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WASHINGTON'S DISCRETIONARY IMMUNITY
DOCTRINE AND NEGLIGENT EARLY
RELEASE DECISIONS: PAROLE
AND WORK RELEASE

Abstract: The Washington Supreme Court has held the discretionary immunity doctrine to constitute a highly circumscribed exception to the rule of governmental liability. An analysis of Washington case law reveals that parole and work release determinations properly fall outside the pale of the exception. A negligent decision to place a sex or violent offender in a parole or work release program therefore should subject the state to liability. The Author proposes a negligence-based liability rule that would create incentives to due care on the part of state administrators responsible for parole and work release decisions without imposing an unreasonable burden on the state.

The decision to place a violent or sex offender on parole or work release carries with it the potential for harm, particularly if the offender poses a significant risk of recidivism. This risk is magnified if a candidate is negligently evaluated as being an appropriate subject for one of these programs. State liability for the negligent assignment of dangerous persons to early release programs is an important question in any legal scheme that seeks to promote accountability and due care on the part of state agencies.

The Washington legislature abolished sovereign immunity in 1961 and 1967, giving the state judiciary a mandate to adjudicate suits against governmental entities for tortious conduct. Since that time, however, the Washington Supreme Court has limited tort recovery against the state and its subdivisions by two principal means: the discretionary immunity exception and the public duty doctrine. The discretionary immunity exception shields governmental entities from liability for considered discretionary decisions in the realm of basic policy. By contrast, the public duty doctrine shields such entities


2. The legislature abrogated state tort immunity in 1961, id. § 4.92.090; it abolished immunity for all governmental entities in 1967, id. § 4.96.010.

This Comment will demonstrate that negligent parole and work release decisions should subject the state to liability, both under the present judicial formulation of the discretionary immunity exception and for compelling reasons of public policy. First, early release decisions do not fall within the parameters of the exception as they have been established by the Washington Supreme Court. Second, liability would create incentives for early release administrators to exercise care commensurate with the dangerousness of their activities and in accordance with their statutory mandates. This Comment proposes a negligence-based liability rule for parole and work release determinations that would promote due care and provide a remedy, while at the same time insulating the state from frivolous suits.

I. THE CONTEXT: THE OPERATION OF EARLY RELEASE PROGRAMS AND THE DEVELOPMENT OF DISCRETIONARY IMMUNITY

State administrators frequently make parole and work release determinations regarding individuals who have committed violent or sex crimes. Whether these decisions are subject to liability if negligently made turns on the Washington Supreme Court's elaboration of the discretionary immunity exception.

A. In the Wake of the Sentencing Reform Act

The criminal justice system in Washington has changed drastically in recent years. Before July 1, 1984, the state sentencing system was animated by the legislative policy of rehabilitation.\(^4\) In the typical case, a felon received two sentences: a statutory maximum term of imprisonment, and an "indeterminate" minimum term subject to change in accordance with the offender's rehabilitative progress.\(^6\) The Sentencing Reform Act of 1981 (SRA) ushered in a "determinate" sentencing system of fixed sentences effective July 1, 1984, emphasis-
ing punishment and public safety.\textsuperscript{7} Despite the Act’s focus on safety, however, a high proportion of violent and sex offenders have been channeled out of prison and into the community through parole and work release during the period the SRA has been in effect.\textsuperscript{8}

I. Parole

The Sentencing Reform Act did not repeal the indeterminate sentencing system; rather, it made the system inapplicable to offenders whose crimes of conviction occurred after June 30, 1984.\textsuperscript{9} Prior to the SRA, the trial judge pronounced a statutorily authorized maximum sentence for a given crime, and the Board of Prison Terms and Paroles set the minimum term of actual imprisonment.\textsuperscript{10} The SRA redesignated the Board of Prison Terms and Paroles as the Indeterminate Sentence Review Board (ISRB).\textsuperscript{11} The ISRB, still commonly referred to as the parole board, retains the same functions as its predecessor for offenders sentenced for crimes committed before July 1, 1984.\textsuperscript{12}

The Washington legislature has prescribed the criteria by which parole decisions for pre-SRA offenders must be made. Parole shall not be granted unless, in the board’s opinion, the inmate’s “rehabilitation has been complete and he is a fit subject for release.”\textsuperscript{13} In addition, the board must “thoroughly inform itself as to the facts” of the person’s offense and the “convict as a personality” before setting conditions for release.\textsuperscript{14} The board must also consider the SRA sentencing guidelines and attempt to make decisions “reasonably consistent” with them.\textsuperscript{15} In its 1989-90 session the legislature elevated public safety considerations to the “highest priority” in parole board decisions.\textsuperscript{16} The board also formulates criteria for duration of confinement and

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\textsuperscript{7} Id. § 9.94A.010. The SRA structures the length of confinement for felonies by means of a grid of presumptive sentence ranges that take into account the nature of the present offense and the offender’s criminal history. See id. §§ 9.94A.310-370.

\textsuperscript{8} See infra notes 19-37 and accompanying text.


\textsuperscript{10} Id. §§ 9.95.010, .011, .040, .052.

\textsuperscript{11} This change became effective July 1, 1986. Id. § 9.95.001. The ISRB is scheduled for extinction June 30, 1998. Id.


\textsuperscript{13} Id. § 9.95.009(2).

\textsuperscript{14} Id. § 9.95.170.

\textsuperscript{15} Id. § 9.95.009(2).

\textsuperscript{16} Id. § 9.95.009(3).
parole, and promulgates its own administrative guidelines and procedures. Implementation of the SRA coincided with more expeditious parole for many violent and sex offenders. During the first two years of the Act, felons convicted under the pre-SRA system filed a multitude of suits to compel retroactive application of generally shorter SRA sentences. In 1986, two such suits resulted in judicial decisions whose joint effect was to require the parole board to review the minimum sentences of the entire population of inmates whose crimes occurred prior to July 1, 1984, in light of the SRA's standard sentencing ranges. As a result of this review, the board reduced minimum terms an average of thirty-two months, and forty percent of the population became eligible for accelerated parole release.

During the period of sentence review, the inmates granted parole eligibility were drawn from a population comprised primarily of persons who had committed violent or sex crimes. The parole board itself characterized the inmates under its jurisdiction at the time as "predominantly very serious offenders who will and do present a serious risk to public safety if one uses their prior criminal history as a

22. Id. at 7. A total of 1,663 inmates became eligible for parole as a result of sentence review. Id. Inmates granted accelerated parole eligibility are eligible for immediate parole, pending approval of an acceptable parole plan. Id. at 12. Although sentence review was mandatory, findings of parolability were not. The Addleman and Myers courts did not relieve the board of its statutory obligation to grant parole only if, in its opinion, an inmate's rehabilitation is complete. Rather, they indicated that the board retained the latitude, upon submission of adequate written reasons, to impose sentences not in conformance with the SRA. Addleman, 107 Wash. 2d at 511, 730 P.2d at 1332; Myers, 105 Wash. 2d at 265-66, 714 P.2d at 307-08; see also Act of January 24, 1990, supra, note 12 (the board may set minimum terms outside the SRA sentencing range upon submission of adequate written reasons for doing so).
24. For example, the board characterized 85% of the 4,983 inmates under its authority as of February 27, 1987, as "serious person offenders." Of these inmates, 688 had committed murder or manslaughter; 1,468, rape 1 or 2, statutory rape 1 or 2, or indecent liberties; and 1,456, assault 1 or 2 or robbery 1 or 2. Id. at 1. ISRB REP., Mar. 1987, supra note 17, at 1.
predictor of risk." \(^2\) Similarly, about ninety-five percent of the offenders remaining under parole board jurisdiction as of February 1990 were "serious, violent" offenders. \(^2\)

2. **Work Release**

The SRA defines work release as "a program of partial confinement available to offenders who are employed or engaged as a student [sic] in a regular course of study at school." \(^2\) It is available to most first-time violent and sex offenders whose crimes of conviction occurred after June 30, 1984, the effective date of the SRA. \(^2\)

Work release decisions for violent and sex offenders effectively reside with the Department of Corrections, \(^2\) whose discretion is framed and limited by department guidelines and procedures. \(^2\) Work release may be denied, for example, if an inmate is incarcerated for an offense that involves victim injury requiring medical treatment. It may also be denied if the offense involves sexual aggression, if the work release facility is located near the victim’s residence, or if the offender has threatened the victim while incarcerated. Another guideline allows denial of work release if an offender has attracted extensive media attention, and placement in the community can be expected to generate negative public reaction. \(^3\)

A 1990 amendment stipulating

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28. See Dept’ of Corrections, Policy 300.380, Classification-Custody Level, effective July 1, 1989, at 2 [thereinafter Policy 300.380]. According to Department of Corrections guidelines, work release is prohibited for murder 1 felons (unless approved in writing by the Secretary of the Department) and for offenders convicted of first-degree rape, during the first three years of confinement. *Id.* Although the statute does not proscribe work release for violent and sex offenders whose crimes of conviction occurred prior to the SRA, Department of Corrections guidelines do. *Id.*; see also WASH. REV. CODE § 72.65.100 (1989) (authorizing the Secretary of the Department of Corrections to establish guidelines for the administration of the work release program).  
29. The Secretary of the Department of Corrections may permit inmates to participate in work release, but only if participation is authorized pursuant to the inmate’s sentence or to WASH. REV. CODE § 9.94A.150 (1989) (limiting work release to the final six months of an offender’s sentence). *Id.* § 72.65.200 (1989).  
30. For offenders sentenced for crimes committed before July 1, 1984, the work release decision resides by statute with the superintendent of the state correctional institution in which a prisoner is confined. The superintendent must carefully study the inmate’s institutional conduct, attitude, and behavior, as well as his criminal history and any relevant case history. Based on this evaluation, the superintendent must determine whether there is a reasonable basis for believing that the prisoner will “honor his trust” in the work release program. *Id.* § 72.65.040.  
31. Policy 300.380, *supra* note 28, at 2; see also Div. of Community Corrections, Dept’ of Corrections, Div. Directive DIR 800-W, Screening of Work Release Candidates, effective Mar. 1,
public safety as the paramount decision making criterion also limits
the discretion of Department of Corrections personnel in supervising
sexually violent offenders.\textsuperscript{32}

Although these guidelines could have been expected to restrict work
release to less dangerous offenders, a large percentage of program par-
ticipants in recent years have been incarcerated for violent and sex
offenses.\textsuperscript{33} As of December 31, 1989, 25.7\% of work releasees had
"violent crime convictions,"\textsuperscript{34} and 12.1\% had committed sex
offenses.\textsuperscript{35} As of the end of the preceding fiscal year, June 30, 1989,
the ratios were 30.4\% and 17.8\%, respectively;\textsuperscript{36} a year before that,
they were 42.6\% and 31.0\%.\textsuperscript{37}

\textbf{B. The Discretionary Immunity Exception In Washington}

The Washington Supreme Court has defined the scope of discretion-
ary immunity narrowly, repeatedly designating it a highly circum-
scribed exception to the rule of governmental liability.\textsuperscript{38} To qualify
for immunity, an official act must involve discretion, it must rise to the

\textsuperscript{32} Act of January 24, 1990, \textit{supra} note 12.
\textsuperscript{33} The data that follow have been derived by the Author from official tables that do not
indicate the extent to which the figures presented for "violent" crimes may overlap with those for
"sex" crimes.
\textsuperscript{34} \textit{See} FY 1990 \textsc{dep't of corrections institutions and work training release
client characteristics and population movement rep.} table 2c. This figure and those
given in the text accompanying notes 35--37 include the category of "pre release," a form of work
release defined by the Department of Corrections for internal purposes as "[t]otal confinement in
a community setting." \textit{Id.} at iv. Prior to fiscal year 1989, the department included both
categories of work release under the single heading of "work release" in the annual reports from
which these statistics were calculated.
\textsuperscript{35} \textit{See id.} table 2b. This percentage and those for sex offenders given in the text
accompanying notes 36--37, \textit{infra}, represent the total number of inmates listed as serving
sentences for specific sex crimes, divided by the total number of work releases.
\textsuperscript{36} FY 1989 \textsc{dep't of corrections institutions and work training release
client characteristics and population movement rep.} tables 2c, 2b.
\textsuperscript{37} FY 1988 \textsc{dep't of corrections institutions and work training release
client characteristics and population movement rep.} tables 2c, 2b. As of June 30,
1987, the ratios were 40.6\% and 28.8\%. FY 1987 \textsc{dep't of corrections institutions and work
training release client characteristics and population movement rep.}
tables 2c, 2b.
\textsuperscript{38} \textit{See, e.g.}, Petersen \textit{v. State}, 100 Wash. 2d 421, 433, 671 P.2d 230, 240 (1983)
(discretionary immunity an "extremely limited exception"); Chambers-Castanes \textit{v. King County},
100 Wash. 2d 275, 281, 669 P.2d 451, 456 (1983) (a "narrowly circumscribed exception");
Bender \textit{v. City of Seattle}, 99 Wash. 2d 582, 587, 664 P.2d 492, 497 (1983) (a "very narrow
exception").
level of basic policy, and it must be the product of a considered decision.\textsuperscript{39}

1. The Evangelical Test: Discretionary and Ministerial Acts

In 1965, the Washington Supreme Court in \textit{Evangelical United Brethren Church of Adna v. State}\textsuperscript{40} created an exception to the rule of governmental tort liability: "discretionary" acts are immune; "ministerial" (or "operational") acts are not.\textsuperscript{51} Although clarified in later decisions,\textsuperscript{42} the \textit{Evangelical} test still serves as the starting point for determining whether a given act is immune.

In \textit{Evangelical}, a church sought damages from the state for a fire set by an escapee from a juvenile corrections facility.\textsuperscript{43} The juvenile had set fires in the past, and in the present instance was being returned to the facility with an official recommendation that he be regarded as a security risk and accorded close supervision. He was assigned to boiler room detail, from which he escaped and set the fires that were the basis for the suit.\textsuperscript{44}

The court held that the decisions to maintain a medium-security program at the facility and to assign the boy to it were discretionary acts and hence not subject to liability.\textsuperscript{45} The state was, however, liable for any negligence that could be shown in the ministerial decision to

\textsuperscript{39} For a cogent summary of these requirements, see Miotke v. City of Spokane, 101 Wash. 2d 307, 335–36, 678 P.2d 803, 818–19 (1984).

\textsuperscript{40} 67 Wash. 2d 246, 407 P.2d 440 (1965)

\textsuperscript{41} \textit{Id.} at 254–55, 407 P.2d at 444. The state statutes abrogating sovereign immunity in Washington do not explicitly retain immunity for the discretionary acts of government agents: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." \textsc{Wash. Rev. Code} § 4.92.090 (1989); \textit{see also id.} § 4.96.010 (abolishing sovereign immunity for state subdivisions). By contrast, the Federal Tort Claims Act explicitly exempts discretionary acts from liability. Tort claims against the federal government cannot be "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." 28 U.S.C. § 2680(a) (1982). Under federal law, the sole element necessary to relieve the government of liability is discretion; under Washington law, mere discretion is not enough. \textit{See infra} notes 47–77 and accompanying text (discussing the requisites of discretionary immunity in Washington).

\textsuperscript{42} In particular, the supreme court has emphasized that only acts requiring the exercise of basic policy discretion qualify for the immunity. \textit{See infra} notes 49–57 and accompanying text.

\textsuperscript{43} 67 Wash. 2d at 247–52, 407 P.2d at 441–43.

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.} at 257–59, 407 P.2d at 446–47. One commentator has questioned whether the court properly applied its own test to the state's decision to place the juvenile in a medium-security facility. \textit{See Survey of Washington Law, Discretionary Acts Protected by Governmental Immunity}, 41 \textsc{Wash. L. Rev.} 552, 555 n.14 (1966).
assign the boy to boiler room detail and in failing to timely notify law
enforcement agencies of his escape.46

The *Evangelical* court formulated a test to determine whether official
acts qualify for discretionary immunity:

(1) Does the challenged act, omission, or decision necessarily involve
a basic governmental policy, program, or objective? (2) Is the ques-
tioned act, omission, or decision essential to the realization or accom-
plishment of that policy, program, or objective as opposed to one which
would not change the course or direction of the policy, program, or
objective? (3) Does the act, omission, or decision require the exercise of
basic policy evaluation, judgment, and expertise on the part of the gov-
ernmental agency involved? (4) Does the governmental agency involved
possess the requisite constitutional, statutory, or lawful authority and
duty to do or make the challenged act, omission, or decision?47

If the answers to these questions are yes, the challenged act, omis-
sion, or decision is discretionary and therefore immune.48

2. Mason, Noonan, and the “Basic Policy” Requirement

Since *Evangelical*, the Washington Supreme Court has stressed that
only acts rising to the level of basic policy qualify for the discretionary
immunity exception.49 In *Mason v. Bitton*, the supreme court stated
unequivocally that the immunity is restricted to acts involving basic
policy discretion.50 In *Noonan v. State*, by contrast, the appeals court
stepped outside the basic policy parameters established in *Mason* by
applying discretionary immunity to parole board decisions.51

In *Mason*, the administrator of an estate sued the state for negli-
gence.52 State and city police officers had conducted a high-speed
chase resulting in the decedent’s death.53 The court held that the deci-
sions to conduct and continue the pursuit involved discretion at an
operational level and were therefore subject to liability.54 Because the
decisions to conduct and continue the pursuit did not require discre-

46. 67 Wash. 2d at 259, 407 P.2d at 447.
47. Id. at 255, 407 P.2d at 445.
48. Id.
49. Although *Evangelical* may be read as granting immunity to acts involving the mere
implementation of basic policy, the court has tacitly rejected this reading as overbroad. See, e.g.,
50. Id. at 328, 534 P.2d at 1365.
52. 85 Wash. 2d at 322–23, 534 P.2d at 1361–62.
53. Id.
54. Id. at 328–29, 534 P.2d at 1365.
Discretionary Immunity

Discretionary immunity exception. The acts at issue involved discretion by officers "in the field," as opposed to discretion at a "truly executive" level. In the face of a statute requiring police officers to exercise caution when deciding to conduct a high-speed chase, the court concluded that immunizing such decisions would circumvent the legislature's intention to subject governmental entities to liability for their tortious acts. Discretionary immunity, stressed the court, is "strictly limited to acts involving basic policy discretion."

In Noonan v. State, the Washington Court of Appeals extended the discretionary immunity exception to parole board determinations. In Noonan, persons injured by a parolee who absconded from a private, nonsecure alcohol treatment facility sued the state. The parolee had attempted to abduct one woman at knife-point and had raped and kidnapped another while armed with a knife and gun. The appellate court affirmed summary judgment for the state, holding that parole determinations are shielded from liability under the discretionary immunity exception. While noting that a parole decision "requires the exercise of policy evaluation, expertise, and judgment," the court failed to inquire into whether it rises to the level of basic policy.

The Noonan court's analysis is similar to that rejected as inadequate by the supreme court when it reviewed two earlier appeals court cases, Clipse v. Gillis and Moloney v. Tribune Publishing Co. The Washington Supreme Court overruled these cases for purporting to extend

55. Id. at 328, 534 P.2d at 1365.
56. Id. at 328-29, 534 P.2d at 1365.
57. Id. at 327, 534 P.2d at 1364 (emphasis in original). The state supreme court since Mason has emphasized the central importance of the basic policy requirement. See, e.g., Petersen v. State, 100 Wash. 2d 421, 434, 671 P.2d 230, 240 (1983) (the scope of discretionary immunity "should be no greater than is required to give legislative and executive policy-makers sufficient breathing space in which to perform their policymaking functions") (quoting Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 445, 551 P.2d 334, 350, 131 Cal. Rptr. 14, 30 (1976)); Chambers-Castanes v. King County, 100 Wash. 2d 275, 282, 669 P.2d 451, 456 (1983) (the "exercise of discretionary acts at a basic policy level is immune from suit, whereas the exercise of discretionary acts at an operational level is not").
59. The issue of discretionary immunity for parole decisions was one of first impression in Washington. Id. at 563, 769 P.2d at 316.
60. Id. at 560, 769 P.2d at 314.
61. Id. at 563, 769 P.2d at 316.
62. Id. at 565, 769 P.2d at 317.
64. Id. (overruling Moloney v. Tribune Publishing Co., 26 Wash. App. 357, 613 P.2d 1179, cert. denied, 94 Wash. 2d 1014 (1980)).
absolute immunity to all discretionary acts. In *Clipse*, the appellate court held that the investigation of criminal complaints by police officers was discretionary and therefore immune. Similarly, in *Moloney* the appellate court granted discretionary immunity to police officers engaged in disclosing investigative information to the press. In both instances, the supreme court specified that the lower courts had failed to inquire whether the challenged conduct was a basic policy decision.

3. The King Corollary: The "Considered Decision" Requirement

In *King v. City of Seattle*, the Washington Supreme Court added a corollary to the test laid down in *Evangelical*. The *King* court held that the discretionary immunity analysis of *Evangelical* applies only to acts that involve a conscious weighing of risks and advantages. If a governmental agent fails to render such a "considered" decision in a particular instance, the issue of discretionary immunity is not reached and the act is subject to liability.

In *King*, purchasers of real property sought damages from the city for wrongful refusal to issue street use and building permits. The city claimed its acts were of a wholly "governmental, policy-implementing character" and thus exempt from liability. Because the trial court found the acts arbitrary and capricious, however, the *King* court held that an inquiry into their purportedly discretionary nature was superfluous. The city was subject to tort liability for not having rendered an appropriately considered decision.

The *King* court sought to formulate a workable definition of "discretionary" that would limit the immunity to its stated rationale. Recognizing that virtually all official acts involve discretion of some

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65. Id.
69. 84 Wash. 2d 239, 525 P.2d 228 (1974).
70. Id. at 245–47, 525 P.2d at 232–33. Logically, the considered decision issue is a threshold matter that should be addressed prior to examining the questions posed in *Evangelical*. In practice, however, the court typically takes up the issue only after a discussion of the *Evangelical* test. See, e.g., *Emsley v. Army Nat’l Guard*, 106 Wash. 2d 474, 479–80, 722 P.2d 1299, 1302–03 (1986); *King v. City of Seattle*, 84 Wash. 2d at 245–47, 525 P.2d at 232–33.
71. 84 Wash. 2d at 241–42, 525 P.2d at 230–31.
72. Id. at 243, 525 P.2d at 231.
73. Id. at 246–47, 525 P.2d at 233.
Discretionary Immunity

kind, the King court rejected a semantic inquiry into the meaning of "discretionary" and directed instead that judicial investigation be guided by the purpose of the discretionary immunity doctrine: to assure that courts do not pass judgment on basic policy decisions committed to coordinate branches of government. In view of that purpose, the state must show that such a policy decision, consciously balancing risks and advantages, actually occurred. Otherwise, the acts at issue are subject to tort liability.

II. THE APPLICATION OF DISCRETIONARY IMMUNITY TO EARLY RELEASE DECISIONS

Early release determinations should not be shielded from liability by discretionary immunity, for both doctrinal and policy reasons. First, parole and work release decisions fall outside the narrow parameters of the discretionary immunity exception as established in Evangelical and its progeny. Second, absolute immunity allows a pursuit of early release program objectives insulated from the competing interest of public safety. Because parole and work release decisions involve the management of violent and sex offenders, program administrators should be provided incentives to exercise care commensurate with the potential for harm arising from the premature release of such offenders.

A. The Doctrinal Basis for Liability

The purpose of Washington's discretionary immunity exception is to preclude judicial review of high-level, basic policy decisions within the province of coordinate branches of government. Determined to prevent the exception from engulfing the rule of governmental liability, the court has repeatedly emphasized that it applies only to considered acts within the arena of basic policy. The Washington

74. The court noted that "it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." Id. at 246, 525 P.2d at 232 (quoting Johnson v. State, 69 Cal. 2d 782, 788, 447 P.2d 352, 357, 73 Cal. Rptr. 240, 245 (1968)).
75. Id. at 246, 525 P.2d at 232-33.
76. Id. at 246, 525 P.2d at 233.
77. In Noonan, the Court of Appeals simply asserted that the specific parole determination at issue was a considered decision without indicating whether the state had shown the parole board to have rendered one. 53 Wash. App. 558, 565 769 P.2d 313, 317, cert. denied, 112 Wash. 2d 1027, 769 P.2d 313 (1989).
80. For a list of cases, see supra note 57.
Supreme Court’s decisions in *Evangelical*,81 *King*,82 and *Mason*83 articulate the test for determining whether the state should be granted discretionary immunity for its acts. When this test is applied to the typical facts of a parole board decision, it is apparent that such decisions should be subject to liability. The same conclusion applies to work release decisions.

1. Basic Policy Discretion and Early Release Decisions

The starting point for judicial inquiry into whether an official act qualifies for discretionary immunity is the test set forth in *Evangelical*.84 In the context of early release decisions, three of the four issues presented for examination under the test are straightforward and may be disposed of simply. The remaining issue, that of basic policy discretion, requires closer inspection.

As regards the parole board, the first question is whether the board possesses the requisite authority to render a parole determination.85 The answer is yes. Sections 9.95.100 and .110 of the Revised Code of Washington empower the board to release prisoners sentenced under the pre-SRA system prior to the expiration of their maximum terms.86

The second and third issues may be taken together. First, does the board’s decision necessarily involve a basic governmental policy, program, or objective? Second, is the board’s decision essential to the realization of the policy involved?87 The answer to both questions is yes. The parole decision, by definition, not only involves the parole program but is integral to its operation. Because the legislature envisaged the parole program as a central element in its pre-SRA policy of rehabilitation,88 the parole decision is also an essential element in the operation of that policy.89

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82. *King*, 84 Wash. 2d at 239, 525 P.2d at 228.
83. *Mason*, 85 Wash. 2d at 321, 534 P.2d at 1360.
84. 67 Wash. 2d at 255, 407 P.2d at 445.
85. *Id.* For ease of discussion, the order of the questions has been changed from that presented in *Evangelical*.
87. 67 Wash. 2d at 255, 407 P.2d at 445. These two questions, though involving basic policy, are distinct from the question of basic policy discretion. *See supra* notes 49–57 and accompanying text.
89. A literal reading of *Evangelical* would require the court to ask whether the act in question is essential to the realization of a basic governmental program or policy. Under this inquiry, a parole decision could not qualify for discretionary immunity because a given decision cannot
The fourth question is at the heart of the *Evangelical* test, and at the heart of any serious inquiry into the applicability of discretionary immunity to a given act. The issue is whether the board’s decision required the exercise of basic policy evaluation, judgment, and expertise.\(^9\) There is little doubt that a parole decision requires the exercise of policy evaluation, judgment, and expertise; the difficulty lies in determining whether they are exercised at the level of *basic* policy. The court has not enunciated a bright line test for deciding this issue, but has instead used common sense criteria to determine whether official acts involve basic policy discretion.\(^9\)

The parole system involves numerous acts that range from basic policy determinations to operational acts. Certainly, the legislative decision to establish the parole system qualifies as basic policy. On the other hand, the decisions rendered by parole officers in the course of parolee supervision are more closely analogous to the operational decisions of police officers in the field held subject to liability in *Mason*.\(^9\)

Parole determinations lie somewhere between the two. However, several characteristics of the parole decision suggest that it more closely resembles the operational decisions of police officers in the field than the basic policy decision to establish the program. An individual parole determination involves not the formulation of basic policy, but its implementation in a specific instance.\(^9\) Like the choice faced by the police officers in *Mason* of whether to conduct a high-speed chase, the parole board’s decision to release a given inmate requires the exercise of judgment regarding the potential risks posed by the specific decision at hand.

In each instance, moreover, discretion is bounded by a statutory limitation. The police officers in *Mason* were directed to exercise caution in the course or direction of the program or the policy. \(^9\) However, the court has generally inquired instead into whether the class of acts of which the specific act is a particular instance is essential. \(^9\) See, e.g., *Emsley v. Army Nat'l Guard*, 106 Wash. 2d 474, 480–81, 722 P.2d 1299, 1303 (1986) (instance of firing artillery held essential to the realization of the basic governmental objective of training the National Guard).


\(^9\) The supreme court in *King* tacitly rejected *Evangelical’s* application of discretionary immunity to the mere implementation of policy. \(^9\) See, e.g., *Emsley v. Army Nat'l Guard*, 106 Wash. 2d 474, 480–81, 722 P.2d 1299, 1303 (1986) (instance of firing artillery held essential to the realization of the basic governmental objective of training the National Guard).

\(^9\) The King court stipulated that the determination of the status of a given act should be guided by the purpose of the exception: to preclude judicial review of policy decisions in the province of coordinate branches of government. \(^9\) See, e.g., *Mason v. Bitton*, 85 Wash. 2d 321, 328, 534 P.2d 1360, 1365 (1975) (discretion exercised by police officers “in the field” is operational).

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tion,\textsuperscript{94} while the parole board must satisfy itself that a given inmate's rehabilitation is complete and the inmate is fit for release.\textsuperscript{95} In \textit{Mason}, the court held that the statute articulated a standard to which the police officers were accountable.\textsuperscript{96} In the present case, the language of the parole statute likewise establishes a standard to which the board should be accountable. Therefore, a parole determination, which requires the application of statutory and administrative guidelines in a specific instance, involves discretion on an operational level and fails the \textit{Evangelical} test.\textsuperscript{97}

When the court of appeals addressed the issue of discretionary immunity for parole board decisions in \textit{Noonan v. State}, it failed to recognize the truly operational nature of parole determinations.\textsuperscript{98} The \textit{Noonan} court noted that the parole decision involves policy evaluation, expertise, and judgment, and stated simply that such a determination necessarily rests on the board's experience and judgment concerning the risks attendant upon an offender's integration into society.\textsuperscript{99} Although this point highlights the discretionary nature of parole determinations, it fails to address the key issue whether the board's discretion is exercised at the level of basic policy. Indeed, the court's analysis resembles that already rejected as inadequate by the Washington Supreme Court when it overruled two prior appellate court decisions.\textsuperscript{100}

Under the \textit{Evangelical} test, work release decisions are properly subject to liability as well. The Secretary of the Department of Corrections possesses the requisite statutory authority to allow inmates to participate in work release.\textsuperscript{101} The work release decision by definition involves the work release program and, indeed, is essential to it.\textsuperscript{102}

\textsuperscript{94} 85 Wash. 2d at 323–24, 534 P.2d at 1362.
\textsuperscript{95} \textit{WASH. REV. CODE} § 9.95.100 (1989).
\textsuperscript{96} 85 Wash. 2d at 328–29, 534 P.2d at 1365.
\textsuperscript{97} At least one other court has concluded that discretionary immunity for parole board decisions is inappropriate. In Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227, 1229–30 (1977), the Arizona Supreme Court established a rule of qualified immunity for parole decisions. The court was faced with facts and a statute similar to those in \textit{Noonan}.
\textsuperscript{99} \textit{Id.} at 563, 769 P.2d at 316. The \textit{Noonan} court went so far as to indicate in dicta that immunity should extend to "those who under [the parole board's] supervision prepare investigation reports and recommendations that underlie the Board's decision." \textit{Id.} at 565–66, 769 P.2d at 317.
\textsuperscript{101} \textit{WASH. REV. CODE} § 72.65.200 (1989).
\textsuperscript{102} See \textit{supra} notes 87–89 and accompanying text.
However, a determination whether to place an inmate in the program does not involve discretion at the basic policy level. Rather, it requires discretion in the implementation of basic policy set forth in statutory and departmental guidelines. Work release decisions are therefore operational in nature and fall outside the scope of the discretionary immunity exception.103

2. “Considered” Early Release Decisions

Because early release determinations fail to meet the basic policy requirement of the Evangelical test, there would normally be no need for judicial inquiry into whether the decision maker, in a particular instance, rendered a considered decision. If, however, the supreme court were to hold that early release determinations do involve basic policy discretion under Evangelical, such an inquiry would be required.104 Unless the state could demonstrate that the particular decision involved a conscious weighing of its risks and advantages, it would be subject to liability even if it were otherwise immune.105

Given the potential risk of harm attendant upon early release determinations, an inquiry into the considered decision requirement would likely lead a court to examine at least two issues. The first is whether the decision was rendered in compliance with the relevant internal guidelines of the parole board or Department of Corrections;106 the second, whether the decision was reasonable in view of the relevant statutory imperatives.107

When the Noonan court examined the considered decision requirement, it did not inquire into whether the board had engaged in the requisite balancing of risks and advantages. The court simply concluded that “[t]he wisdom of the decision is not subject to attack if, as here, it is a considered decision.”108 Either the court was satisfied on the basis of evidence not mentioned in its opinion that the decision was a considered one, or it failed to conduct the required inquiry. In light

103. See supra notes 90–97 and accompanying text.
105. Id.
106. For the parole board’s decision making criteria and procedures, see generally ISRB REP., Mar. 1987, supra note 17; Rules, supra note 18. Parole board guidelines require the Department of Corrections to furnish documents to the board prior to a parole meeting or decision. These include the institutional progress report covering the offender’s adjustment, achievement, infractions, and program participation; a current psychological or psychiatric report, if requested by the board; and a full review and report from the superintendent regarding the offender’s prospects for rehabilitation. Rules, supra note 18, at 14–15.
107. See supra notes 13–18 and 28–30 and accompanying text.
of the supreme court's criticism of *Clipse*109 and *Moloney,*110 a failure to make this inquiry might constitute reversible error.111

B. The Normative Basis for Liability

Although supreme court doctrine alone suggests the propriety of governmental liability for early release decisions, important policy concerns compel the same conclusion. The incentives provided by liability would be instrumental in promoting due care by program administrators in the management of a potentially highly dangerous population.

When parolees are selected from the ranks of dangerous offenders, the possibility of harm from the negligent assessment of an inmate's suitability for parole is great. This potential is particularly well illustrated by the occasions on which the board has released large numbers of inmates from such populations. In 1986, the *Myers* and *Addleman* courts required the board to reconsider, but not necessarily to modify, the sentence lengths for all offenders convicted under the indeterminate sentencing system.112 As a result of sentence review, the board granted accelerated parole eligibility to forty percent of these offenders.113 According to the board, however, the population from which the parolees were drawn was comprised of "predominantly very serious offenders" who posed a "serious risk" to public safety on the basis of their criminal histories.114 A negligent decision granting parole in this context would have carried, by the parole board's own estimation, a serious risk of grave harm to individual members of the public.

Liability in this setting and in others like it would be useful in providing incentives to the board to make parole decisions with great care and to distinguish offenders likely to reoffend from those who are not, as the statutes direct.115 These incentives are especially important today, given the high concentration of violent and sex offenders in the population remaining under parole board jurisdiction.116

110. *Id.*
111. *Id.*
116. Approximately 95% of the offenders remaining under parole board jurisdiction as of February 20, 1990, were "serious, violent" offenders. Approximately one-third of the offenders remaining under parole board jurisdiction have committed sex crimes. *Bail, supra* note 26.
Discretionary Immunity

The prophylactic functions of liability are equally applicable to work release. During fiscal years 1987, 1988, and 1989, a high percentage of the work release population was composed of violent or sex offenders. Liability for negligence would encourage decision makers to study candidates carefully and grant work release only to those who are unlikely, based on their history and profile, to present a threat of serious harm if assigned to the program.

Liability would also provide incentives for parole and work release administrators to abide by their respective statutory and administrative guidelines. Parole decisions are subject to a statutory injunction that offenders not be released until, in the board's opinion, their rehabilitation is complete. The board is also required to make public safety its highest priority and to thoroughly familiarize itself with a candidate's criminal history and personality before rendering its decision. Similarly, work release determinations involving "sexually violent offenders" are now subject to a 1990 amendment making public safety the primary consideration. Work release decisions are also subject to Department of Corrections guidelines emphasizing caution and a need to minimize risks of harm to the public.

Liability for negligent early release determinations is proper even though such decisions involve, to a degree, a balancing of imponderables regarding the likelihood of recidivism. Statutory and administrative admonitions to evaluate candidates carefully and exercise informed judgment regarding their suitability for early release attests to the capacity of diligence to reduce the risk of releasing persons who pose a danger to the community.

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117. See supra notes 33–37 and accompanying text.
118. Few checks exist to guard against negligent parole or work release determinations. Such decisions are not ordinarily subject to review, and the public cannot vote irresponsible early release decision makers out of office. Members of the parole board, for example, cannot be removed except for cause determined by the superior court of Thurston County. WASH. REV. CODE § 9.95.003 (1989). The Washington Supreme Court has stated that “[a]ccountability through tort liability in areas outside the narrow [basic policy] exception . . . may be the only way of assuring a certain standard of performance from governmental entities.” Bender v. City of Seattle, 99 Wash. 2d 582, 590, 664 P.2d 492, 498 (1983).
120. Id. § 9.95.170 (1989); Act of January 24, 1990.
123. Even apart from the statutory and administrative admonitions, it is a well-established principle of tort law that where the risk of harm is great, commensurately great care is required: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” RESTATEMENT (SECOND) OF TORTS § 319 (1965).
Given the heightened legislative and public concern over the handling of dangerous offenders, a rule providing redress to persons harmed in the event of a negligent release may increase public confidence in early release programs. Accountability might therefore enhance the viability of these activities. Moreover, because liability is likely to provide incentives to greater care, costly judgments for negligent acts are unlikely to occur with a frequency that would significantly impair the operation of the programs.

C. A Proposed Liability Rule for Early Release Decisions

An appropriate liability rule for negligent parole and work release determinations would create incentives to due care without imposing an unreasonable burden on the state. The rule proposed here would allow a plaintiff to establish a prima facie case of negligence on the part of officials responsible for early release decisions by showing that a person sentenced for a violent or sex crime committed either a violent or sex crime while on parole or work release. The burden of production would then shift to the state to show that it was reasonable, in light of the offender’s criminal history and profile, to conclude that the offender did not pose a risk of committing a violent or sex crime while on early release. If the state was unable to produce evidence from which a trier of fact could find the decision to have been reasonable, the burden of proof would reside with the state to justify its decision in light of the offender’s history and profile. If the state could adduce such evidence, however, the plaintiff would have the ultimate burden of proving the decision was unreasonable and therefore negligent.

The rule enunciated here is narrow, proposing liability for early release decisions only in instances of violent or sex crimes. Thus,

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124. Concern over injuries inflicted by violent repeat sex offenders in Washington prompted the state attorney general to convene a committee to draft legislation making public safety a “top priority” in the state’s handling of such individuals. See ATTORNEY GEN.’S EXECUTIVE COMM. ON VIOLENT SEX OFFENDERS, FINDINGS AND RECOMMENDATIONS p. 1 (Sept. 1989). It also prompted the 1989-90 legislative session to enact a number of laws aimed at reducing the risks these persons pose to the public. Among other things, the new laws enjoin the parole board and Department of Corrections to make public safety the primary consideration in their discretionary decisions regarding all pre-SRA offenders and post-SRA violent sex offenders. However, with the exception of “sexually violent” offenders, the public safety provisions do not address violent offenders whose crimes of conviction occurred after June 30, 1984. Moreover, they do not proscribe parole or work release for violent or sex offenders. Finally, they do not apply to early release decisions rendered prior to July 1, 1990. See Act of January 24, 1990, supra note 12.

125. The burden of production refers to the obligation of a party to bring forward sufficient evidence to preclude a ruling against that party on the issue. BLACK’S LAW DICTIONARY 178 (5th ed. 1979).
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unlike strict liability, the rule would not make the state an insurer of every harm that might emanate from an early release decision. Under the rule the state would not, for example, be liable for property damage caused by offenders negligently granted early release. Similarly, liability would not attach even in the case of violent or sex offenses if the decision to place the offender on parole or work release was reasonable based on the offender's history.

The rule would not unduly hamper program administrators in their statutory duties or subject the state to unlimited financial vulnerability. Decision makers would not be required to actually predict future criminal behavior, but rather to make reasonable assessments of the risk an offender poses of recidivism. Imposing a burden of production upon the state would provide an incentive strong enough to encourage decision makers to carefully evaluate each candidate, to generate a paper record, and to place those deliberations on that record to guard against suit. At the same time, because the burden of proof shifts to the state only if it is unable to meet a relatively light burden of production, the rule is unlikely to invite frivolous claims.126

III. CONCLUSION

The application of discretionary immunity to parole and work release determinations is inappropriate both doctrinally and normatively. The evolution of discretionary immunity in Washington as elaborated by the state supreme court indicates that such decisions fall outside the narrow purview of the doctrine. Moreover, if law is to consist of more than a body of internally consistent rules, it must be responsive to the values it professes to serve, to the context in which its decisions occur, and to the results its decisions produce. Liability for negligence would promote careful deliberation by parole and work release administrators in compliance with their respective mandates. Liability would also provide a remedy where one is appropriate, and would ultimately enhance the legitimacy of state programs by rendering them accountable where their negligent operation results in harm.

Marie Aglion

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126. Given the comparatively light burden on the state and the potentially grave risk of harm attending negligent decisions, a negligence standard is superior to a gross negligence standard. The latter would not promote the level of care enjoined by the applicable statutes, or commensurate with the nature of the activity itself.