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Governmental Immunity and the Release of Dangerous Inmates from State Institutions: Can the State Get Away with Murder?

INTRODUCTION

We are all too often reminded of brutal aspects of our society: newspapers and television news depict daily the violent assaults, robberies, rapes and murders that have become commonplace in modern life. Statistics show that nationwide over one million violent crimes occur each year. The inevitability of becoming a victim of criminal activity has become a growing concern among many Americans.

Serious questions are raised by the prevalence of crime. What, for example, of the victim who has suffered at the hands of a person with a history of violent criminal activity who has recently been released from a prison or mental institution? Is the victim’s injury or death as inevitable as it may be perceived? Is he/she entitled to compensation? If so, who is responsible?

To the victim or to his/her family it often appears inconceivable that the prison inmate or mental patient could have been released in the first place. Especially if the crime was a serious one, the victim and his/her family will look to the courts for redress against the state, generally the only party able to compensate victims or their families.

The concerns of the victims and their families would appear to favor stricter release standards and longer terms of confinement. Other interests, however, pull in a different direction. Programs such as parole for prisoners and “open door” treatment for mental patients exemplify firmly-rooted policies designed to facilitate the inmate’s rehabilitation and reintegration into society.

4. See generally Note, Liability of Mental Hospitals for Acts of Their Patients Under the Open
These programs demonstrate a legislative awareness that the rights of the inmate cannot be forgotten; to the contrary, they must be balanced against the competing interests of society. Since the power to release is usually granted directly from the legislature, the state traditionally has been insulated from liability for these types of actions, based on the doctrine of sovereign immunity, which has its roots in the notion that "the king can do no wrong."

Recognizing, however, that governments perform many activities which are non-governmental in nature, Congress passed the Federal Tort Claims Act, waiving the United States government's immunity from suit. Many states have followed Congress's initiative and have enacted similar statutes. This waiver of immunity is in no way absolute. Fearing that the very process of government


5. See infra notes 196-97 and accompanying text.

6. This phrase was coined by Blackstone when he wrote in 1765: "The king can do no wrong. . . . The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing: in him is no folly or weakness." 1 W. Blackstone, Commentaries *238-39. See also Jaffe, Suits Against Governments and Officials: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963); Note, Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government, 56 Iowa L. Rev. 930, 933-40 (1971) (documenting the history of the immunity doctrine); Borchard, Government Liability in Tort, 34 Yale L.J. 1, 4-9 (1924).


might be hampered if liability were incurred for its every program or policy decision, the federal government and many of the states have created an exception to this waiver for claims based on the performance of "discretionary duties" of government employees. The exception provides that if the act in question involved "discretion" or "planning," immunity results. Actions which are merely "ministerial" or "operational," on the other hand, are not protected.

This Comment will closely examine the applicability of the discretionary function exception (and common law or statutory immunity applied by state courts) to cases where inmates are released by correctional and mental institutions. It will be helpful to see how courts have treated immunity outside release situations. This Comment will begin by looking at the federal cases which have dealt with this issue, and will conclude with a survey and analysis of New York's approach to immunity.

It will be argued that the sovereign immunity doctrine should not be applied to release cases. The discretionary function exception has proved to be an inadequate standard in ascertaining the applicability of immunity outside release situations. Artificial and arbitrary labelling of activity as "discretionary" or "planning" (as opposed to "ministerial" or "operational") has inevitably led to confusion among the federal courts as to where the line between these two levels of activity should be drawn. This labelling has provided judges with little or no guidance in deciding cases applying this "standard." As a result, courts have been forced to decide


The Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1982) reads that immunity is not waived for

(a) Any claim based upon an act or omission of an employee of the Government. exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

11. See generally infra notes 15-86. For a general survey of case law applying the discretionary function exception of the FTCA, see Annot., 36 A.L.R. Fed. 240.
these cases on what is essentially an ad hoc basis.

A second reason is submitted for the inapplicability of sovereign immunity to release cases: Since one of the major purposes of sovereign immunity is to maintain the separation of powers (i.e., to preclude judges from implementing legislative policy by awarding damages to those victimized by certain acts of government), it should be applicable only when suits against the government would tend to threaten the government's ability to govern. It will be argued that holding the state liable for negligently releasing dangerous inmates who subsequently, and foreseeably, commit violent crimes has no such inhibiting effect on the government's ability to legislate or execute policy.

It will be concluded that, since release committees act essentially in a quasi-judicial capacity, they should be afforded a qualified judicial immunity. Unlike absolute immunity, which precludes judicial review of governmental activity in spite of any alleged negligence, release decisions should be reviewed for propriety in the decisionmaking process. If the release committee is presented with all the relevant facts (e.g., an inmate's background and psychological reports), and makes a reasonable determination in light of these facts, then the committee (and vicariously the state) should be immune, even though the decision may have been wrongly made. On the other hand, if the forum is not sufficiently judicial-like, immunity must be stripped in its entirety, and traditional tort standards should be applied.

Applying the doctrine of absolute sovereign immunity to quasi-judicial bodies such as release committees is in contradiction to the basic tenet of governmental immunity, which is designed to protect the sovereign's mandate to govern. Instead, immunity has come to shield decisions which are merely administrative in nature, and which affect the rights of identifiable individuals rather than the public in general. Divested of procedural and substantive safeguards, determinations by tribunals empowered to release inmates often do not account for consequences which are foreseeable—that certain released inmates may be unfit for reassimilation into society—often leading to the injury and death of innocent persons.

12. See infra notes 48-65 and accompanying text.
13. See infra notes 168-70 and accompanying text.
The doctrine of sovereign immunity should not be carried over into the area of inmate releases. Courts must be allowed to review release decisions; if the decisionmaking process is shown to be negligently defective, and the released inmate foreseeably injures someone, the injured plaintiff must be allowed to recover against the state.\(^{14}\)

I. GOVERNMENTAL IMMUNITY

A. Setting the Stage: A Brief Look at Federal Governmental Immunity

In 1946 the federal government waived its immunity from tort liability by enacting the Federal Tort Claims Act (FTCA).\(^{15}\) One exception to this general rule of liability, found in 28 U.S.C. § 2680(a), is that for "an act or omission of an employee of the government . . . based upon the exercise or performance or failure to perform a discretionary function or duty on the part of a federal agency."\(^{16}\)

1. Non-release cases. Two doctrinal aspects of these cases must be separately explored:

—"Planning" versus "operational" levels: Is there really a distinction?

Determining what constitutes discretion and what does not has proven to be no simple task for the courts. In Dalehite v. United States,\(^{17}\) the seminal case under the FTCA, plaintiffs brought suit for personal injury against the United States resulting from the explosion of fertilizer being loaded for export overseas. The fertilizer was manufactured by the federal government and sent to Germany, Japan, and Korea in order to increase productivity and thereby help feed people from these countries shortly after the conclusion of World War II.\(^{18}\) Despite the fact that the ingredients of the fertilizer rendered it particularly susceptible to explo-

\(^{14}\) The issue of the liability of the official(s) who released the inmate is outside the scope of this article. As to this issue, see generally Note, Absolute versus Qualified Immunity for Public Officials Acting in Quasi-Judicial Capacities, 24 WAYNE L. REV. 1513 (1978); Annot., 5 A.L.R.4th 773 (1981).


\(^{16}\) Id. at § 2680(a). For the full text of § 2680(a), see supra note 10. For further discussion of the discretionary function exception see Jayson, 24 Fed. B.J. 153 (1964); Note, The Discretionary Exception and Municipal Tort Liability: A Reappraisal, 52 MINN. L. REV. 1047, 1052-56 (1968); Note, supra note 6.

\(^{17}\) 346 U.S. 15 (1953).

\(^{18}\) Id. at 19.
sion, the government permitted shipment without warning of its danger. The Court ruled that even though the government was negligent in manufacturing, packaging, and loading the fertilizer, these negligent acts fell within the discretionary exception since they were performed under the direction of a plan developed at a high level of authority.\textsuperscript{19} Governmental liability was thereby precluded.

\textit{Discretion . . . includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.}\textsuperscript{20}

While \textit{Dalehite} seemed to hold that discretion in policy-making served as an umbrella for protecting the negligent implementation of that policy as well,\textsuperscript{21} later courts pulled back from this restrictive standard.\textsuperscript{22} Within four years of \textit{Dalehite}, the Supreme Court decided \textit{Indian Towing Co. v. United States},\textsuperscript{23} which held that governmental negligence in failing to check and repair an inoperative lighthouse was actionable, and \textit{Rayonier Inc. v. United States},\textsuperscript{24} which allowed recovery for negligent fire-fighting. Both cases appeared to fall safely within the \textit{Dalehite} holding, which purportedly protected the acts of subordinates carrying out directions according to "policy."\textsuperscript{25} In a more recent circuit court of appeals case\textsuperscript{26} it was thus noted that "[i]f the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist approach to \textit{Dalehite}, and that interpretation is rejected by \textit{Indian Towing} and especially by \textit{Rayonier}."\textsuperscript{27}

20. \textit{Id.} at 35-36 (emphasis added).
21. For a discussion on policy-making versus implementation of policy, see \textit{infra} note 119.
27. \textit{Id.} at 246. \textit{See also} Note, \textit{Remedies Against the United States And Its Officials}, 70 \textit{HARV. L. REV.} 827, 895 (1957). \textit{Dalehite}, however, may find new life from the most recent Su-
In rejecting the rigid Dalehite test, federal courts looked to Rayonier and Indian Towing as distinguishing between decisions made at the planning as opposed to the operational levels of government. A new test was devised whereby high level policy decisions fall within the protective net of section 2680(a) while acts performed during the operations necessary to carry out this policy do not. In United States v. Hunsucker, for example, plaintiff sued preme Court pronouncement on the subject. In United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 104 S. Ct. 2755, 2764 (1984), the Court noted that the discretionary function exception was not at issue in Indian Towing, since the government in that case conceded the exception was not applicable. The Court concluded that Indian Towing and Eastern Airlines v. Union Trust Co., 221 F.2d 62, 189 (D.C. Cir.), aff'd per curiam sub nom. United States v. Union Trust Co., 350 U.S. 907 (1955) (also purporting to limit Dalehite) "cannot be taken as a wholesale repudiation of the view of § 2680(a) set forth in Dalehite." Id. at 2764-65 (citation omitted).

Nevertheless, by itself S.A. Empresa does little to resurrect Dalehite. The Court shies away from attempting to define the scope of Dalehite and instead speaks in generalities, most particularly commenting that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee . . . of the nature and quality that Congress intended to shield from tort liability." Id. at 2765. Notwithstanding the Court's vagueness, the gates appear to have been opened for the government's argument that the Supreme Court has rejected the notion that Dalehite has been eroded in any way, and that this implicitly overrules the tidal wave of cases relying on Indian Towing and Rayonier. This Pandora's box could potentially reshape the scope of the discretionary function exception by overruling progressive judicial interpretation on this subject over the past 25 years.

28. See, e.g., United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962); Mahler v. United States, 306 F.2d 713 (3rd Cir. 1962); Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964); Swanson v. United States, 229 F. Supp. 217 (N.D. Cal. 1964). In Swanson, the court noted that:

The planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. . . .

The operations level decision, on the other hand, involves decisions relating to the normal day-by-day operations of the government. Decisions made at this level may involve the exercise of discretion but not the evaluation of policy factors.

Id. at 220.

29. See United Air Lines, Inc., 335 F.2d at 393. The court there noted that [c]ases which illustrate the line of demarcation are as follows: discretionary to undertake fire-fighting, lighthouse, rescue, or wrecked ship marking services, but not discretionary to conduct such operations negligently, discretionary to admit a patient to an Army hospital, but not discretionary to treat the patient in a negligent manner; discretionary to establish a post office at a particular location, but not to negligently fail to install handrails; discretionary to establish control towers at airports and to undertake air traffic separation, but not to conduct the same negligently; discretionary to reactivate an airbase, but not to
for damages incurred by flooding due to the government's negligent diversion of waters from a nearby air force base located on high ground. The federal government decided to reactivate the airbase, which had been unused since World War II. During reactivation, extension of runways required construction of conduits to replace drainage ditches which were cut off. These conduits were insufficient to divert the flood waters, and plaintiff's land was frequently inundated with water. The court held that while the decision to reactivate the base was made on the planning level, the negligent construction of the drainage ditch occurred on the operational level and thus was not protected by section 2680(a).

A second, albeit similar, test distinguishes between activity which is discretionary as opposed to ministerial. Discretionary action, much like planning, connotes the formulation as opposed to the execution of policy, the latter which is deemed ministerial.

While the planning/operational and discretionary/ministerial dichotomies have served to soften the impact of Dalehite, they have often proved difficult to apply. In Smith v. United States, for example, the court noted that:

Unless government officials make their choice by flipping coins, their acts involve discretion in making decisions... It is not a sufficient defense for the government merely to point out that some decision-making power was

construct a drainage and disposal system thereon in a negligent fashion: and discretionary for CAA to conduct a survey in a low flying, twin engine airplane, but not for pilots thereof to fly negligently.


30. 314 F.2d 98 (9th Cir. 1962).
31. Id. at 100.
32. Id.
33. Id. at 101.
34. Id. at 105.
35. See Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964); Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974). Generally, federal courts other than the District of Columbia circuit rely on the planning/operational distinction while many of the states and the District of Columbia apply the discretionary/ministerial standard, which developed in the law of municipal corporations. See Driscoll v. United States, 525 F.2d 136, 139 (9th Cir. 1975). Nevertheless, the language is often applied interchangeably. See, e.g., Cohen v. United States, 252 F. Supp 679, 687 (N.D. Ga. 1966), rev'd on other grounds, 389 F.2d 689 (6th Cir. 1967) (holding that the discretionary function exception is "properly limited to [activity conducted on] the planning level and not the operational level; and to acts of a governmental and not a ministerial function."); Payton v. United States, 679 F.2d 475, 480 (5th Cir. 1982).
36. 375 F.2d 243 (5th Cir. 1967).
exercised by the official whose act was questioned. Answering these ques-
tions . . . is not aided by importation of the planning stage-operational stage
standard argued for by Smith. Such a distinction is specious. . . . [I]n diffi-
cult cases it proves to be another example of a distinction "so finespun and
capricious as to be almost incapable of being held in the mind for adequate
formulation."37

While recent cases have continued to pay lip-service to the
planning/operational distinction, Smith is representative of the in-
creasing judicial awareness that the line between the two is often
difficult to discern.38 In Baird v. United States,39 for example, plain-
tiff sued the federal government for damages and injuries in-
curred when his aircraft crashed during landing. Plaintiff had re-
lied on a government-published chart which informed pilots of
the length of the longest runway in hundreds of feet as well as
whether or not it was lighted.40 Plaintiff erroneously inferred
from the symbols "L-28" that the lighted runway was 2800 feet
long.41 In actuality, the lighted runway was not that long, but was
instead 220 feet shorter than expected, causing plaintiff to over-
run it and crash.42 The court held for the government on the

37. Id. at 246 (quoting Frankfurter, J., in Indian Towing v. United States, 350 U.S. 61
(1959). Recovery in Smith was denied on the grounds that discretion of the Attorney
General is absolute. For further criticism of the planning/operational distinction in federal
cases see Payton v. United States, 636 F.2d 132, 138-39 (1981), rev'd in part on rehearing,
679 F.2d 475 (5th Cir. 1982); Downs v. United States, 522 F.2d 990 (6th Cir. 1975);
Moyer v. Martin Marietta Corp., 481 F.2d 585 (5th Cir. 1973); Laird v. Nelms, 406 U.S.
797, 811 (1972) (Brennan, J., dissenting).
38. See, e.g., Moyer, 481 F.2d at 598. Moyer involved an action against the United States
for the death of a test pilot who died when the ejection seat of his aircraft was acciden-
tly triggered while the airplane was still on the ground. The court noted:

We have difficulty applying the decided cases as to negligence in exercise of a
discretionary function to the facts presented here. The facts in this case bring it
very close to the line separating actions covered by the FTCA and those beyond
its reach because governed by the discretionary function exception. . . . We
agree with the United States that the selection of B-57 aircraft . . . constituted
the exercise of a discretionary function. Equally the determination of the num-
ber of such aircraft to be purchased also constituted the exercise of a discre-
tionary function. But, coming down to the acceptance of a system of the air-
craft, such as the pilot's ejection seat and its mechanism, which, if negligently
designed or constructed posed a safety hazard to an individual operating the
aircraft, we hold that the discretionary function exception's sweep falls short of
immunizing the United States from liability.
Id. at 598. See also infra note 119.
39. 653 F.2d 437 (10th Cir. 1981).
40. Id. at 438.
41. Id.
42. Id.
grounds that even though the chart may have been ambiguous and misleading, it conformed to Inter-Agency Air Cartographic Committee (IACC) specifications. 43

To have allowed recovery for negligence in drawing up the flight charts would have, in effect, amounted to holding the government liable for what was clearly a policy decision, notwithstanding the fact that the policy may have been defective. Presumably, if IACC’s specifications were not riddled with ambiguity, but “L-28” were mistakenly printed on the chart, then plaintiff would have been allowed to recover on the grounds that the negligence occurred in the operational stage. Under the Baird logic, which effectively immunizes policy decisions, a policy which, for example, allowed soldiers to conduct target practice in public parks would deny recovery to a child who was accidentally shot by a stray bullet on the theory that there can be no liability. The act complained of merely represents the carrying out according to instructions of a defective policy. In essence, then, there is no difference between negligent implementation of a sound policy and proper implementation of a negligent policy—other than the fact that only in the former instance does plaintiff have a viable cause of action. 44

This distinction is illustrated in a recent Supreme Court case, United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig

43. Id. at 440. The court noted that “[t]his challenge thus goes to the heart of the IACC’s deliberative and judgmental activities in designing and approving the extent of detail to be included in aeronautical sectional charts.” Id. at 441.

44. This absurd result has prompted federal courts to often scrutinize the policy itself to ensure that the act complained of falls within the agency’s own specifications. See, e.g., Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974), which involved a suit against the United States by a woman whose injuries resulted when she orally ingested live virus polio vaccine, causing her to become a permanent paraplegic. An issue before the court was the degree of discretion that the Division of Biologic Standards (DBS) had in interpreting a regulation concerning the release of polio vaccines. The court, in affirming judgment for the injured plaintiff, noted that:

Even were we to concede that discretion was otherwise conferred upon DBS by the regulation, no discretion was conferred to disregard the mandatory regulatory command. In discounting test results that were required to be considered significant, DBS acted outside the scope of the authority conferred by the regulation. The violation of a non-discretionary command takes what otherwise might be characterized as a “discretionary function” outside the scope of the statutory exception.

Id. at 1068-69 (citations omitted).
Airlines). That case stemmed from an airplane fire occurring while the plane was in flight. In one of the two cases before the Court, 124 of the 135 passengers died from asphyxiation or the effects of toxic gases released by the burning plane. Respondents, the airline seeking damages for the destroyed aircraft and the families of the deceased passengers, sued the Civil Aeronautics Agency (predecessor to the FAA) for the negligent certification of the airplane on the theory that it did not satisfy applicable safety regulations.

In holding for the government, the Court looked solely to procedures designed by the FAA to monitor safe manufacture of airplanes. Noting that the FAA does not have the manpower to adequately monitor all aspects of airplane production, the Court gave weight to the FAA's argument that it followed internal procedures by merely "spot-checking" manufacturers. Since the FAA complied with its own procedures, the Court reasoned the activity was discretionary, even though the spot-check program "necessarily took certain calculated risks."

Conspicuously absent from the Court's opinion was any discussion on how dangerous or unreasonable the FAA's internal procedures might have been. Instead, since policy was carried out according to the rules, the government was protected from suit. Under this rationale, it would be simple to justify almost any government action, so long as the action was performed pursuant to policy. In contrast, the same activity performed in contravention of "policy" is negligent and would not be protected by section 2680(a) since it constitutes implementation of policy.

—The Separation of Powers Doctrine

Undoubtedly, one reason that Congress was unwilling to completely abrogate sovereign immunity was to maintain the separation of powers. The concern was that the judicial branch would interfere with the legislative or executive branch in its formulation or execution of governmental policy. Congress clearly did

46. Id. at 2768.
47. Id.
49. See generally Herzog, Liability of the State of New York for "Purely Governmental" Func-
not envision all torts of government employees to fall within the ambit of the discretionary function exception. The legislative history of the FTCA evidences a Congressional intent to protect only that activity which is legislative in nature (such as administrative rulemaking), as well as the implementation of that "legislation":

[The discretionary function exception is] designed to avoid any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity, such as a flood control or irrigation project, where no wrongful act or omission on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, the Federal Trade Commission, the Securities and Exchange Commission, the Foreign Funds Control Office of Treasury, or others. It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like.50

Some courts began to show concern that, discretionary or not, many decisions made by government officials are often not legislative in nature and should not therefore be protected. A series of cases originating in the District of Columbia illustrates this progression.51

In Calomeris v. District of Columbia,52 decided only two years after Dalehite, plaintiff, administratrix of her husband's estate, sued the District of Columbia General Hospital alleging her husband died as a result of negligent medical treatment. The court of

50. Tort Claims Hearings on H.R. 5373 and H.R. 6463 Before the Comm. on the Judiciary, 77th Cong. 2d Sess. 33 (1942). See also Swanson v. United States, 229 F. Supp. 217, 220 (N.D. Cal. 1964), where it was held that "[t]he planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy."
51. Id. at 268. The FTCA is not applicable to the District of Columbia. See Douffas v. Johnson, 83 F. Supp 644 (D.C. Cir. 1949). Traditionally, immunity in that jurisdiction applied to "governmental" as opposed to "proprietary" functions. Later courts, however, have begun to replace the governmental/proprietary standard with the discretionary/ministerial one. See, e.g., Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964); Urow v. District of Columbia, 316 F.2d 351 (D.C. Cir. 1963); Spencer v. General Hosp., 425 F.2d 479 (D.C. Cir. 1969).
52. 226 F.2d 266 (D.C. Cir. 1955).
appeals affirmed dismissal of the complaint on the grounds that medical care for the indigent sick is a governmental function protected by the doctrine of sovereign immunity.

In sharp contrast to Calomeris is Elgin v. District of Columbia, decided in 1964. Plaintiff, a minor, fell into a hole adjacent to a school building while engaged in a required recreation program on the school playground. The complaint alleged negligence in failure to provide a rail or other safeguard around the depressed area. In reversing the district court’s dismissal of the complaint, the court of appeals stressed that to be deemed “governmental,” it must be shown that judicial redress would jeopardize the quality and efficiency of government itself.

Almost from the very moment of creation by the courts of an immunity initially resting upon the ancient dogma that the king can do no wrong, the judges have been alert to insist that the king be acting as such at the time injury occurs. . . . The capacity and the incentive to govern effectively are arguably not enhanced by the prospect of being sued by those citizens who may be adversely affected by the choice eventually made. . . . By the same token, in those areas of governmental action where the reason for the rule does not apply, the rule itself is disregarded. . . .

We are not persuaded, however, that the function of repairing broken guardrails imposes upon the District determinations of such delicacy and difficulty that its ability to furnish public education will be ponderably impaired by liability for neglect in failing to make such repairs.

In 1969, the Court of Appeals for the District of Columbia Circuit decided Spencer v. General Hospital. Spencer presented a situation nearly identical to Calomeris, which the District relied on as controlling. Nevertheless, the court rejected the District’s argument and held that Elgin overruled Calomeris since there was no distinction between the operation of hospitals and schools with respect to the imposition of tort liability. In a concurring opinion, Judges Wright and Bazelon criticized the protection of activities solely on the grounds that they are labelled “governmental” in nature. Noting that plaintiff’s claim was for medical malpractice, they continued that “[a]t this is not to say that the performance of an operation does not involve judgment and discretion. The point is that medical, not governmental, judgment and discretion are in-

53. 337 F.2d 152 (D.C. Cir. 1964).
54. Id. at 154, 156-57.
55. 425 F.2d 479 (D.C. Cir. 1969).
56. Id. at 482.
The concurrence concluded that while it is not a tort for government to govern, I would not want to take the flat position that the government is immune from paying for the consequences of the adoption of every policy, however neglectful that policy might be of the bodily security or the property of those affected by it.

Finally, in a 1975 case, *Downs v. United States*, the Court of Appeals for the Sixth Circuit reiterated the notion that the sovereign immunity doctrine was not designed to sweep all governmental activity under its protective umbrella. That case concerned the hijacking of a small passenger airplane in Nashville, Tennessee. The hijacker ordered the plane to be flown to the Bahamas. When the plane landed in Jacksonville, Florida for fuel, FBI agents refused to allow the refueling, even though the pilot had signalled that the hijacker was armed and dangerous. After the hijacker allowed the co-pilot and an associate to deplane to bargain for fuel, the FBI shot at the airplane's engines and tires to prevent takeoff. The attack provoked the hijacker to shoot and kill his wife, the pilot and himself. Survivors of the victims sued the United States, alleging negligence in the FBI's handling of the hijack attempt. The government relied on the discretionary function exception, contending that the FBI agent in charge had the "discretion to make an on-the-scene judgment."

The *Downs* court, conceding that the situation called for the use of discretion and judgment, nevertheless rejected the government's argument. Judge Celebrezze, writing for a unanimous court, noted that the discretionary function exception immunizes government employees only when they are formulating policy.

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57. *Id.* at 489 (Wright, J., concurring) (emphasis in original).
58. *Id.* at 489-90 (quoting Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)) (citations omitted).
59. 522 F.2d 990 (6th Cir. 1975).
60. *Id.* at 994. The court noted that the pilot also signalled that in his opinion the agent's intervention would prove disastrous. *Id.*
61. *Id.*
62. *Id.* at 995.
63. *Id.* at 996. In dictum, Celebrezze also asserted that the first part of 28 U.S.C. § 2680(a) immunizes the government from liability for the actions of employees who exercise due care in implementing policy as set forth in a statute or regulation. *Id.*

At first blush, this seems to indicate a great disparity between activity which is conducted pursuant to statute (which is immunized even if it implements policy) and activity which is conducted without statutory authority (immunized only if policy is being formulated). The added requirement, however, that activity conducted pursuant to statute must
Since the FBI agents were not involved in formulating policy, their judgments did not rise to " 'the nature and quality' which Congress intended to put beyond judicial review." The court further agreed with one commentator who asserted that only an administrator's exercise of a quasi-legislative or quasi-judicial function should be protected under the discretionary function exception.

2. Federal release cases. In Fair v. United States, plaintiffs sued the federal government for the death of three persons killed by an Air Force captain after he had been released from a government hospital. The captain had previously threatened the life of one of the victims, and this was known by the base commander and the Air Force doctors. The decision to release was made despite knowledge on the part of the Air Force doctors treating the patient that he had previously threatened the decedent's life. Without elaboration, the court held that the discretion vested in the Air Force medical staff was at the operational level, thereby rendering defendant liable for its negligence.

be exercised with due care annihilates the distinction. Since "with due care" implies non-negligently, negligent implementation of a statute, such as a negligent decision to release an inmate, does not appear to be protected. Conversely, if the decision is made without due care (i.e. non-negligently) there is no need for governmental immunity, since the abrogation of immunity does not absolve the plaintiffs from proving negligence.

64. Id. at 997 (citing Smith v. United States, 375 F.2d 243, 246 (5th Cir.), cert. denied, 389 U.S. 841 (1967)).
65. Id. (citing Note, supra note 27, at 896).
66. 234 F.2d 288 (5th Cir. 1956).
67. Id. at 290. The patient's target was a student nurse, Miss Cooper. Along with Miss Cooper, two bodyguards hired to protect her against the patient were also killed.
68. Id. at 295. See also Underwood v. United States, 356 F.2d 92 (5th Cir. 1966), which involved the shooting death of the former wife of an Air Force pilot. In Underwood, the Air Force had been notified that one of its airmen, Edward Dunn, had assaulted his former wife with a crowbar. A colonel's observation that Dunn "was practically on the edge of a nervous breakdown," id. at 95, led to Dunn's hospitalization for psychiatric care. While Dunn was hospitalized, Mrs. Dunn visited the Air Force base and told a sergeant that she was frightened for her life since Dunn had previously attacked her and also followed her on occasion. The sergeant, who knew Dunn, concluded that Dunn had the potential for inflicting harm on his former wife. This information was relayed to Dunn's psychiatrist, although a written note was not made and the psychiatrist was transferred off the base. Dunn was subsequently released while under the care of a second psychiatrist who was never informed of Mrs. Dunn's conversation with the Air Force sergeant or of the sergeant's observations. Shortly after his release, Dunn, who was not under any restrictions, checked out a pistol and shot his former wife to death.

The government's reliance on the discretionary function exception was disposed of in quick fashion. The court merely noted that "[t]he negligence of [the first psychiatrist] in
More recently, in *Rieser v. District of Columbia*, action was brought by the father of a woman who was raped and strangled by Thomas Whalen, a parolee. Whalen had a history of prior violent crimes against women and, at the time of the incidents giving rise to the case, was a prime suspect in another rape and double murder which occurred in the apartment complex where he worked as a maintenance man. Whalen was forced to leave his job at the complex because of the murder investigation. Although Whalen's parole officer was aware of Whalen's record as well as the investigation into the rape-murders, he recommended the parolee for maintenance work at another apartment complex. The parole officer did not notify Whalen's employer of the prior murder or rape offenses or his status as a suspect in the murders under investigation. After learning that Whalen was a suspect in a third murder involving a sixteen-year-old girl living at his former place of employment, his parole officer recommended revocation of Whalen's parole. The parole board declined in light of the absence of "hard facts" of Whalen's guilt, instead ordering only that the parole officer "supervise [Whalen] closely." Shortly thereafter, Whalen entered Rebecca Rieser's room, where he raped and strangled her.

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70. *Rieser*, 463 F.2d at 464-65. The court noted that, at age 13, the parolee, Thomas Whalen, killed an elderly woman whom he accused of "exciting him sexually." Six years later, while on conditional release from a state hospital for the insane, Whalen assaulted a female cab driver and received a criminal sentence of 6 to 18 years. After serving 9 years, Whalen was again released, this time on parole. *Id.* at 464-65.

71. *Id.* at 464-68. After Whalen's parole in 1971, he was employed as a maintenance worker for an apartment complex. Because of his prior history of assaults on women, and because of his refusal to take a polygraph test in connection with the incident; Whalen was believed to be involved in the rape-murder of a woman at the complex where he worked, as well as the murder of her small child. Although he was forced to leave his maintenance job at the complex, he was hired by another apartment complex in a similar capacity. It was there that he raped and murdered plaintiff's deceased.

72. *Id.* The parole officer referred Whalen to the Employment Counseling Service. On the referral form, which required the parole officer to indicate the parolee's adult criminal record, the officer indicated that Whalen had been convicted of robbery but failed to note the attempted rape conviction.

73. *Id.* at 466.
Approving of the distinction between discretionary and ministerial acts, the Rieser court quickly determined that the activities in question were performed on the ministerial level, and that therefore the suit was not barred by sovereign immunity:

Whatever the problems of linedrawing potentially raised by [the discretionary-ministerial distinction], we conclude that [the parole officer's] acts in the present case were "ministerial." [He] was not involved in the formulation of policy, but in the execution of policy as it affected an individual parolee. He was under a clear duty . . . to disclose Whalen's full adult record. . . . [He] was similarly under a duty to provide adequate supervision . . . .

In another recent case, Payton v. United States, a murder victim's family brought suit under the FTCA alleging that a federal prisoner was released from custody in disregard of medical reports evaluating him as a homicidal psychotic. In 1966, the prisoner, Thomas Whisenhant, an Air Force member, was sentenced to twenty years in federal prison for assault with attempt to murder a female member of the Air Force. The court noted that while imprisoned for this crime, "Whisenhant manifested his continued homicidal tendencies" by threatening the only female he had contact with, an employee of the penitentiary. Whisenhant was diagnosed as psychotic and described as suffering from paranoid schizophrenia. Nevertheless, his sentence was reduced by one-half and he was paroled in 1973. Shortly after his release, Whisenhant confessed to the brutal murder and mutilation of three females.

In deciding whether or not the decision to release Whisenhant was discretionary for purposes of section 2680(a), a panel of the Court of Appeals for the Fifth Circuit acknowledged

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74. Id. at 475.
75. 636 F.2d 132 (1981), rev'd in part on rehearing, 679 F.2d 475 (5th Cir. 1982).
76. Id. at 134.
77. Id.
78. Id.
79. Id. Within two years of his parole, Whisenhant beat and murdered a woman in Mobile, Alabama. Five months later, he kidnapped and murdered another woman from Mobile, returning the next day to mutilate the body. The court noted that there were nine stab wounds just above the heart area, the abdomen was slashed open, the thighs were slashed through the entire length, the throat was cut, the larynx was severed, the vagina was cut by two lateral incisions—each six inches long, the labia was severed from the pubis, and both breasts were fully amputated. Six months after this second attack, Whisenhant kidnapped, raped and murdered appellants' wife/mother, returning to mutilate her body in a manner similar to that described above. Id. at 134 n.2.
the difficulties in applying the planning/operational distinction and asserted that "we must look deeper into the purposes expressed by the FTCA to extract the sense of the matter and upon this attempt to build a workable standard." The court concluded that defining what is discretionary requires application of a balancing test which considers the nature of the loss imposed by the government on the injured party, the nature and quality of the governmental activity causing the injury, and the court's capacity for deciding the case.

80. Id. at 138. The court noted that "the crux of the concept embodied in the discretionary function exemption is that of the separation of powers." Id. at 143. See also supra note 48 and accompanying text.

81. The court noted that "[t]he more serious, in terms of physical or mental impairment, and isolated the loss the closer the question becomes as to whether the individual can be expected to absorb the loss as incident to an acceptable social or political risk of governmental activities." Payton, 636 F.2d at 144.

82. The court, citing Dalehite, indicated that it must be "determine[d] if the allegations attack the rules formulated by the agency or merely their application. . . . [C]onsiderations . . . relevant at this juncture [are] whether this activity is one traditionally or constitutionally exercised by a coordinate branch of government or one fraught with political or policy overtones such as the feasibility or practicality of a program . . . ." Id.

83. The court further observed that it "should consider whether the vehicle of a tort suit provides the relevant standard of care, be it professional or reasonableness, for the evaluation of the governmental decision." Id. at 145.

While the court's balancing test seems to stray far from the more traditional planning/operational test, the court later notes that

[i]t is important to note . . . that the allegations attack only the application of the Parole Board's guidelines to Whisenhant and not the guidelines themselves. The exercise of policy-making discretion by the Board occurred in formulating and implementing the guideline criteria and matrix . . . . Such "policy" decisions . . . are probably exempt under Dalehite . . . . [But], the choices involved in applying the guidelines and releasing a particular person[,] [w]hether characterized as "operational," "day-to-day" or by some other label, . . . do not achieve the status of a basic policy evaluation and decision. Such decisions, if negligent, are not protected by § 2680(a). Id. at 146-47 (emphasis added).

This passage appears to reduce the impact of the balancing test described in the text. While the balancing test purports to aid in determining what activity is discretionary, the above passage suggests that this analysis applies only to activity which has traditionally been designated as operational or ministerial, i.e., application as opposed to formulation of policy. See text accompanying note 72. If taken literally, the Court of Appeals in Payton appears to require a two-pronged test: First, a court would have to determine whether or not the decision involved policy. Determination of this question would appear to require application of the traditional planning/operational test along with its concomitant inadequacies. If policy is involved, immunity results. If not, the second prong requires application of the court's balancing test, which requires consideration of the nature of the loss imposed on the injured party, the government's interest, and the court's capacity for deciding the case. Surely the Court of Appeals did not wish to mandate this approach, which would only
On appeal to the full court of appeals, the court reversed the decision of the panel. Ignoring the balancing test applied by the panel, the full court looked no further than the statute governing parole releases. That statute states in part that if there is a "reasonable probability" that the prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Parole Board the release "is not incompatible with the welfare of society" then the Board may in its discretion authorize the prisoner's release. The court rejected plaintiff's argument that since the statute required a determination that the prisoner is a "good risk" before it may, within its discretion, release him, this first determination is a non-discretionary one. Instead, the court held that:

The decision to release the prisoner on parole must necessarily entail an evaluation by the parole board of the prisoner's records. Thus, the parole board's final decision that the prisoner is worthy to live in society as a free person is not different from the decision to release him on parole. The statute clearly describes this as a discretionary function.

3. Critique of federal cases. In struggling to devise a suitable formula for analyzing cases in which the government alleges immunity, the federal courts have focused their attention on the distinction between planning activity as opposed to mere implementation of that planning. The result has been creation of the planning/operational and discretionary/ministerial standards. Criticism of these standards stems from three identifiable problems inherent in these distinctions. First, as Justice Goldberg indicated in Smith, difficult cases render application of this standard almost impossible. This situation was illustrated in Baird and S.A. Empresa, where the line between policy and its implementation becomes virtually imperceptible. In those cases, the courts held for the government on the ground that any negligence consisted in the plan or procedures, but not in the imple-
mentation of these procedures. But there is no distinction other than in the level the negligent act occurred; in both cases the result is exactly the same. The courts' logic brings to mind the oft-cited war crimes defense that "I was only carrying out orders," since, under this rationale, one will be protected for carrying out orders according to the rules, regardless of the "orders" themselves.

Secondly, characterizing a decision as policy or as the carrying out of that policy lends itself to vast judicial discretion. Since almost any decision can be made to look like policy, or, alternatively, its implementation, judges can draw lines virtually where they please. For instance, a sound argument could have been made in Baird that the policy decision amounted only to the decision to publish the charts, while the implementation of that policy consisted in the actual decisions as to which symbols and specifications were to be used in the charts. This type of arbitrary judicial line-drawing would explain the trend away from Dalehite, as evidenced by Rayonier and Hunsucker, as plaintiff-oriented courts began to label activities formerly falling under the rubric discretionary as operational.91

Finally, later courts have implicitly recognized that even when policy and planning are involved, holding the government liable for the activity in question often would not hinder the federal government's ability to govern, as opposed for example, to a policy decision to subsidize farmers or to reinstate the draft.92 This position was emphasized in Elgin and Spencer, which held that the mere labelling of an activity as governmental is insufficient to trigger sovereign immunity. Only when judicial interference would thwart the government's ability to govern effectively does the activity benefit from immunity. Alluding to the target practice hypothetical discussed earlier,93 liability would be proper since judicial "interference" in allowing a victim in that situation to recover would make no statement on the propriety of encouraging

91. Presumably, if this line were pushed back far enough, the discretionary exception would be effectively thwarted as only the actual plans or ideas themselves would amount to policy. See Cerrone & Hardy, supra note 22, at 1265.
93. See supra text accompanying notes 43-44.
soldiers to target practice, although it does require the government to safely conduct these exercises. The critical question that must be asked is whether liability would threaten executive or legislative independence or whether the activity in question instead more closely resembles a common-law tort.

The federal release cases present a good illustration of the inadequacy of the present standards for applying the discretionary function exception and sovereign immunity in general. In both Fair and Rieser, the courts had no difficulty in making the determination that the release decisions were non-discretionary. Searching for something on which to base their opinion, the courts in these cases focused on activity which they asserted represented the execution rather than the formulation of policy.\(^\text{94}\) In Rieser, for example, the court of appeals noted that liability was largely predicated on "[the parole officer's] actions in filling out the referral form,\(^\text{95}\) and in determining precisely when and how to speak to Whalen and his supervisors . . . ."\(^\text{96}\) The court, however, offered no clues as to why the parole officer's decision concerning how to "speak to" Whalen and his supervisors was not in fact any more discretionary than in authorizing the release of a prisoner.

Moreover, cases like Rieser provide no guidelines for future courts deciding similar cases. Although the facts of Payton were similar to those of Rieser, the court in the former case ultimately held that the government's activity was discretionary. Relying on a statute which stated the parole board may in its discretion authorize the release of prisoners,\(^\text{97}\) the court there held the release therefore to be within the discretionary function exception. But, as was noted in Smith, all decisionmaking involves discretion.\(^\text{98}\) "Discretion" as the word is used in the statute appears to have no relation to the "discretion" required for activity to fall within section 2680(a). For activity to be discretionary as the word is used in the latter sense, the courts usually have required the activity to stem from policy or planning decisions. Following the logic of Payton, even ministerial acts which may or may not be performed by government employees (i.e. it is within the employee's discretion

\(^\text{94}\) See, e.g., supra text accompanying notes 66-74.
\(^\text{95}\) See supra note 72.
\(^\text{96}\) Rieser, 563 F.2d at 475.
\(^\text{97}\) See supra text accompanying note 85.
\(^\text{98}\) See supra text accompanying note 37.
to perform these acts) would fall under the rubric "discretionary."

The result of the confusion in discerning discretionary from non-discretionary activity has forced courts into linguistic gymnastics (such as that described above in *Payton*) or into scrutinizing the facts of each case in search of some governmental activity which appears to be ministerial in nature. In response to this open-ended approach, plaintiffs have been forced to allege in their complaint negligence at every stage of release, including improper psychiatric treatment while an inmate,99 improper release,100 failure to put appropriate constraints on the release,101 failure to revoke the release,102 inadequate supervision of the released inmate,103 and failure to warn potential victims that the inmate has been released.104 The list is by no means exhaustive. Liability is frequently pinned on governmental action outside the decision to release, since the release decision is often cloaked with immunity directly granted in the statute.105 But relying on these alternate routes to recovery masks the fact that often the decision to release is negligently made.

Finally, as will be more fully discussed later, the release cases fail to take account of the very purpose of immunity— maintenance of the separation of powers. The prospect of releasing inmates clearly does not present questions of "such delicacy and difficulty" that the government's ability to furnish these services (e.g., prisons and mental institutions) would be impaired by judicially-imposed liability.106

99. See, e.g., *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982).
100. See, e.g., *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956).
101. See, e.g., *Underwood v. United States*, 356 F.2d 92, 94 (5th Cir. 1966) (claim based on Air Force allowing disturbed airman to return to duty and have access to .45 caliber pistol).
104. See infra note 117.
105. See infra text accompanying notes 190-91.
106. See text accompanying note 54.
B. The Federal Standard Revisited: Recent State Consideration of Release Cases

In *Cairl v. State*,107 plaintiffs sued the state of Minnesota for injuries and damage caused by Tom Connolly while visiting his family on holiday leave from the Minnesota Learning Center at Brainerd State Hospital. Connolly bordered on mental retardation with an I.Q. of 57, and in 1976 at age 15 was declared a delinquent and placed in a foster home.108 During his stay there, he was suspected of starting three fires.109 Soon thereafter, in May 1977, Connolly ran away and was found at the scene of another fire.110 Pursuant to an order of the Juvenile Court, he was placed in an adolescent treatment unit, where his psychiatrist noted that Connolly's propensity for fires "does remain a concern for the next several years."111 In September of that year, he was admitted to the Minnesota Learning Center, which is an open door facility designed to provide treatment and education to retarded youths with behavioral problems.112 After being suspected of starting two fires at the Center, his condition became slated for treatment. Nevertheless, prior to the commencement of treatment, Connolly was granted a temporary holiday pass to return to his mother's apartment, consistent with the Center's goal of encouraging home visits.113 During the visit, Connolly set fire to a couch in the apartment, killing his sister and destroying the apartment.114

Plaintiffs115 sued the state116 alleging negligence in releasing Connolly in light of the state's awareness of Connolly's dangerous

107. 323 N.W.2d 20 (Minn. 1982).
108. Id. at 21.
109. The court stated that "[a]lthough [Connolly] was never adjudicated as having been responsible, there is little doubt but that he was involved." Id. at 22.
110. Id. at 22. Arson charges were brought but eventually dismissed for lack of evidence.
111. Id.
112. Id. The court noted that "the Center is committed to treating its students by the least restrictive means and encourages home visits." Id. For a fuller discussion on "open door" facilities, see Note, supra note 4.
113. Id.
114. Id.
115. The two plaintiffs were Mrs. Connolly and the landlord of the destroyed building.
116. Plaintiffs also sued the County of Ramsay Welfare Department and certain state and city employees. This Comment will only focus on the potential liability of the state.
tendencies towards setting fires. The Minnesota Supreme Court, in denying recovery, first declared that the decision to release Connolly was protected by the doctrine of sovereign immunity, which is triggered when an official of the state acts within his discretionary capacity in performing his duties. After noting that the plaintiffs' claim for relief focused on the decision to release, and not the negligent implementation of that decision, the court stated that the decision to release "involves the balancing of complex and competing factors comprising 'a discretionary choice between alternatives' . . . . Moreover, the decision is an im-

117. As a second cause of action, plaintiffs asserted that the state was negligent in failing to warn them of the danger Connolly presented. The court, noting this was a case of first impression in Minnesota, looked to California law. The case relied on was Thompson v. County of Alameda, 27 Cal.3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980). There, a juvenile offender with "latent, extremely dangerous and violent propensities regarding young children" had expressed an intention to kill one of the neighborhood children if he was released, not specifying anyone in particular. Within 24 hours of his furlough he killed a small boy. Nevertheless, the California Supreme Court affirmed the dismissal of plaintiff's claim on the theory that the decedent was not a specifically identifiable victim. Though the killer had expressed an intention to do so, these threats were "nonspecific threats of harm directed at nonspecific victims." Id. at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77 (emphasis original).

In denying any liability for the state in Cairl, the Supreme Court of Minnesota focused on Thompson, and, consequently, held that

if a duty to warn exists, it does so only when specific threats are made against specific victims. . . . Tom Connolly did not pose a danger to plaintiffs different from the danger he posed to any member of the public with whom he might be in contact when seized with the urge to start a fire.


118. Cairl, 323 N.W.2d at 23-24.

119. Id. at 23 n.1. This distinction may be illustrated by the following example: Assume the government decides to fly a dangerous radioactive cargo across country on a certain day even though the weather conditions are such that a prudent individual would not take the risk. It then proceeds to hire a pilot with a history of alcoholism and who has been known to drink prior to flying. Assume further that the plane crashes because the pilot, in a state of inebriation, is unable to control it, and people on the ground are injured by the fallout. Presumably, the Minnesota court would hold that the decision to go ahead with the flight, despite the inclement weather conditions, is a discretionary one and thus immune from attack, while the implementation of that decision, in hiring an incompetent pilot, does not benefit from the same protection. This distinction is not nearly always so clear. For example, how would the court rule if, in the example cited above, the government adhered to a policy of hiring alcoholic pilots? Could it be argued that the state would be immune from suit notwithstanding this policy because it represents a judgment of discretion? See supra text accompanying notes 38-47.
portant element in planning Tom Connolly's overall treatment program and is thus indicative of 'decision-making on the planning level of conduct.'"\textsuperscript{120}

Similarly, in \textit{Sherrill v. Wilson},\textsuperscript{121} the Missouri Supreme Court came to the same result as the Minnesota Supreme Court in \textit{Cairl}. In \textit{Sherrill}, Gregory Corley, who had been involuntarily committed to a state mental hospital, was released on a two day pass. Corley did not return from his leave, and shortly thereafter shot plaintiff's son in the head eleven times. The court disposed of the claims against the state in merely one sentence, noting that the state is protected from liability by the doctrine of sovereign immunity.\textsuperscript{122} Nevertheless, in deciding that recovery against hospital supervisors and physicians must similarly be denied, the court noted that:

Analogies abound. Judges are immune from civil liability for damages. . . . The reason . . . is one of policy. Every obstacle to a judicial officer's detached and unencumbered judgment must be removed. There must be protection not only against what might be proved but against what might be claimed. Decisions about temporary or permanent release of involuntary detainees should be likewise unencumbered and unfettered, at least as against negligence claims.\textsuperscript{123}

Not all states have come to the same result. In \textit{Smith v. Dep't of Corrections},\textsuperscript{124} the District Court of Appeals of Florida held that sovereign immunity is not applicable where a corrections department employee causes a prisoner to be reclassified to a minimum custody status. In 1973 the prisoner, Prince, was convicted of first degree murder. In 1974, Prince was classified as a minimum custody inmate and transferred to a vocational center. He escaped on the day of the transfer, and was recaptured shortly thereafter suffering from unexplained gunshot wounds.\textsuperscript{125} In 1976 Prince was nevertheless reclassified to minimum custody status. In 1978 he again escaped, and in the course of an armed robbery shot plaintiff. The court, applying the planning/operational distinction,\textsuperscript{126} held that the discretion exercised by prison officials was on an op-

\textsuperscript{120} \textit{Id.} at 23-24 (emphasis added).
\textsuperscript{121} 653 S.W.2d 661 (Mo. 1983) (en banc).
\textsuperscript{122} \textit{Id.} at 669.
\textsuperscript{123} \textit{Id.} at 665.
\textsuperscript{124} 432 So.2d 1338 (Fla. Dist. Ct. App. 1983).
\textsuperscript{125} \textit{Id.} at 1339.
\textsuperscript{126} \textit{Id.} at 1340.
erational rather than a planning level, and concluded that there is no sovereign immunity when an inmate is negligently given preferential treatment and placed in inadequately supervised confinement.\textsuperscript{127}

The state cases present two points of concern. First, with the exception of \textit{Smith} (which appears to be in the minority) the trend of recent cases is to follow the federal scheme of distinguishing discretionary from ministerial or operational activity, and to deny recovery on the theory that decisions made by parole board members or hospital supervisors are discretionary and consequently immune from suit.

Perhaps more importantly, these cases demonstrate the simplistic analysis used in applying the federal test. In \textit{Sherrill}, for example, the court wastes only one sentence in asserting that sovereign immunity applies.\textsuperscript{128} There is no discussion as to why Corley was allowed the leave of absence in light of his history of violent crimes and mental illness, whether those who authorized the release knew of Corley’s propensities or the extent of his illness, or how he behaved on previous leaves of absence. These questions are obscured in the court’s search for some “discretion” in the decisionmaking process, which, if found, suffices to quash action against the state regardless of how incompetent the decision to release may have been.

Focusing merely on the “discretion” of administrators rather than the circumstances of the release appears even more absurd when it becomes clear that the distinction between discretionary and ministerial is without meaning, as was demonstrated by the difficulty of the federal courts in applying that standard. These cases show that the court can easily find an action to be either within or without an administrator’s discretion. The holding in \textit{Smith}, for example, is entirely at odds with that in \textit{Cairl} and \textit{Sherrill}. How can there be any more or less discretion involved in making a decision to release an inmate on temporary furlough than in a decision to reclassify an inmate to minimum custody status?

\textsuperscript{127} Id.

\textsuperscript{128} See \textit{supra} text accompanying note 122.
II. THE NEW YORK PERSPECTIVE

Similar to the Federal Tort Claims Act, New York has adopted the Court of Claims Act section 8, which reads:

The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations . . . .

Omitted from this Act is a section analogous to section 2680(a) (the discretionary function exception) in the federal act. This omission has led one commentator to observe that New York has waived sovereign immunity more completely than any other jurisdiction, including the federal government.

Despite such apparently broad waiver, in Weiss v. Fote, the seminal case regarding sovereign immunity in New York, plaintiffs nevertheless were denied recovery on the grounds that the alleged negligence resulted from a discretionary act of public officials. The plaintiff in that case was injured while driving through an intersection which had an insufficient "clearance interval" between the light turning red in one lane and green in the oncoming lane. The clearance interval was established by a Board of Safety which made extensive studies of traffic conditions. The court held that "courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits."

Ostensibly, then, New York appeared to adopt the federal distinction of planning versus operational levels of government. But at the conclusion of the Weiss opinion the court seemed to retreat from this position by noting that "[l]iability . . . may only be predicated on proof that the plan either was evolved without ade-

129. N.Y. COURT OF CLAIMS ACT § 8 (Mckinney 1963).
132. Id. at 583, 167 N.E.2d at 64, 200 N.Y.S.2d at 411.
133. Id.
134. Id. at 588, 167 N.E.2d at 67, 200 N.Y.S.2d at 415.
This qualification is perplexing and appears facially inconsistent with the court's refusal to review governmental determinations of policy. If this statement is taken literally, it is unclear what types of decisions remain protected. The court's caveat on the immunity rule smacks of traditional tort notions, and foreshadows future courts' willingness to curtail the immunity doctrine when traditional elements of negligence have been satisfied.135

A. The Aftermath of Weiss—Bifurcation of a Doctrine

1. Sovereign immunity in New York before and after Weiss. It has been held that section 8 of the Court of Claims Act has not served to abolish all types of immunity in New York. Judicial immunity, for example, has remained a firmly rooted bar to recovery when the judge is acting within the performance of his official duties.136 Similarly, New York courts have held that section 8 does not apply to decisions which are "governmental" in nature.137 In Barrett v. State,138 decided in 1917, plaintiff, a landowner, sued the state for damages incurred by a legislative act prohibiting the hunting of beaver and appropriating money for the purchase and restocking of beaver.139 Claimants owned land adjacent to the restocked area, and suffered financial loss when beavers, which are by nature destructive of certain types of trees, felled hundreds of popular trees on plaintiff's land. The Court of Appeals denied the claim on the grounds that the legislature, in protecting the beaver, was exercising a governmental function for which it could not be held accountable:

Wherever protection [of wildlife] is accorded harm may be done to the individual. . . . In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the bene-

135. Id. at 589, 167 N.E.2d at 68, 200 N.Y.S.2d at 416 (emphasis added).
136. See infra text accompanying notes 150-73.
138. See Herzog, supra note 130.
140. The court noted that by the year 1900, the beaver was practically exterminated in New York. It was for this reason the protective legislation was passed. Id. at 425, 116 N.E. at 100.
fit of the public at large and no one can complain of the incidental injuries that may result.\textsuperscript{141}

In later cases, the realm of "governmental" functions was expanded. In one case,\textsuperscript{142} the Third Department, relying on Barrett, held that injuries sustained in a car accident with a New York Guardsman were not actionable against the state on the grounds that legislative dispositions of policy are not a proper subject for suits against the government.

Some New York courts have looked to Weiss as confirmation of this expanded interpretation. In Bellows v. State,\textsuperscript{143} for example, plaintiff claimed that his extended stint in prison resulted from a failure of the state to provide him with a sufficient amount of medical and psychiatric attention and treatment. Although noting that decisions concerning the frequency and amount of psychiatric care to furnish prisoners are administrative in nature, the court, citing Weiss, nevertheless rejected plaintiff's claim on the ground that these types of governmental decisions are sovereign in character. In determining whether or not an activity is governmental, other New York courts have looked to the familiar discretionary/ministerial distinction\textsuperscript{144} and have immunized governmental activity which involves discretion or planning.

2. Sidestepping the problem of immunity—the separation of powers notion and emergence of a tort standard of care. While cases citing Weiss to support the proposition that activity by the state of a governmental nature will be immune from review have the effect of precluding liability irrespective of negligence in the decisionmaking,\textsuperscript{145} other cases have posited a less restrictive interpretation of

\textsuperscript{141} Id at 427, 116 N.E. at 100.
\textsuperscript{142} Newiadony v. State, 276 A.D. 59, 93 N.Y.S.2d 24 (3d Dep't 1949).
\textsuperscript{143} 37 A.D.2d 342, 325 N.Y.S.2d 225 (4th Dep't 1971).
\textsuperscript{144} See, e.g., Rottkamp v. Young, 21 A.D.2d 373, 375, 249 N.Y.S.2d 330, 333 (2d Dep't 1964), aff'd, 15 N.Y.2d 831, 866, 257 N.Y.S.2d 944 (1966) (discretionary/ministerial test applied); Hudleasco, Inc. v. State, 90 Misc. 2d 1057, 396 N.Y.S.2d 1002 (1977), aff'd, 63 A.D.2d 1042, 405 N.Y.S.2d 784 (3d Dep't 1978) (State's negligence arose out of ministerial error, not discretionary act); Crisafulli v. State, 37 A.D.2d 688, 323 N.Y.S.2d 320 (4th Dep't 1971) (Conservation Department has discretionary power to order removal of beaver dams, but once removal is ordered failure to so remove the dams is a ministerial act); Southworth v. State, 62 A.D.2d 731, 740, 405 N.Y.S.2d 548, 553 (4th Dep't 1978), aff'd, 47 N.Y.2d 874, 392 N.Y.S.2d 1254, 419 N.Y.S.2d 71 (1979) ("State has retained its immunity in areas involving the exercise of expert judgment in the course of governmental planning for the public safety").
\textsuperscript{145} See supra notes 141-42 and accompanying text.
Weiss. In *Niagara Frontier Transit System v. State*, plaintiff sued the state for indemnification of payments made to a woman injured by one of plaintiff's buses. Plaintiff's claim asserted that the state's decision to locate the bus terminal where the injury occurred was negligently made and was the cause of this injury. Although liability was denied, the court cited the Weiss caveat and held that "where it can be shown that a duly executed highway plan 'either was evolved without adequate study or lacked reasonable basis,' liability may attach where injury arises out of the operation of such a plan."

Although *Niagara Frontier* appears consistent with Weiss, it is hard to reconcile this case with those that cite Weiss to support an analysis based on the planning/operational or the discretionary/ministerial distinctions. In the latter cases, judicial inquiry ends upon the determination that the decision in question was policy-oriented; in *Niagara Frontier*, however, the state must hurdle a second inquiry: namely, was that decision properly made (i.e. was there adequate study and reasonable basis for the decision)? While this second inquiry might not mandate recovery even upon a showing of negligence, it does signal a shift away from complete immunity and towards a more qualified immunity.

Other cases have interpreted Weiss as conflicting even more directly with the doctrine of immunity. In *Poysa v. State*, the plaintiffs sought damages for injuries resulting from the state's negligent design and reconstruction of a highway. According to design plans, light stone was to be placed on top of bedrock to form the shoulder of the highway. Although the state was advised by the general contractor that this would not hold, the warning was ignored. After a heavy rain the shoulder eroded and plaintiffs' property was inundated with water and debris.
The state argued that liability was barred under Weiss. In rejecting this argument, and allowing recovery for plaintiff, the court noted that:

The holding in Weiss . . . has generated some confusion. Although the decision appeared to be premised on the doctrine of governmental immunity, the court added the caveat that liability could be found where it is demonstrated that a duly executed highway design plan was evolved without adequate study or lacked a reasonable basis. Thus, in a practical sense, the standard enunciated was no different than the reasonable man standard applied to professional malpractice in the private sector.

Similarly, in Drake v. State plaintiff sued for injuries resulting from gunshot wounds sustained while driving through a campsite occupied by a group of Mohawk Indians calling themselves the “Warrior Society.” The Indians had earlier taken over the campsite by force and claimed possession in what appeared to be an act of war. Armed patrols were maintained and trespassers were physically ousted. Gunfire ensued on at least one occasion. Although the state was aware of these incidents, little action was taken. Plaintiff, a nine-year-old girl being driven through the campsite by her parents (who were unaware of the takeover) was shot twice in the back, one bullet lodging in her heart.

The court noted the general rule that “the State, acting in its governmental capacity, cannot be cast in damages for its failure to furnish police protection to a particular individual.” The court

154. Id.
155. Id. (emphasis added).
156. 97 Misc. 2d 1015, 416 N.Y.S.2d 734 (Ct. Cl. 1979).
157. The court noted that “[b]unkers and foxholes were placed at various locations to the west of the road. Armed patrols were maintained throughout the site . . . . [T]he occupied lands resembled an armed encampment.” Id. at 1017, 416 N.Y.S.2d at 736.
158. Id. at 1017-18, 416 N.Y.S.2d at 736.
159. Id. at 1018, 416 N.Y.S.2d at 736-37.
160. The court noted that the state “merely stepped up patrols on the roadway, investigated complaints without entering the campsite and gathered information from individuals in the area.” Id. at 1018, 416 N.Y.S.2d at 737.
161. There were two plaintiffs in this action. Only the girl recovered, since the court found the other plaintiff contributorily negligent in provoking an attack.
162. Id. at 1023, 416 N.Y.S.2d at 740.
163. Id. at 1019, 416 N.Y.S.2d at 737. The court further noted that “[t]he general rule does not apply where there is owed a special duty to the claimant. This duty may be created where the status of the claimant gives rise to a special relationship. Thus, a special duty is owed to informers, undercover agents, persons under court orders of protection,
nevertheless held for plaintiff on the ground that the state breached its duty as a landowner to exercise reasonable care to abate a known dangerous condition existing on its land.\textsuperscript{164} This result was obtained in spite of the fact that the decision not to eject or otherwise neutralize the threat was a policy decision,\textsuperscript{166} and that the state’s failure to provide police protection is not actionable.\textsuperscript{166}

\textit{Poysa} and \textit{Drake} demonstrate the New York courts’ willingness to substantially curtail the scope of the immunity doctrine. In \textit{Poysa}, the court stresses the fact that a principle which underlies governmental immunity is protection of the integrity of the separation of powers doctrine.\textsuperscript{167} It was stated that:

The . . . predicate of immunity, separation of powers, is premised on the notion that the courts may not intrude into the policy-making decisions of co-ordinate branches of government. Thus, it has consistently been held that there is no liability for a breach of the executive or legislative duty to govern, which is owed only to the general public.

. . .

With respect to highway design, certain decisions, such as those related to a public improvement’s necessity . . . involve duties owed only to the general public. The implementation of an unsafe design, however, may impinge upon the recognized tort rights of an individual or definable class. Liability in such a case is . . . [predicated] upon the violation of the recognized tort duty . . . The court in \textit{Weiss v. Fote} . . . recognized this distinction as well, when it backed away from absolute immunity and applied the reasonable man standard of professional malpractice to a case where there existed an underlying duty to keep a street or highway in a reasonably safe condition.

Simply stated, if the duty violated is one owed only to the general public, there is no remedy in law and the act or decision is immune from review. . . . If, however, a duty arises from the existence of a special relationship, or if an act or decision violates a pre-existing right of a person or definable class of persons, which right is recognized by the law of torts, then liability may be adjudged by the application of general tort principles.\textsuperscript{168}

Rejecting the planning/operational classification, the \textit{Poysa} and school children where a municipality has assumed a responsibility of providing crossing guards.” \textit{Id.} at 1019, 416 N.Y.S.2d at 737-38 (citations omitted). The \textit{Drake} court, however, held there was no special relationship created which obligated the state to provide police protection in that case. \textit{Id.} at 1020, 416 N.Y.S.2d at 738.

\textsuperscript{164} \textit{Id.} at 1020-21, 416 N.Y.S.2d at 738.

\textsuperscript{165} \textit{Id.} at 1022, 416 N.Y.S.2d at 740.

\textsuperscript{166} \textit{Id.} at 1020, 416 N.Y.S.2d at 738.

\textsuperscript{167} \textit{Poysa}, 102 Misc. 2d at 273, 423 N.Y.S.2d at 620.

\textsuperscript{168} \textit{Id.} at 273.74, 423 N.Y.S.2d at 620-21 (citations omitted).
court instead focuses on the nature of the duty owed to the pub-
lic;\textsuperscript{169} if an act or decision is found to violate an individual’s “pre-
existing right,” then liability is judged by the application of gen-
eral tort principles.\textsuperscript{170}

\textit{Drake} similarly dilutes the immunity doctrine by allowing re-
covery if a separate duty owed a plaintiff is breached, even if the activity would otherwise be outside the bounds of judicial re-
view.\textsuperscript{171} While that court reiterated the notion that failure to pro-
vide police protection could not result in governmental liability, it allowed plaintiff to bypass that doctrine by relying on common-law notions of duty owed by property owners.\textsuperscript{172} But this analysis flies in the face of the legal tenet that “[w]here [immunity] applies, [it] is absolute, no matter how wrongful or injurious the act, and re-
gardless of the breach of an otherwise recognized tort duty.”\textsuperscript{173}

Further restrictions on the immunity doctrine occurred in a case arising out of the Attica riots. In \textit{Jones v. State},\textsuperscript{174} action was brought against the state for the death of a correctional facility accounts clerk who was taken hostage during the riot, and who later died from state police gunfire during the retaking of the prison. The lower court, in denying recovery, relied on \textit{Weiss} for the proposition that the decision to retake the prison necessitated the exercise of judgment in the course of governmental planning and was clearly sovereign in nature.\textsuperscript{175} Although the Court of Ap-
peals rejected reliance on \textit{Weiss} on the ground that the claim at hand sounded in intentional tort rather than negligence,\textsuperscript{176} it fur-
ther noted that “[t]he action of retaking the prison is no more ‘governmental’ than making an arrest, maintaining someone in 
custody or investigating a traffic infraction.”\textsuperscript{177}

\textit{Jones} stands for the proposition that merely because an action is performed by government officials or involves planning does

\begin{itemize}
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} \textit{Id.} at 274, 423 N.Y.S.2d at 621.
  \item \textsuperscript{171} \textit{See supra} note 166 and accompanying text.
  \item \textsuperscript{172} \textit{See Drake}, 97 Misc. 2d at 1019-21, 416 N.Y.S.2d at 737-39.
  \item \textsuperscript{173} \textit{Poysa}, 102 Misc. 2d at 272, 423 N.Y.S.2d at 620.
  \item \textsuperscript{174} 33 N.Y.2d 275, 307 N.E.2d 236, 352 N.Y.S.2d 169 (1973).
  \item \textsuperscript{175} \textit{Jones v. State}, 40 A.D.2d 227, 229, 338 N.Y.S.2d 738, 740-41 (4th Dep't 1972).
  \item \textsuperscript{176} In \textit{Kelly v. State}, 57 A.D.2d 320, 329, 395 N.Y.S.2d 311, 318 (4th Dep't 1977), the court noted that dismissal of the negligence cause of action in \textit{Jones} was not on the grounds that there is no cause of action for negligence in governmental planning, but was instead dismissed on the grounds that Worker's Compensation was the exclusive remedy.
  \item \textsuperscript{177} \textit{Jones}, 33 N.Y.2d at 280, 307 N.E.2d at 238, 352 N.Y.S.2d at 172.
\end{itemize}
not mean that the action itself must be deemed governmental. The Court of Appeals has embraced the modern tendency against the rule of nonliability\textsuperscript{178} by recognizing the distinction between the actions of government agents and the sovereign actions of a legislative body.

It is clear that New York has refused to apply a strict immunity analysis. New York courts have attempted to find a middle ground between restricting governmental decisionmaking by imposing potential liability for all policy decisions made by government, and precluding recovery by victims of governmental negligence.

The New York approach has thus been twofold. First, rather than focusing on whether the decision was policy-oriented, the trend in this state has been to find exempt from liability only those decisions which are purely "governmental" in nature\textsuperscript{179}—that is, those decisions which by allowing a plaintiff to recover would threaten the state's ability to govern.\textsuperscript{180} A decision is not governmental merely because it is made by a government official, or because it involves policy or planning.\textsuperscript{181} Decisions are immune from liability only when the duty owed is to the general public, as opposed to specific individuals. This would presumably cover decisions concerning matters such as budgetary questions and taxation. Thus, if the state legislature decides to cut back on its aid to the poor, those detrimentally affected by the legislation presumably would not have a cause of action against the state. Referring to the hypothetical discussed earlier,\textsuperscript{182} however, it appears that since there the decision to take target practice in the park breaches the government's duty of care to specific individuals (park patrons), injured persons would appear to have a cause of action against the state. The distinction here is that govern-

\textsuperscript{178} See Augustine v. Town of Brant, 249 N.Y. 198, 163 N.E. 732 (1928).

\textsuperscript{179} Even if the activity in question is purely governmental, liability might still ensue if the plaintiff can show that a separate duty of care owed to him or her was breached. This duty has been found in a special relationship to the plaintiff, see Florence v. Goldberg, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978); Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958), and when the state acts in a proprietary capacity. See Drake, 97 Misc. 2d 1015, 416 N.Y.S.2d 734 (Ct. Cl. 1979), aff'd, 75 A.D.2d 1016, 432 N.Y.S.2d 676 (4th Dep't 1980).

\textsuperscript{180} See infra note 184 and accompanying text.

\textsuperscript{181} See supra text accompanying notes 174-78.

\textsuperscript{182} See supra text accompanying notes 43-44.
ment could easily have designated a safer area to target practice without hampering the government's ability to govern (i.e. to choose to encourage soldiers to target practice); allowing recovery to persons injured by budgetary legislation, however, would create an impossible obstacle to legislators.

This analysis acknowledges that the purpose of immunity is not so much to protect the government from liability, as to ensure the uninhibited separation of powers. In essence, New York courts have looked to the nature of the activity in question, rather than the level of government on which the decision is made. Rejecting the simplistic tests applied by the federal courts, the trend of courts in this state has been to focus on the duty owed to claimants. Is the duty owed merely a general duty to govern, or are rights of specific individuals involved?

Secondly, even where immunity applies, the courts have been unwilling to allow for more than a qualified immunity whereby decisions of governmental officials are reviewed for adequate study and reasonable basis. Thus, as was the case in Niagara Frontier, even policy or planning decisions can trigger liability if in fact these decisions were improperly made. Implicit in these decisions is the recognition that the Weiss caveat has swallowed the general rule preceding it. The notion of immunity is inconsistent with the application of tort doctrine to the same action.


184. An example is in order. Assume the state legislature must decide whether to hold the state olympic games in county X or county Y. While the facilities of county X are far superior, and it would be less costly to hold the games in that county, the decision nevertheless is to have the games in county Y for the bizarre reason that county Y has a large candy factory and it is believed that "the smell of candy in the air will stimulate the athletes to perform at their best." In this instance, presumably the state would be immune from suit brought by county X even though the state's logic for having the games in county Y was faulty and/or ridiculous. Nevertheless, it is the legislature's choice to pick which county it feels is best, and the judicial branch cannot override or inhibit the legislative branch by holding the state liable for a "wrong" decision.

Assume, however, that county Y was chosen because the majority of the legislators own businesses in that county and are aware of the potential financial gain to their businesses of having the games in county Y. Here, there should be no immunity, since holding the state liable would not hinder the legislature's ability to govern, but would merely deter them from governing corruptly.

185. See supra note 173 and accompanying text.
B. The Release Cases

In *Taylor v. State*, a woman was murdered by a parolee who was alleged to be a "prior sexual offender, a dangerous, irresponsible, violent, homicidal, perverted individual." On appeal from the lower court's refusal to dismiss for failure to state a claim, the Appellate Division took these allegations to be true. Nevertheless, recovery was denied. The court held that:

[T]he State is not responsible for the Parole Board's release of Sickler predicated as it presumably was on the professional judgment of a qualified and competent physician. . . . Where there is any substantial support in the record for the Parole Board's action, we cannot substitute our evaluation as to whether there is a reasonable probability of a safe return to society for the Board's "opinion" even if we deem the board's "opinion" to be unreasonable.

In making its decision, the court relied on New York Correction Law § 212, which mandated that "[a]ny action by the board pursuant to this article shall be deemed a judicial function and shall not be reviewable if done according to law." Nevertheless, while the state argued that pursuant to this statute the parole board is deemed a quasi-judicial body and thus entitled to full immunity, the court, by requiring the decision to be based on substantial support, instead applied the qualified immunity test of *Niagara Frontier*.

This analysis has similarly been applied to the area of release.

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187. Id. at 878, 320 N.Y.S.2d at 344.
188. Id. at 878, 320 N.Y.S.2d at 344-45.
189. Id. at 878-79, 320 N.Y.S.2d at 345.
190. N.Y. CORRECT. LAW § 212 was repealed in 1970. 1970 N.Y. Laws c.476 § 42. The language relied on by the *Taylor* court is now incorporated in N.Y. EXEC. LAW § 259-i(5) (McKinney 1982), which states: "Any action by the board pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law."
191. See N.Y. EXEC. LAW § 259-i(5)(McKinney 1982). The guidelines for making the parole decision are listed in § 259-i(2)(c) of that statute and include

(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate . . .
192. See Brief for Appellant at 10-11.
of state mental hospital patients. Thus, in *Orman v. State*,\(^{194}\) where plaintiff was shot in the back by a patient on home visit from a state hospital, it was held that in spite of an earlier diagnosis that the patient suffered from catatonic schizophrenia, the state was not responsible for an error in professional judgment, barring unreasonable basis for the decision to release.\(^ {195}\)

The court’s reluctance to afford the state total immunity represents a compromise approach, and demonstrates a judicial recognition that parole boards and “competent physicians” act in a quasi-judicial fashion when determining whether an individual should be released. A hearing board, much like a judge who sets low bail or suspends a sentence, must take a “calculated risk”\(^ {196}\) by weighing the interests of the individual against those of society. As one court noted, “[i]f a liability were imposed on the physician or the State each time the prediction of future course of mental disease was wrong, few releases would ever be made and the hope of recovery and rehabilitation . . . would be impeded and frustrated.”\(^ {197}\)

Notwithstanding the recognition of the judicial nature of parole and patient discharge tribunals, the courts’ reluctance to grant full immunity indicates a similar awareness that often, perhaps due to the informal nature of these hearings,\(^ {198}\) decisions to release are hastily or improperly made. When this occurs, the re-


197. Id. at 183, 241 N.Y.S.2d at 496-97.

198. N.Y. MENTAL HYG. LAW § 29.15(a) (McKinney 1978) stipulates that “[A] patient may be discharged or conditionally released to the community by the director of a department facility, if, in the opinion of staff familiar with the patient’s case history, such patient does not require active in-patient care and treatment.” Similarly, N.Y. EXEC. LAW § 259-i(2)(c)(McKinney 1982), governing parole, states that [in] making the parole release decision . . . the following [shall] be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . .

*See also infra* note 217.
leasing body loses its status as a quasi-judicial forum, and injured third parties will be allowed to recover. In *Homere v. State*, for example, two women were assaulted by a state hospital releasee. Although the patient was initially judged suitable for release, during the 41-days delay prior to his release, the patient showed signs of violent and uncontrollable behavior. He was nevertheless released minutes before he injured plaintiffs. The court held that although no liability would attach if the release had been implemented immediately subsequent to the commission’s order to discharge, the patient’s deterioration in attitude mandated further medical inquiry into his psychological fitness. The court noted that by failing to do so, the ultimate release thus amounted to a “purely administrative decision.”

Relying on the semantic distinction that the decision to release was administrative rather than medical, the court in *Homere* seems to underscore a concern that decisions of this type will be rendered immune regardless of the circumstances surrounding the release. By characterizing the release decision as an administrative act, the *Homere* court recognized that the procedures used in assessing the patient’s fitness were so lacking that the decision to release could not be said to have been made quasi-judicially. Moreover, the court strips the state of any vestige of immunity, and instead applies a test of foreseeability. The distinction here is critical: Presumably, if a reevaluation by the initial commission were made of the patient after he displayed signs of violence, affirming an earlier decision to release would not have been actionable, since this decision would have been made by competent physicians and thus requires only a *reasonable* basis.

199. 48 A.D.2d 422, 370 N.Y.S.2d 246 (3d Dep’t 1975).
200. *Id.* at 424, 370 N.Y.S.2d at 248.
203. *Id.* at 424, 370 N.Y.S.2d at 249.
204. More accurately, the court does not assail the procedures used, but those omitted in not reevaluating the patient after his violent outbursts. *Id.* at 424, 370 N.Y.S.2d at 248.
205. See also *Payton*, 636 F.2d at 146, where the court noted that “[t]he 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.”
207. See supra notes 186-95 and accompanying text. That a decision is supported by a
By deeming the decision to release as an administrative act, however, injury need only have been foreseeable. Applying traditional tort standards precludes state employees from taking a "calculated risk" with impunity.\(^{208}\)

While *Homere* represents an exceptional case in the area of mental patient releases, a recent Court of Claims case involving furloughs for juvenile delinquents\(^{209}\) has gone even one step further. *Robilotto v. State*\(^ {210}\) involved a "vicious" assault on the plaintiff by a juvenile delinquent who was released on temporary furlough from a State Division for Youth facility. The statute authorizing release noted merely that "[t]he division [for youth] may release . . . any child . . . whenever it deems such release to be in the best interest of the child . . . and that there is a reasonable probability that the child can be released without endangering the public safety."\(^ {211}\) The court noted that the assault was particularly heinous, "involving not only the punching and stabbing of the then 58 year old claimant, but also multiple rape and threats to kill, all over a two hour period."\(^ {212}\) Claimant sued on the grounds that the youth, who had a well documented history of

"reasonable basis" does not mean it is not negligently made. A reading of the *Taylor* segment quoted (see text accompanying note 170) indicates that the decision may both have reasonable basis and yet be an unreasonable decision. Thus, the term "reasonable basis" as used by the court cannot be equated with the "reasonable man" standard applied in tort law.

208. *See supra* notes 196-97 and accompanying text.

209. The statute governing the release of youths from state facilities is similar to the statute governing parole, in that in each case the release may be effected if there is a reasonable probability that the releasee will not subsequently violate the law. The parole statute, § 259-i of the Executive Law, states that "release on parole shall . . . be granted . . . [only] after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society . . . ." *N.Y. Exec. Law* § 259-i(2)(c) (McKinney 1982).

The statute governing release of youths, § 523 of the Executive Law, states that "[t]he division may release . . . any child . . . whenever it deems such release to be in the best interest of the child, [and when] there is a reasonable probability that the child can be released without endangering the public safety . . . ." *N.Y. Exec. Law* § 523(i) (McKinney 1982).


211. *N.Y. Exec. Law* § 523(1) (McKinney 1982). Two years after the decision in *Robilotto*, this statute was amended to severely limit home visits for delinquents who have been restrictively placed, and to provide intensive supervision following release. *N.Y. Exec. Law* § 523(4) (McKinney 1982); *Family Court Act* § 753 (McKinney 1975).

violent crimes,213 was negligently released.214 The state argued that releasing youths from state facilities was analogous to parole releases, and thus releasing authorities are immune from liability if the releases are done "according to law."215 The court disagreed, and responded by asserting that "the pathetic state arrangements" were unreasonable, and in violation of the statute.216

The Robilotto court expressed concern that decisions regarding the temporary release of youths are administrative in nature, and are made in a non-judicial forum: "[We] believe there is a significant, quantum difference between a parole determination based on a hearing and other due process and judicial-like procedures on one hand and the unilateral and often routine granting of home visit passes on the other."217 Liability was pinned to the

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213. The youth, Joseph Johnson, began his criminal career at age 13. At that time he was arrested for attempted robbery. At age 14, after being abandoned by his parents and taken in by his 20-year-old sister, Johnson was arrested three separate times within one month for possession of stolen property, robbery and forcbcible rape (in which he hit the victim in the face, threatened to kill her, and raped her) and possession of a knife. He was then admitted to a school for boys. There, his criminal ways continued. The year before the rape of concern in the instant case, Johnson was arrested at least three times for robbery or attempted robbery, and once for possession of drugs, assault on a police officer, burglary, petit larceny, criminal trespass and possession of stolen property. Moreover, while at the school for boys, Johnson extorted money from weaker boys through a process of "methodical intimidation," and was involved in at least one assault. Nevertheless, despite a social worker's recommendation to the contrary, he was released on February 9, 1977 on a five-day pass to visit his sister because it was believed he would be difficult to deal with if he didn't get one. Within one hour of his arrival in New York (where his sister lived) Johnson repeatedly raped and stabbed plaintiff. Id. at 716-18, 429 N.Y.S.2d at 364-65.

214. Id. at 714-15, 429 N.Y.S.2d at 363.

215. Id. at 719, 429 N.Y.S.2d at 366.

216. Id. at 721, 429 N.Y.S.2d at 367.

217. Id. at 721, 429 N.Y.S.2d at 367. In Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977), the Arizona Supreme Court, in strong language, held that public officials acting in other than true judicial proceedings do not have absolute immunity in their discretionary functions. Although suit against the state was barred, the court's discussion on public official immunity for Parole Board members is instructive.

While leaving intact the absolute judicial immunity enjoyed by participants in judicial proceedings, we now abolish the absolute immunity previously granted to public officials in their discretionary functions.

We have come to this 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. Comparing the relatively small number of judges with the large numbers of administrators, the idea of fearless, unbridled decision-making becomes less appealing. While society may want and need courageous, independent policy decisions among high level gov-
state's "breach of clear duty" and the presence of foreseeable harm resulting from such breach.\textsuperscript{218}

Other recent cases have recognized this problem by requiring that a judgment to release an inmate be made only after "careful examination." In \textit{Clark v. State},\textsuperscript{219} plaintiff filed suit against the state for injuries sustained when she was inexplicably attacked by an outpatient at a state-operated mental health facility. The outpatient, John Lynch, had a history of multiple attempted suicides, violence and abusiveness toward others, and was medically diagnosed as paranoid schizophrenic. In February 1978, Lynch's therapist, a Dr. Murphy, was alerted to the fact that Lynch's condition was deteriorating. Although Murphy examined Lynch and found him to be actively psychotic and hallucinating, he felt that Lynch was not in need of hospitalization. Shortly thereafter, Lynch attacked claimant with a knife.

The court, in imposing liability on the state for the plaintiff's injuries, held that Dr. Murphy's decision not to hospitalize Lynch "was not a professional medical determination because it was not founded upon careful examination of the patient, the medical record, and the vital information from [Lynch's nurse] at that time."\textsuperscript{220}

In the most recent judicial pronouncement on this topic, however, the Appellate Division, Fourth Department appears to have shifted the tide toward a resurgence of the sovereign immunity doctrine in release cases. In \textit{Santangelo v. State},\textsuperscript{221} a youth with a history of predominantly non-violent crimes was released from a government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. . . . In this day of increasing power wielded by government officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous.

\textit{Id.} at 266, 564 P.2d at 1233.

\textsuperscript{218} \textit{Robilotto}, 104 Misc. 2d at 721, 429 N.Y.S.2d at 367.

\textsuperscript{219} 99A.D.2d 616, 472 N.Y.S.2d 170 (3d Dep't 1984).

\textsuperscript{220} 99 A.D.2d at 617, 472 N.Y.S.2d at 172. \textit{See also Bell v. New York City Health & Hospitals Corp.}, 90 A.D.2d 270, 456 N.Y.S.2d 787 (2d Dep't 1982) (liability imposed on state for injuries sustained by plaintiff, a psychiatric outpatient who set himself on fire shortly after being released from a state mental hospital).

\textsuperscript{221} 103 Misc. 2d 578, 426 N.Y.S.2d 931 (Ct. Cl. 1980), aff'd, 101 A.D.2d 20, 474 N.Y.S.2d 995 (4th Dep't 1984).
minimum security facility on a temporary furlough. Shortly after release, the youth raped plaintiff. In holding it inappropriate to confer absolute immunity on decisions of temporary release committees, the New York Court of Claims accepted the fact that, historically, acts of judges are immunized. However, it continued:

The decisions of temporary release committees do not enjoy the same status as those of a judge. . . . Concededly, there is an interest in the rehabilitation of prisoners. . . . [However], there exists no means available to test the propriety of the temporary release committee's decision. . . . Unlike the decision of a judge, there is no way for the public to challenge the determination to release, either by participation in the decision-making process or by appeal.

Having concluded that the release committee should not be imbued with absolute judicial immunity, the court held that this committee "has the duty to exercise reasonable care to avoid the release of a prisoner, where to do so would create a foreseeable risk of injury." Since it was determined that the youth's violent crime was not foreseeable, the state avoided liability.

The trial court in Santangelo explicitly acknowledged that the duty owed by release committees is not a general duty to govern, but a specific duty owed to particular individuals foreseeably endangered by a decision to release. It was held that "[a]lthough there may not have been a duty to pass penal laws or to incarcerate dangerous criminals in the first instance, once this has been done a special duty is established." On appeal to the Fourth Department, the claimant contended the lower court erred in not finding that freeing the inmate created a foreseeable risk of injury to her. Affirming dismissal of plaintiff's claim, the Court held that it need not reach the issue of foreseeability, since actions of the Temporary Release Committee were of a discretionary and quasi-judicial nature for which the

222. Id. at 582, 426 N.Y.S.2d at 934. While the court noted that decisions to release involve the exercise of judgment and discretion, it rejected the notion that such discretion alone would be sufficient to immunize these decisions. Id. at 938.
223. Id. at 582, 426 N.Y.S.2d at 933.
224. Id. at 582-83, 426 N.Y.S.2d at 934.
225. Id. at 584, 426 N.Y.S.2d at 995.
226. Id. at 585, 426 N.Y.S.2d at 935-36.
227. Id. at 583-84, 426 N.Y.S.2d at 934-35 (emphasis added, citations omitted).
State enjoys absolute immunity. Moreover, the Fourth Department rejected the lower court's reasoning that the informal nature of inmate releases warrants greater scrutiny into the decisionmaking process and cuts against application of an absolute immunity:

While procedures to be followed by the Temporary Release Committee do not entail hearings and are less formal and in that sense less judicial than those involved in parole release proceedings, the Temporary Release Committee must nevertheless, like a judicial officer, exercise reasoned judgment in balancing the welfare of the applicant and the possible risks to the community in deciding whether to grant or deny temporary release and, if it is granted, in devising an appropriate plan.

In a concurring opinion, Justice Denman rejected the majority's position that all decisions made by state functionaries in the exercise of discretion are entitled to absolute immunity. It was argued that this holding would serve to erase *sub silentio* a significant body of law recognizing the potential liability of the State for discretionary acts.

C. Comment on New York Perspective

In the non-release cases, it appears that the New York courts have become increasingly suspect of immunity. Cases like *Poysa* and *Jones* have served to restrict the applicability of sovereign immunity only to those cases where the act in question directly stems from purely "governmental" action. As the basis for governmental activity shifts from a general duty to govern towards a recognizable duty owed to specific individuals, the protection afforded by the immunity doctrine is diminished. In essence, immunity serves the same purpose in New York that it does federally—protection of the separation of powers doctrine. That some New York cases apply the language of planning/operational and discretionary/ministerial thus comes as no surprise. However, New York cases which have rejected these distinctions, like some of the more recent federal cases, have demonstrated a

229. *Id.* at 21, 474 N.Y.S.2d at 997.
230. *Id.* at 29, 474 N.Y.S.2d at 1001.
231. *Id.* at 29, 474 N.Y.S.2d at 1002.
232. *See supra* note 80.
233. *See supra* note 144 and accompanying text.
234. *See, e.g.*, text accompanying note 37.
recognition that this type of analysis has the effect of protecting activity which is not purely sovereign or judicial in nature.\textsuperscript{235} These cases have focused not on who has made the decision in question, but rather on the nature of the decision itself.

At the very least, however, New York courts have refused to grant total immunity, and have instead reviewed governmental decisions for reasonable basis and adequate study. Application of this "qualified" immunity affords some protection to the state, but conversely acknowledges that all governmental decisions, however badly made, will not be automatically protected.

Application of sovereign immunity in the release area has been unpredictable. A majority of cases have applied a qualified immunity test, whereby the release decision must be based on substantial support in the record in order to be protected.\textsuperscript{236} Presumably, application of only a qualified immunity acknowledges judicial concern that release decisions are often made without serious reflection of the record and the potential consequences of release.

Recent cases that have emphasized the lack of a judicial-type forum for releasing inmates have refused to allow administrators even a qualified immunity,\textsuperscript{237} and have instead applied traditional tort standards in reviewing these cases. Since the premise of immunity is to protect high level governmental decision making,\textsuperscript{238} immunizing hasty and imprudent release determinations disserves the reason for the rule.\textsuperscript{239}

Nevertheless, the foothold of sovereign immunity has not weakened easily. No sooner does the trend in release cases shift away from protection of these essentially administrative decisions, than an appellate court in this state holds that decisions of this type warrant not merely a qualified, but an absolute, immunity.

Reversal of the trend toward greater scrutiny and less immunity for release decisions is ill-advised. Concededly, courts must acknowledge the concern that the fear of liability would inhibit release of inmates who are thought to be rehabilitated.\textsuperscript{240} But this concern must be accounted for by application of a judicial rather

\begin{enumerate}
  \item See generally supra notes 145-84 and accompanying text.
  \item See supra text accompanying notes 186-95.
  \item See supra text accompanying notes 199-227.
  \item See supra text accompanying note 168.
  \item See supra note 217.
  \item See supra note 197 and accompanying text.
\end{enumerate}
than sovereign immunity. With judicial immunity, public officials acting in a quasi-judicial capacity are immune from suit for fear that they would otherwise be influenced by subsequent retaliatory suits.241 Once the judge (or quasi-judge) is immune, so too is the state.242

Although sovereign immunity is inapplicable since administrative releasing forums do not govern, the state might still avoid suit through the immunity of administrators acting in their quasi-judicial capacity. The critical focus is on whether or not the release decision is made in a sufficiently judicial-like forum—meaning the decision in the least must be made with the assistance of reports by competent professionals who have evaluated the inmate and the releasing body has sufficiently interviewed the inmate and has inquired into his character and background.243 If the forum is sufficiently judicial-like, then the state is entitled to a qualified immunity. This means that the decision to release may still be reviewed by the courts for reasonable basis and adequate study. Questions for review are: Did the releasing body have all the facts before it? If so, was its decision reasonable in light of these facts? An erroneous decision reasonably made enjoys immunity from suit.244 In contrast, where the releasing forum is not sufficiently judicial-like, immunity must be stripped in its entirety, and the state should be held to a standard of foreseeability.245

Allowing only a qualified immunity demonstrates a judicial

241. See, e.g., Poyxa, 102 Misc. 2d at 272, 423 N.Y.S.2d at 619-20.
243. In Robilotto, the court noted the serious lack of adequate study done on the youth prior to release. Specifically noted was "the failure of said counselor responsible for Johnson's release to have any psychiatric studies done on this chronic if not pathological young criminal." Robilotto, 104 Misc. 2d at 722 n.6, 429 N.Y.S.2d at 368 n.6.

Similarly, in Santangelo, the court asserted that

'The "Temporary Release Committee" has an obligation to make certain that it has before it, sufficient information on an inmate's character to allow a rational decision to be made concerning the propriety of his release. If an inmate has a history of violent behavior, the Committee is under an obligation to make further inquiry in order to determine whether that person's release would present a foreseeable risk to the public.

Santangelo, 103 Misc. 2d 584, 426 N.Y.S.2d at 935.

245. See Robilotto v. State, 104 Misc. 2d 713, 429 N.Y.S.2d 362 (Ct. Cl. 1980). The courts have sidestepped the built-in statutory immunity by holding that such decisions have not been made "according to law."
awareness that while release committees play an instrumental role in implementing policy in a quasi-judicial manner, their decisions are nevertheless neither purely legislative (or "governmental") nor purely judicial. Unlike a legislature, release committees do not govern. The duty involved is not a nebulous duty owed to the general public, but rather is a duty owed to particular individuals endangered by persons released from state institutions.

Similarly, although these tribunals sit in judgment, procedural as well as substantive inadequacies distinguish decisions to release from judicial determinations. Review of release determinations for, at a minimum, substantial support and adequate study mitigates these inadequacies and ensures a judicially acceptable decision. Nevertheless, some protection for decisionmakers is required if the goals of promoting rehabilitation via programs such as parole and open door treatment are to be attained.

CONCLUSION

This Comment has identified two difficulties in applying the doctrine of sovereign immunity to the inmate release area. The first problem is inherent in the tests for determining the applicability of immunity: the so-called "discretionary function" exception in the Federal Tort Claims Act and the discretionary/ministerial distinction in the states. Application of these tests has proved troublesome, if not impossible, in light of artificial line-drawing between deeming an act as "discretionary" or "planning" as opposed to "ministerial" or "operational." It has been shown that these distinctions break down under close scrutiny. The hy-

246. In Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981), it was held that judges might not be afforded an absolute immunity were it not for the safeguards built into the judicial process. The court noted that judges are insulated from political influence, that the litigation process is by nature adversarial, that there exists the appeal forum to correct error, and that there exists precedent for resolving controversies. The court concluded that these safeguards "tend to enhance the reliability of information and the impartiality of the decision-making process." 641 F.2d at 1300 n.9.

247. See Poyha, 102 Misc. 2d at 273, 423 N.Y.S.2d at 620-21; Grimm, 115 Ariz. at 266, 564 P.2d at 1233.

248. See supra notes 204-08 and accompanying text. See also Grimm, where the court observed that "[m]embers of the Legislature may be voted out of office—as may judges in Arizona. Judges may be reversed by an appellate court. The Board of Pardons and Paroles, however, has had no check on its unbridled discretion." Grimm, 115 Ariz. at 265-66, 564 P.2d at 1232-33. See also supra note 217.
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pothetical soldiers target practicing in the park is illustrative of this point. Once a decision is deemed “policy” (the goal of making soldiers better marksmen) the ministerial aspect of that “policy” (the actual target practice) is obscured, and immunity is held to apply. In the final analysis, courts have been forced to apply the discretionary function exception in an ad hoc manner.

Secondly, since the purpose of sovereign immunity is to protect the notion of the separation of powers, immunity should be applicable only when suits against the government would tend to threaten the government’s ability to govern. But holding the state or federal government liable for negligently releasing dangerous inmates who thereafter foreseeably commit violent crimes would have no such effect. Liability would not assail the government’s policy of encouraging parole or open door treatment, but would merely encourage administrative committees empowered to release inmates to conduct proper inquiries and tests, prior to releasing a particular individual. Holding the government liable in negligence for improperly releasing an inmate no more inhibits programs such as parole and open door treatment as holding a police officer liable for negligently shooting an innocent bystander would encourage the government to do away with police.

The inapplicability of sovereign immunity does not leave the state totally unprotected. The concern that retracting immunity will lead to a governmental fear of releasing inmates that are believed to be rehabilitated is warranted. If the release committee has acted in a quasi-judicial capacity, it should be afforded a qualified judicial immunity. This ensures judicial review into the decisionmaking process of these administrative bodies. However, an impromptu decision by an administrator to release or furlough an inmate would not be protected since the victim has not been afforded the societal considerations inherent in a true judicial forum. In such a case, immunity should be stripped in its entirety, and the court should apply traditional tort notions to determine whether there should be liability.

Thus, the fact that immunity may not be available does not mean that there automatically is liability. Plaintiffs must still show negligence in the decisionmaking process. This standard might not be fulfilled by the mere demonstration that an inmate

249. See supra text accompanying notes 43-44.
foreseeably would commit the act complained of. Arguably, each inmate who has in the past committed a violent crime would foreseeably commit another such crime.250 Proof of negligent release should require some clear defect in the decisionmaking process such as the failure of the release committee to consider a psychologist's report that the inmate remains a danger to society, or the knowledge by the committee that prior releases of the inmate have resulted in the commission of crimes.

Nevertheless, while New York continues to struggle with this issue, other states (and some courts in this state) have followed the federal trend and have continued to apply outdated and simplistic standards such as the discretionary/ministerial distinction. It is unfortunate for many victims that these states have rejected the more enlightened approach discarding these standards and have instead adhered to the antiquated notion that the king—or more precisely governmental institutions and administrators—can do no wrong.

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