and costs.[78]

In determining whether parole officials should be granted immunity, reviewing courts should decide whether the release decision was the product of a reasoned cost-benefit analysis.[79] If the court determines that the release decision was the product of such an analysis, then the officials should be granted immunity because of the discretionary character of that task. Conversely, if the court finds that the parole board's analysis was cursory and insubstantial, made hastily without reasonable deliberation in the company of a high risk of potentially serious recidivism, then the court should find that the board abused its discretion and deny official immunity.[80]

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recidivism, courts should consider the decision a discretionary act. *See* Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, —, 564 P.2d 1227, 1234 (1977).

78. For a discussion of the trade-offs between the social benefit of parole release and the social cost of recidivism, see W. PARKER, PAROLE—ORIGINS, DEVELOPMENT, CURRENT PRACTICES & STATUTES 26 (rev. ed. 1975).

79. See notes 74 & 78 *supra*.

80. The most significant recent case to hold that parole decisionmaking is a ministerial task was Payton v. United States, 49 U.S.L.W. 2521 (5th Cir. Feb. 2, 1981), where the court held that the United States Board of Parole had no discretion to ignore parole eligibility criteria when making release decisions. *Id.* In *Payton*, a wrongful death action was brought against the United States on the ground that its employee, the Board of Parole (now the United States Parole Commission), negligently paroled an alleged paranoid schizophrenic who subsequently murdered the plaintiff's decedent. 468 F. Supp. 651, 651 (1979). The district court disregarded the significance of evidence that the Board of Parole had failed to obtain and review all records which, pursuant to regulations, were required to be considered. *Id.* at 651-52, 656. Accordingly, the court dismissed the case on the ground that parole decisions fall within the discretionary function exception to the Federal Tort Claims Act. *Id.* at 656.

On appeal, the Fifth Circuit reversed the district court's ruling and held that the United States was liable for the decedent's death. 49 U.S.L.W. at 2521. The court stated:

> The present administration of the parole system . . . is carried on in a somewhat *ministerial fashion at a low level within the agency*. The process requires the hearing examiner to review the records, add up pre-identified salient characteristics of the offender and to compare this to a largely predetermined offense severity rating in order to find the appropriate time frame for release. *If not a totally fixed and mechanical process, this certainly comes very close to being decisionmaking "between the limits of positive rules . . . subject . . . to review."*

Id. at 2521 (citation omitted)(emphasis added). The court went on to say that psychiatric evaluations "are not a policy-making function." *Id.* Noting that the Board ignored statutory eligibility criteria, the court emphasized that "a release in total disregard of known propensities for repetitive brutal behavior is not an abuse of discretion but rather an act completely outside of clear statutory limitations." *Id.*

The *Payton* approach is consistent with the approach followed in *Grimm* which permitted liability of parole officials for grossly negligent or reckless parole decisions. Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, —, 564 P.2d 1227, 1234 (1977). Unlike *Grimm*, however,

Although it may be difficult to predict with mathematical precision whether a particular parole candidate is dangerous, it does not necessarily follow that reasoned parole decisions are impossible or that recidivism tables are unreliable prediction aids.[81] Social scientists have developed many devices and guidelines for intelligently assessing risk, such as the salient factor score,[82] which aid parole officials in release decisions.[83] Such devices are valuable in revealing whether a particular inmate is a poor parole risk.[84] Where scores cannot be misinterpreted without serious error, an assessment that an inmate is a poor risk should be treated by courts as a ministerial decision. If the release decision evidences obvious negligence in risk assessment calculations, parole officials should not be accorded official immunity.[85]

Many parole decisions that are today treated as discretionary decisions should be treated as ministerial decisions to which official immunity should not attach. Decisions should be treated as ministerial when parole officials elect to ignore available release criteria, when they are poorly or inadequately trained to make such decisions, or when decisions are made arbitrarily without reliance on accessible data about the parole candidate. Courts that grant immunity to parole officials on the ground that accurate prediction is impossible endorse the exercise of official discretion to abandon reasonable release criteria. Immunity for administrative officials was never intended to promote the uninformed

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Payton directly attacked the classical proposition that parole decisions are always discretionary. 49 U.S.L.W. at 2521. For this reason, *Payton* represents a more significant attack on the application of the doctrine of official immunity to parole officials.

81. *See, e.g.*, Cohen, Groth, & Siegel, *The Clinical Prediction of Dangerousness*, 24 CRIME & DELINQUENCY 28, 37-39 (1978).

82. *See* Paroling, Recommiting, and Supervising Federal Prisoners, 28 C.F.R. § 2.20 (1979). Even the salient factor score, which is currently employed by the United States Parole Commission, is not characterized as a device for *predicting* recidivism. It serves merely "as an aid in determining the parole prognosis (potential risk of parole violation)." *Id.* § 2.20(e). It is nevertheless an extremely valuable guideline since officials may not override the score in parole decisions without first articulating the reasons for its disregard, and even then they must commit those reasons to writing. The ultimate purpose of the salient factor score, along with an array of other guidelines, is to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making . . ." *Id.* For an excellent discussion of the salient factor score, see Hoffman & Adelberg, *The Salient Factor Score: A Nontechnical Overview*, 44 FED. PROBATION 44 (1980).

83. For a discussion of the problems in interpreting the causal relationship between independent and dependent variables in prediction, see Hirschi & Selvin, *False Criteria of Causality in Delinquency Research*, 13 SOC. PROB. 254 (1966).

84. *See* S. TITUS REID, THE CORRECTIONAL SYSTEM—AN INTRODUCTION 338-39 (1981); Hoffman & Adelberg, *The Salient Factor Score: A Nontechnical Overview*, 44 FED. PROBATION 44 (1980).

85. *See, e.g.*, Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, —, 564 P.2d 1227, 1234 (1977).

and unreasonable use of discretion.[86] Courts, when determining whether to grant immunity, should distinguish between the reasonable use of discretion to make an informed parole decision, and the unreasonable use of discretion to ignore established release criteria.

III. ESTABLISHING A LEGAL DUTY OF CARE: THE MENTAL PATIENT RELEASE ANALOGUE

The decision to discharge a mentally disturbed offender from involuntary supervision is similar to the parole release decision. Dangerous behavior often associated with mental illness[87] requires hospital personnel to engage in risk assessment calculations[88] tantamount to the risk assessment calculations of parole officials. Psychiatric experts who release mental patients must, like parole boards, delicately balance the need for public safety against the equally important therapeutic value of reintegrating persons into society.[89]

A. *The Role of Relationship and Foreseeability*

Courts have frequently used two different approaches in establishing the tort liability of psychotherapists for the release of mental patients.[90] Under one approach, a legal duty is found in the relationship

86. Official immunity is intended to promote the reasonable use of discretion by precluding fear of suit. When parole officials knowingly deviate from their statutory duty to promote the interest of the public and of the parole candidate then they act unreasonably. In such instances, immunity should be inapplicable. In Palermo v. Rockefeller, 323 F. Supp. 478 (S.D.N.Y. 1971), the court stated:

> When a parole board abandons its statutory duty to make its decision on the basis of an independent judgment as to whether release of the prisoner will be in the best interests of the individual and of society. . . , it no longer acts within the prescribed scope of its duties or according to the procedures which it is by law required to follow, and it cannot expect the same measure of deference from the courts.

Id. at 484.

87. *See* H. ROLLIN, THE MENTALLY ABNORMAL OFFENDER AND THE LAW, 39-41, 69 (1969).

88. *See, e.g.*, Eanes v. United States, 407 F.2d 823, 824 (4th Cir. 1968) (calculation of assaultive tendencies is commensurate with the risk of release); Baker v. United States, 226 F. Supp. 129, 134-35 (S.D. Iowa 1964) (calculated risks necessary to intelligent and rational pursuit of modern psychiatric treatment), *aff'd*, 343 F.2d 222 (8th Cir. 1965). Risk assessment in parole decisions entails many similar considerations of which the following are included: a critical comparison of the most recent offense with the inmate's total record; whether the crime committed was premeditated; whether the crime committed was a situational offense; whether the prisoner was reluctant to admit guilt where guilt was obvious and confirmed. *See* National Council on Crime and Delinquency, *Guides for Parole Selection*, in L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT—THE CORRECTIONAL PROCESS 427 (1973); note 74 *supra* and accompanying text.

89. *See* Note, *Torts—Governmental Immunity—Absolute Versus Qualified Immunity for Public Officials Acting in Quasi-Judicial Capacities*, 24 WAYNE L. REV. 1513, 1521 & n.55.

90. This note deals only with psychotherapists' liability for mentally disturbed offenders sentenced to treatment rather than to incarceration as the result of criminal prosecution. Excluded

between the psychotherapist and the victim injured as a result of the release. Under the alternative approach, a legal duty of care can be imposed on psychotherapists if the patient's personal history reveals a pattern of behavior that is sufficiently violent to make future violent behavior reasonably foreseeable. This section explores the operation of each approach and briefly examines their applicability to the parole release decision.

1. The Determinants of Duty

The type of relationship required to support the psychotherapist's legal duty of care in release decisions can arise in various ways. It can arise, for example, under a court decree that orders a patient's mandatory commitment to a mental facility. This approach was used with success in *Semler v. Psychiatric Institute*,[91] where a hospital was held liable for negligently releasing a mental patient who later attacked and killed a young girl. The judgment institutionalizing the patient had suspended a twenty year prison sentence on the condition that the patient be remanded for treatment to the custody of the institute. In critically examining the judgment, the court found that it entailed a dual purpose of protecting the welfare of the patient and of protecting the public, particularly young girls.[92] The duty to the public was expanded by the court into a special relationship between the hospital and the patient's victim. This duty was breached when the decision was made to release the patient, with the result that the hospital was held liable for the victim's death.[93]

Another relationship on which a psychotherapist's duty of care has been based is the relationship between the psychotherapist and the pa-

from discussion are those patients committed through the various forms of civil commitment and for whom the psychotherapist's duties may markedly differ. *See, e.g.*, Semler v. Psychiatric Inst., 538 F.2d 121, 124 (4th Cir. 1976) (suspended prison sentence conditioned on continued psychiatric treatment), *cert. denied*, 429 U.S. 827 (1976). See note 93 *infra* and accompanying text. Primarily, the impact of the type of commitment on duties owed by the practitioner is the consequence of due process interpretations in Baxtrom v. Herold, 383 U.S. 107 (1966).

91. 538 F.2d 121 (4th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976). The facts in *Semler* reveal that John Gilreath had been indicted for the abduction of a young woman. Pending trial, Gilreath entered the defendants' psychiatric institute for treatment. Later, he was sentenced to twenty years in prison, but that sentence was suspended on the condition that psychiatric treatment continue. Gilreath's institutionalized status was subsequently changed by doctors to an outpatient status after which he murdered the plaintiff's daughter.

92. *Id.* at 124.

93. *Id.* at 126. One commentator has compressed the *Semler* duties into "two analogous common law duties: the duty to control and the duty to warn potential victims of a patient's harmfulness." *See* Comment, *Psychotherapists' Liability for the Release of Mentally Ill Offenders: A Proposed Expansion of the Theory of Strict Liability*, 126 U. PA. L. REV. 204, 212 (1977).

tient. This approach was successfully utilized in *Tarasoff v. Regents of the University of California*,[94] where the California Supreme Court reviewed the question whether therapists had been negligent in failing to warn a woman later murdered by the patient. The court, in a controversial opinion, held that the relationship between the therapist and the patient supported "affirmative duties for the benefit of third persons."[95] The defendant's failure to warn was negligent because the victim was found to be a member of this protected class.[96]

One approach that has been effective in establishing a duty of care

94. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). This case, often referred to as *Tarasoff II*, vacated the California Supreme Court's first opinion in *Tarasoff I*. Tarasoff v. Regents of the Univ. of Cal., 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).

95. The *Tarasoff* opinion discussed and analyzed the legal duty concept and the sources from which such duties might emanate. The case was novel because of the liberality with which the California Supreme Court approached the duty problem. Legal duties, said the court, "are merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Id.* at —, 551 P.2d at 342, 131 Cal. Rptr. at 22. The court discussed the relationship between foreseeability and legal duty but expressly preferred to impose liability on the basis of the relationship between the psychotherapist and patient. *Id.* at —, 551 P.2d at 344, 131 Cal. Rptr. at 24. Such a relationship compels the therapist to "assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." *Id.* at —, 551 P.2d at 344, 131 Cal. Rptr. at 24.

The decision has been widely criticized and widely praised. One commentator has predicted that the *Tarasoff* decision will preclude "effective therapy and consequently will diminish public safety." Stone, *The* Tarasoff *Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 378 (1976). *But see* Note, *Untangling* Tarasoff: Tarasoff v. Regents of the University of California, 29 HASTINGS L.J. 179, 197 (1977). *See generally* Comment, *Discovery of Psychotherapist—Patient Communications After* Tarasoff, 15 SAN DIEGO L. REV. 265 (1978); Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165 (1978); Note, Tarasoff v. Regents of the University of California: *Psychotherapist's Obligation of Confidentiality Versus the Duty to Warn*, 12 TULSA L.J. 747 (1977).

96. 17 Cal. 3d at —, 551 P.2d at 340, 131 Cal. Rptr. at 20. *Tarasoff* dealt almost exclusively with the duty to warn, not with the duty to confine. *Compare id.* at —, 551 P.2d at 340, 131 Cal. Rptr. at 20 *with* Semler v. Psychiatric Inst., 538 F.2d 121, 124 (4th Cir. 1977) (duty to confine the patient), *cert. denied*, 429 U.S. 827 (1976). The duty to warn was characterized as a ministerial act to which California's immunity statute was inapplicable. 17 Cal. 3d at __, 551 P.2d at 340, 131 Cal. Rptr. at 20. Conversely, the duty to confine was the corollary of the question whether to release, a task which could have been successfully characterized as discretionary and to which statutory immunity would have applied. *Id.* For these reasons, the plaintiffs strictly relied on a cause of action alleging the failure of the defendants to warn the decedent, despite the court's intimation that, had official immunity been inapplicable, liability could have been predicated on the release itself. *Id.*

The distinction between types of duties owed is significant because parole officials do not enjoy access to the same highly personal information about parole candidates that psychotherapists typically obtain with regard to patients in a professional relationship. Hence, parole officials lack the depth of information normally required to raise a duty to warn *particular persons* of an impending release. Plaintiffs, therefore, unlikely to succeed on such a cause of action, must alternatively establish the negligence of the release decision in addition to the ministerial character of that decision. See note 75 *supra* and accompanying text. The only remaining option would be the § 1983 action under which official immunity might be foreclosed pursuant to *Martinez*. *See* 444 U.S. at 284 & n.8; see notes 4, 23 & 29 *supra* and accompanying text.

in release decisions was used in the *Grimm* decision.[97] That approach, authorized by the *Restatement (Second) of Torts*,[98] provides that one who assumes responsibility for a foreseeably dangerous individual also assumes the duty to take reasonable measures to ensure that third persons are not injured by that individual.[99] This approach has been used successfully in actions against parole authorities[100] and in actions against psychotherapists.[101]

Relationship approaches to establishing a legal duty of care in release decisions are sufficient but unnecessary where it is reasonably foreseeable that the release will endanger the public.[102] Courts utilizing foreseeability approaches evaluate the case history of the release candidate to determine whether dangerous post-release conduct is reasonably foreseeable.[103] If such conduct is reasonably foreseeable, then

97. 115 Ariz. 260, —, 564 P.2d 1227, 1234 (1977); see notes 98 & 99 *infra* and accompanying text.

98. RESTATEMENT (SECOND) OF TORTS § 319, Comment a, Illustration 2 (1965).

99. *Id.*

100. *See* 115 Ariz. 260, —, 564 P.2d 1227, 1234 (1977).

101. *See* Semler v. Psychiatric Inst., 538 F.2d 121, 125 (4th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976).

102. *Cf.* Dennert v. United States, 483 F. Supp. 1317, 1322 (D.S.D. 1980). In *Dennert*, the plaintiff alleged that the United States was negligent, through its agency the Job Corps, in supervising her attacker. The district court held in favor of the United States on several grounds, one being that the behavior of the attacker had not been reasonably foreseeable. *Id.* at 1322. *But see* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In *Tarasoff*, the court found that the relationship approach controlled the question of due care and declined to decide whether foreseeability alone would have been sufficient to establish a duty of care. *Id.* at —, 551 P.2d at 343, 131 Cal. Rptr. at 23.

103. In Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977), the Arizona Supreme Court relied on the following case history in determining that dangerous post-release conduct by the releasee was reasonably foreseeable:

> Mitchell Blazak was released from the Arizona State Prison after completing approximately one-third of the sentence imposed on him for armed robbery and assault with intent to kill. His criminal record began in 1961, when, as a minor, he served a term in the Fort Grant Industrial School for burglary. In 1964 he was sentenced to prison for burglary and in 1965 he was returned to prison for parole violation. On September 9, 1966 he was released and in January 1967 was arrested for marijuana possession, armed robbery and assault with intent to kill. After psychiatric evaluations and several periods spent in the State Hospital, he was convicted and sentenced to prison.

Id. at —, 564 P.2d at 1229.

Another extremely significant factor in *Grimm* on which the court relied in its finding that dangerous postrelease conduct was reasonably foreseeable was the prerelease opinions of eight psychiatrists who had examined Blazak. The court summarized those opinions as follows:

> Blazak is "an extremely dangerous person who should not be free in society until some major psychological changes take place." He is a paranoid schizophrenic whose psychosis prevents him from distinguishing between right and wrong and from controlling his conduct. He has never made an adequate adjustment to society for any prolonged period and is unlikely to change. He has a definite potential for violence. During at least one hospital stay he seemed to abandon his psychotic behavior but reverted to such behavior after his release back into society.

Id. at —, 564 P.2d at 1230.

psychotherapists must exercise reasonable care in the release decision in order to preclude the type of harm suggested by the perceived risk.[104]

2. Substantive Requirements

Courts have imposed upon psychotherapists numerous substantive requirements incident to the duty to exercise care in release decisions. First, care must be used to ensure that the patient is not dangerous at the time of the release and that the patient will not become dangerous following the release.[105] To ensure adequate compliance with this requirement, courts have further imposed on psychotherapists the duty to possess the psychiatric acumen and skill appropriate to making informed release decisions.[106]

Courts have also held that release decisions must be the result of the psychotherapist's best professional judgment.[107] Under this rule, the psychotherapist must critically examine the patient's recorded personal history. If material facts in the history are disputed or missing, an investigation may be required in order to compile an updated and accurate record from which a release decision can be made.[108] Even then, a release is unwarranted unless, after careful deliberation, the psychotherapist decides that a release would be best in light of the totality of the circumstances.[109] If release is warranted but there are still lingering doubts about the propriety of release, the psychotherapist may be required to forewarn particular individuals who might be endangered by the release.[110]

104. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, —, 551 P.2d 334, 342-43, 131 Cal. Rptr. 14, 22-23 (1976).

105. *Id.*

106. *See, e.g.*, Schwenk v. State, 205 Misc. 407, —, 129 N.Y.S.2d 92, 98 (1953).

107. *Id.* at —, 129 N.Y.S.2d at 98-99.

108. *See, e.g.*, Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967). In *Merchant*, state hospital agents were found to have been negligent in releasing a mental patient from institutional supervision. The district court's finding rested principally on proof that the agents had ignored recommendations advising against release; that records upon which the release decision was made were incomplete; and that there had been a failure to investigate material and disputed issues adequately. *Id.* at 418-19.

109. The best professional judgment rule holds that a mere error of judgment is not of itself a sufficient basis for liability, as long as the psychotherapist "does what he thinks is best after careful examination." Schwenk v. State, 205 Misc. 407, —, 129 N.Y.S.2d 92, 98-99 (1953). The rule reflects the view that psychotherapists are not strictly liable for errors of judgment.

110. *See* note 96 *supra* and accompanying text; *cf.* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, —, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976) (patient's right to privacy balanced against the foreseeable victim's right to be warned of possible danger).

B. *An Application to the Parole Decision*

The legal duty models implemented in negligent release litigation are peculiarly suited for application to suits involving allegedly negligent parole decisions.[111] Shared factors in mental patient and parole releases include principally the power to decide whether institutionalization shall terminate or continue. Also shared by psychotherapists and parole officials is the burdensome task of defining the substantive content of the public interest.

In jurisdictions where official immunity is lacking or qualified, parole officials are presumably subject to substantive legal obligations that are substantially identical to obligations imposed on psychotherapists.[112] This follows not only because psychotherapists have been found to owe significant duties to the public, but because parole officials owe the public similar duties in their own right.[113] Nevertheless, many concepts developed in mental patient release litigation can be grafted to ligitation involving careless parole decisions.

Parole officials are subject to a legal duty of care in parole decisionmaking not only under the logic of *Semler*, but also under the logic of *Tarasoff*.[114] Under *Semler*, parole officials must face the prospect that orders which institutionalize prisoners also impose upon parole officials the duty to protect the public, and in some instances particular persons, from the potentially dangerous conduct of parolees.[115] Although the applicability of *Tarasoff* is less clear, that decision can be interpreted to mean that the relationship between an inmate and parole officials can have the effect of imposing on the latter "affirmative duties for the benefit of third persons."[116]

Perhaps the most fruitful comparison between parole officials and psychotherapists should center in the context of shared substantive obligations. Arguably, parole officials and the systems in which they operate have failed to adhere to the minimum requirements of due care in parole decisionmaking. Studies reveal, for example, that statutory requirements for the qualification of parole officials generally do not re-

111. *Cf.* Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, —, 564 P.2d 1227, 1234 (1977) (direct comparison between cases involving negligent mental patient release decisions and negligent parole release decisions).

112. *Id.* at —, 564 P.2d at 1234.

113. *Id.*

114. See note 96 *supra*.

115. See note 93 *supra* and accompanying text.

116. *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, —, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976).

quire formal training in criminology or related social sciences.[117] Parole officials may not always possess the minimal acumen and skills necessary to the informed formulation of parole decisions.

Significant problems exist in parole decisionmaking. The principal problem is that prisoners who should be released are often not released while prisoners who are unsuitable for parole may be discharged. The best professional judgment rule, which requires psychotherapists to use reasonable care in decisions to release mental patients, appears in the parole context only sporadically if at all. The same complaint arises with regard to inadequate prerelease investigations of parole candidates, for whom case histories may be incomplete or missing. Courts should consider the analogy between mental patient releases and parole decisions and should show less reluctance to hold parole officials liable for negligent or reckless parole decisions.

IV. ACTIONS AGAINST PAROLE OFFICIALS UNDER SECTION 1983

Although section 1983 has been uniformly construed to afford plaintiffs a cause of action against persons who violate protected constitutional rights, courts have nevertheless permitted states to immunize officials from such actions when the act complained of results from official discretion.[118] In effect, the federal bench has deferred to state created official immunity at the expense of persons who could not obtain redress after having been deprived of constitutional rights by state action. The *Martinez* decision is significant because it split from precedent by intimating that such federal self-restraint may be eliminated.[119] This means that persons injured by parolees might now invoke section 1983 to defeat state official immunity and obtain legal redress.

A. *Practical Considerations in Section 1983 Actions*

Plaintiffs who bring section 1983 actions against parole officials

117. This problem stems from poorly designed statutes that provide few if any criteria for selecting parole officials. Community responsiveness and expertness are the unspoken criteria. One commentator points out, however, that "the laws have a long way to go in catching up with . . . these standards." D. STANLEY, PRISONERS AMONG US—THE PROBLEM OF PAROLE 28-29 (1976). One study reported that only eight states have statutory selection criteria for the appointment of parole officials. *Id.*

118. For a general discussion of the relationship between official immunity and § 1983, see Theis, *Official Immunity and the Civil Rights Act*, 38 LA. L. REV. 279 (1977-78); Comment, *Official Immunity from Damages Under Section 1983 Suits*: Wood v. Strickland, 56 ORE. L. REV. 124 (1977); Comment, *Liability of State Supervisory Officials Under Section 1983*, 22 S.D. L. REV. 369 (1977); note 2 *supra* and accompanying text.

119. *See* 444 U.S. at 284 & n.8; see notes 3, 4, 20, 23, 28-29 and accompanying text.

must observe a complex array of pleading rules. It is imperative that specific factual allegations be pleaded[120] and that the facts reveal a constitutional violation that resulted from state action.[121] Once the facts are specifically alleged the court cannot dismiss the action unless it appears that the plaintiff will be unable to prove that the facts entitle relief.[122] The action should furthermore be brought in state court, not in federal court, in order to avoid complications associated with the eleventh amendment's immunity provision.[123] In addition, the action should be brought against parole officials in their personal capacities and not against the parole board as a governmental entity.[124]

Where the crime committed by the parolee results in death to the victim the plaintiff should specifically allege that the parole decision deprived the victim of the right to life protected by the due process clause of the fourteenth amendment.[125] In the alternative, if the crime was against property, the plaintiff should allege that the release decision violated the victim's property rights protected under the due proc-

120. *See, e.g.*, Johnson v. Wells, 566 F.2d 1016, 1017 (5th Cir. 1978).

121. *See, e.g.*, Palermo v. Rockefeller, 323 F. Supp. 478, 483 (S.D.N.Y. 1971). The plaintiff who sues parole officials under § 1983 must demonstrate that the constitutional violation caused by the release was a consequence of state action. This can be established in either of two ways. First, it must be demonstrated that the official immunity, either doctrinal or statutory, promoted a release decision which precipitated the constitutional violation proscribed by § 1983. This approach, which was unsuccessfully asserted by the plaintiffs in *Martinez*, 444 U.S. at 281, seeks to establish that had the immunity been absent, the release decision and resultant criminal act would not have occurred.

The second approach for establishing state action inquires whether the parole officials acted under color of law. Because parole officials are usually state officials or, at the very least, arms of the state, a parole release decision has been typically characterized as state action. *See, e.g.*, Palermo v. Rockefeller, 323 F. Supp. at 484. Under this approach, the only remaining question is whether the state action caused the constitutional violation. Although the causation issue is conceptually separate from the issue of state action, *Martinez* confused the distinction by handling the issues in a single question. 444 U.S. at 284-85. This led to the Court's finding that the action by the parolee "five months later can not be fairly characterized as state action." *Id.* at 285. That finding was unnecessary, however, because it showed merely that the Court had found that the parole release had not caused the alleged constitutional violation.

122. *See, e.g.*, Johnson v. Wells, 566 F.2d 1016, 1017 (5th Cir. 1978) (citing Conley v. Gibson, 355 U.S. 41 (1957)).

123. *See, e.g.*, Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478, 479 (N.D. Ala. 1976) (eleventh amendment immunity held to bar suit). While plaintiffs should sue in state court to avoid problems with eleventh amendment immunity, it does not necessarily follow that the state court must accept jurisdiction of the federal claim. In *Martinez*, the Supreme Court noted that such an exercise would appear to be consistent with the rule that congressionally imposed penalties *may be* enforced in state court where Congress fails to specify the appropriate remedy. Nevertheless, the Court reserved the question whether states *must* exercise jurisdiction over § 1983 claims, intimating only that mandatory jurisdiction would be more likely where similar claims would be enforced if they were to arise under state law. 444 U.S. at 284 & n.7.

124. *See* note 5 supra.

125. 444 U.S. at 281.

ess clause.[126] The plaintiff's foremost problem, of course, will be proof of causation. There must be proof of a plausible connection between the release decision and the alleged constitutional violation.[127]

V. CONCLUSION

The reasoning of *Martinez* coupled with recent judicial criticisms of official immunity for parole officials suggest that such officials should be liable for negligent or reckless parole decisions. Developments in mental patient release litigation with regard to the increasing legal duties of psychotherapists may be applied with predictable effectiveness in the context of parole decisions, where many similar considerations are involved.

In jurisdictions retaining the doctrine of official immunity for parole officials, plaintiffs should consider the possibility of seeking redress through section 1983 actions. Such actions may be advantageous not only because they do not involve the burden of establishing a duty of care, but because official immunity may be completely precluded once the elements of section 1983 are affirmatively established. The curious gap in official immunity opened by *Martinez* is a significant development in parole release litigation which ultimately might improve parole decisionmaking. Undoubtedly, courts that have been asked to decide whether to grant official immunity to parole officials have too often made the mistake of seeing judges in the faces of administrators.

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126. *Id.* at 283-84.
127. See note 121 *supra* and accompanying text.