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TORT LAW—MUNICIPAL LIABILITY FOR NEGLIGENT ENFORCEMENT OF DRIVING WHILE INTOXICATED STATUTES: MASSACHUSETTS LEADS THE WAY IN Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d (1984)

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NOTES

TORT LAW—MUNICIPAL LIABILITY FOR NEGLIGENT ENFORCEMENT OF DRIVING WHILE INTOXICATED STATUTES: MASSACHUSETTS LEADS THE WAY IN *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984).

I. INTRODUCTION

The immense social costs imposed upon the public by intoxicated motorists[1] have prompted widespread demands for governmental action.[2] In response to the campaigns of numerous citizens groups,[3] every state legislature has passed stricter laws[4] increasing the penalties for driving under the influence of alcohol.[5] The Massachusetts legislature amended its driving under the influence statute[6] in 1982 and Gov-

1. The casualties attributable to intoxicated motorists are staggering: 25,000 fatalities and 750,000 injuries annually; 70 deaths and 2,000 injuries daily. N.Y. Times, April 15, 1982, at A-18. Analysts have estimated the annual economic losses involved at levels as high as $24 billion. PRESIDENTIAL COMMISSION ON DRUNK DRIVING, INTERIM REPORT 2 (1982)[hereinafter cited as COMM'N INTERIM REP.]

2. COMM'N INTERIM REP., *supra* note 1, at 3.

3. *Id.* The largest of these groups is Mothers Against Drunk Driving(MADD). Candy Lightner founded MADD in 1980 after an intoxicated motorist killed her thirteen-year old daughter. The group now has 320 chapters across the country and involves 600,000 people. Friedrich, *Man of the Year: Seven Who Succeeded*, TIME MAG., Jan. 7, 1985, at 41.

4. During 1980-82, thirty-four states enacted new legislation. COMM'N INTERIM REP., *supra* note 1, at 3. By the end of 1984, all fifty states had passed new drunk driving laws. In July of 1984, President Reagan signed into law a bill reducing federal highway grants to any state failing to raise the drinking age to twenty-one. Friedrich, *supra* note 3, at 41.

5. Statistics showing that drunk driving goes largely undetected undermine the deterrent value of the new legislation. Only one in 500 to one in 2000 drivers on the road with a blood alcohol content over .10% is arrested for driving while intoxicated. COMM'N INTERIM REP., *supra* note 1, at 2. The arrest rate averages approximately two arrests per year per uniformed officer. PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 14 (1983).

6. MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 1984).

On November 21, 1984, Governor Dukakis approved regulations adopted by the Alcoholic Beverages Control Commission (ABCC) banning "happy hours," which are promotions designed to boost the sales of alcoholic beverages through price reductions. *See* Prohibition of Certain Practices, 444 Mass. Admin. Reg. 59-61 (1984) (to be codifed at

ernor King approved it with an emergency preamble.[7] As the duty of government to protect the public from the dangers imposed by intoxicated motorists has emerged as a critical and unique area of governmental responsibility, the courts are becoming increasingly involved in redefining the limits of municipal tort liability.[8]

In *Irwin v. Town of Ware*,[9] the Massachusetts Supreme Judicial Court held that a municipality owes a duty to the public with respect to intoxicated motorists and that tort liability may be based on the duty.[10] The court concluded that under the Massachusetts Tort Claims Act[11] a municipality may be held liable for the negligent failure of its police officers to remove an intoxicated motorist from the highway, when the motorist subsequently causes harm to other individuals using the highways.[12] By determining that the "public duty" rule[13] did not bar the action,[14] the court distinguished prior precedent[15] and rejected the majority rule.[16]

Although citizens groups acclaimed the *Irwin* decision as a victory,[17] two other groups did not view it with favor: law enforcement

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MASS. ADMIN. CODE tit. 204, §§ 4.00-06). The governor stated that such promotions "are a threat to public safety which undeniably contributes to drunken driving." Office of the Governor of Mass., News Release (Nov. 21, 1984).

The ABCC promulgated the regulations after holding seven public hearings in cities across Massachusetts in August and September, 1984, at which "literally unanimous" testimony supported banning "happy hours" statewide. Memorandum to Governor Dukakis from Paula Gold, Secretary of Consumer Affairs and Business Regulations, 2 (Sept. 28, 1984).

7. Act of Aug. 12, 1982, ch. 393, 1982 Mass. Acts 989-90. The legislature declared the law to be "an emergency law, necessary for the preservation of public safety." The amendment's purpose is "to provide an immediate increase in the penalties of operating a motor vehicle while under the influence of alcoholic beverages." *Id.*

8. *See e.g.*, Huhn v. Dixie Ins. Co., 453 So. 2d 70 (Fla. Dist. Ct. App. 1984)(suit against city for injuries sustained by pedestrian struck by intoxicated motorist whom police had stopped but not arrested prior to accident, not barred by municipal or sovereign immunity (rejecting Everton v. Willard, 426 So. 2d 996 (Fla. Dist. Ct. App. 1983); City of Cape Coral v. Duvall, 436 So. 2d 136 (Fla. Dist. Ct. App. 1983); and Evett v. City of Inverness, 224 So. 2d 365 (Fla. Dist. Ct. App. 1969)). *See also infra* text accompanying notes 106-08.

9. 392 Mass. 745, 467 N.E.2d 1292 (1984).

10. *Id.* at 755, 467 N.E.2d at 1300.

11. MASS. GEN. LAWS ANN. ch. 258 (West Supp. 1984)[hereinafter referred to as the Act].

12. 392 Mass. at 774, 467 N.E.2d at 1310-11.

13. *See infra* notes 92-93 and accompanying text.

14. 392 Mass. at 755, 467 N.E.2d at 1299.

15. *Id.* at 755-56, 467 N.E.2d at 1300.

16. Alaska, Florida, Iowa, Louisiana, Oregon and Wisconsin have abolished the public duty rule. 18 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 53.04b, at 166-67 (3d ed. 1984). *See infra* notes 92-93 and accompanying text.

17. "I think it's absolutely fantastic . . . police are paid by the public and have a

authorities claimed it would destroy the discretionary powers of police;[18] local citizens predicted that it would bankrupt municipalities.[19]

After surveying the history and the policies underlying the doctrine of municipal immunity in Massachusetts, this note concludes that the "public duty" rule should be discarded. The note suggests that the potential difficulties which the *Irwin* decision invites arise from the court's effort to create an exception to the "public duty" rule.[20] The note offers alternative approaches to the issue of liability that could be used to reach the *Irwin* result without decreasing the discretionary powers of the police or threatening municipal governments with bankruptcy.

II. *IRWIN V. TOWN OF WARE*

A. *Facts*

At approximately 2:00 a.m. on May 14, 1980, a Ware police officer observed an automobile departing from the Cue N' Cushion lounge at a high rate of speed.[21] The officer stopped the vehicle for "driving too fast under the circumstances,"[22] and radioed the police station[23] for a second officer who arrived at the scene several minutes later.[24] The driver admitted to the first officer that he had been drinking,[25] and the officer later testified that the driver's breath smelled of alcohol.[26]

Upon the arrival of the second officer, the two conferred, leaving the driver in his car.[27] An eyewitness later testified that while the of-

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responsibility to the public. It's no different than a fire truck going by a burning house." 114 N.J.L.J. 295 (1984)(telephone interview with Candy Lightner, president of MADD).

18. "We don't disagree with police accountability, but what's happening is that police are only concerned about being sued and not using discretionary powers." 114 N.J.L.J. 295 (1984) (telephone interview with Edward Merrick of the Massachusetts Police Association).

19. *See* Margolick, *Drunken Driving Case Divides Town*, N.Y. Times, March 13, 1983, § I, at 26, col. 2, 3 (discussing local reaction to jury verdict awarding Debbie Irwin $873,697 and noting that Ware's budget is $5.6 million, its unemployment rate is 11%, and its average wage earner earns $15,000 a year).

20. *See* Dinsky v. Framingham, 386 Mass. 801, 438 N.E.2d 51 (1982).

21. *Irwin*, 392 Mass. at 763, 467 N.E.2d at 1304.

22. *Id.*

23. Plaintiff's Complaint at 3, Irwin v. Town of Ware, No. 17562 (Mass. Super. Ct. Feb. 11, 1983).

24. 392 Mass. at 763, 467 N.E.2d at 1304.

25. The driver told the officer that he had consumed "a couple of beers." *Id.*

26. *Id.*

27. *Id.*

ficers conferred the driver moved unsteadily and held onto his car.[28] Despite his apparent intoxication, the officers merely gave him an oral warning[29] and permitted him to drive his vehicle away.[30] They administered to the motorist no field sobriety test.[31] At about 2:10 a.m., travelling at a high rate of speed,[32] the motorist collided head-on with a vehicle operated by the plaintiff's decedent.[33] The drivers of both vehicles died in the collision, as did Misty Jane Irwin, a passenger in the back seat of the Irwin vehicle.[34]

The plaintiffs[35] brought an action in Hampshire County Superior Court against the Town of Ware alleging a negligent failure of the police to take the intoxicated motorist into protective custody.[36] In a special verdict, a jury found that the town's breach of its duty to exercise reasonable care to protect the Irwins from harm proximately caused their injuries[37] and awarded them $873,697 in damages.[38] The town appealed from several evidentiary rulings and the denial of its motion for judgment notwithstanding the verdict[39] while the plaintiffs

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28. *Id.*

29. "[The first officer] spoke with [the driver] for about one minute and returned to his cruiser." *Id.* at 764, 467 N.E.2d at 1305. The officer told the driver "Go home and drive carefully." Margolick, *supra* note 19, § I at 26, col. 4.

30. *Irwin*, 392 Mass. at 764, 467 N.E.2d at 1305.

31. *Id.*

32. The driver's vehicle was traveling at a speed between sixty-five and seventy-five miles an hour at the time of the collision. *Id.* The driver's vehicle crossed the center of the highway and travelled about 400 feet on the shoulder, striking a utility pole before hitting the Irwin vehicle. Plaintiff's Complaint at 3, Irwin v. Town of Ware, No. 17562 (Mass. Super. Ct. Feb. 11, 1983).

33. 392 Mass. at 764, 467 N.E.2d at 1305.

34. *Id.*

35. The plaintiffs were Steven Irwin, by his mother and next friend, Debbie L. Irwin, and Debbie L. Irwin, in her own right and as administratrix of the estates of Mark D. Irwin and Misty Jane Irwin. *Id.* at 745 n.1, 467 N.E.2d at 1292 n.1.

36. *Id.* at 746-47, 467 N.E.2d at 1295.

37. Special verdict at 21, Irwin v. Town of Ware, No. 17562 (Mass. Super. Ct. Feb. 11, 1983).

38. 392 Mass. at 747, 467 N.E.2d at 1295.

39. *Id.* On the evidentiary level, the town primarily objected to the admission of a letter sent to the medical examiner of the town by the chief of the Clinical Chemistry Department of Laboratory Medicine at the University of Massachusetts Medical Center. *Id.* at 748, 467 N.E.2d at 1296. The letter reported the results of a blood alcohol analysis test performed on the motorist whose vehicle struck the plaintiffs. *Id.*

On appeal, the court agreed with the town's argument that the business records exception to the hearsay rule did not support admission of the letter. MASS. GEN. LAWS ANN. ch. 233, § 78 (West Supp. 1984); *Irwin*, 392 Mass. at 749, 467 N.E.2d at 1296. *See infra* text accompanying note 42. The letter did not qualify under the statute because it represented the summation of an expert opinion, rather than a record made in the regular course of business, and because its author relied upon information from other persons who had not "reported that information as business routine." *Id.*

motioned for a new trial on the issue of damages for the death of Misty Jane Irwin.[40] The supreme judicial court granted the plaintiff's motion for direct appellate review.[41]

After review, the supreme judicial court remanded the case for a retrial on the ground that the trial judge had wrongfully admitted into evidence a letter reporting the results of a blood test on the intoxicated motorist.[42] A majority of the court [43] concluded that Ware could be held liable under the Act for the negligent failure of its police officers to detain the intoxicated motorist if the failure proximately caused the plaintiff's injuries. [44]

B. *Rationale*

Statutes define the powers and duties of Massachusetts law enforcement officers.[45] In *Irwin*, the court viewed the statutes defining the responsibilities of police officers regarding intoxicated motorists[46]

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40. *Irwin*, 392 Mass. at 749, 467 N.E.2d at 1296.

41. *Id.*

42. *Id.* at 749-50, 467 N.E.2d at 1296-97. A settlement on February 7, 1985, avoided the necessity of a second trial. Under the terms of the settlement, Debbie Irwin and her son will be named the beneficiaries of a $1.9 million dollar annuity contract that the town will purchase at a cost of $237,000. The Morning Union, Feb. 8, 1985, at 1, col. 2.

43. Justices Wilkins, Liacos, and Abrams joined Chief Justice Henessey, who wrote the opinion for the majority; Justices Nolan, Lynch, and O'Connor dissented. *Irwin*, 392 Mass. at 775, 467 N.E.2d at 1311.

44. *Id.* at 774, 476 N.E.2d at 1310-11.

45. MASS. GEN. LAWS ANN. ch. 41, § 98 (West 1979). *See generally* MASS. GEN. LAWS ANN. ch. 41, § 96 (West 1979)(setting forth administrative standards for department operations).

46. Those statutes and their text in relevant part are as follows.

MASS. GEN. LAWS ANN. ch. 41, § 98 (West 1979):

> . . . public officers . . . shall suppress and prevent all disturbances and disorder.

Id.

MASS. GEN. LAWS ANN. ch. 90, § 21 (West Supp. 1984):

> Any officer authorized to make arrests may arrest without warrant and keep in custody for not more than twenty-four hours . . . any person operating a motor vehicle on any way . . . and any officer authorized to make arrests. . .may arrest without warrant any person . . . upon any way or place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees . . . who the officer has probable cause to believe has operated or is operating a motor vehicle while under the influence of intoxicating liquor . . . .

Id.

MASS. GEN. LAWS ANN. Ch. 90, § 24(1)(a)(1) (West Supp. 1984):

> Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor . . . shall be punished by a fine of not less than one hundred

as evidence of a legislative intent to protect both intoxicated motorists[47] and other users of the highways.[48] Noting that Masssachusetts had previously discerned a "special relationship" based on statutory responsibilities and legislative intent in cases holding liquor store owners liable to the public for harm caused by intoxicated motorists,[49] the court reasoned that the liquor store cases were at least analogous to the *Irwin* situation.[50] The court therefore concluded that it could apply the analysis of the liquor store cases by analogy to the *Irwin* case.[51] Using the analysis, the majority found that a "special relationship" based upon statutory responsibilities and legislative intent exists between a police officer who negligently fails to remove an intoxicated motorist form the highways and a member of the public who suffers

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nor more than one thousand dollars, or by imprisonment for not more than two years, or both.

Id.

MASS. GEN. LAWS ANN. ch.90, § 24(1)(f) (West Supp. 1984):

> Whoever operates a motor vehicle upon any way or in any place to which the public have access as invitees or licencees, shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. . . .

Id.

MASS. GEN. LAWS ANN. ch. 90 C, § 2 (West Supp. 1984):

> Any police officer assigned to traffic enforcement shall . . . record the occurence of automobile law violations upon a citation . . . .

Id.

MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1979):

> Any person who is incapacitated may be assisted by a police officer with or without his consent to his residence, to a facility, or to a police station . . .
>
> No person assisted to a police station pursuant to this section shall be held in protective custody against his will; provided, however, that . . . an incapacitated person may be held in protective custody until he is no longer incapacitated or for a period of not longer than twelve hours, whichever is shorter.

Id.

47. 392 Mass. at 762, 467 N.E.2d at 1304.

48. *Id.* Prior case law concerning issues of tort liability arising out of alcohol consumption and motor vehicle operation had construed the applicable statutes as enacted for the dual purpose of protecting both the individual motorist and the general public as well. Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 10, 453 N.E.2d 430, 433 (1983)(quoting Rappaport v. Nichols, 31 N.J. 188, 201-02, 156 A.2d 1, 8 (1959)); Adamian v. Three Sons, Inc., 353 Mass. 498, 500, 233 N.E.2d 18, 19 (1968).

49. *See* 392 Mass. at 757-58, 467 N.E.2d at 1301 (discussing Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 453 N.E.2d 430 (1983), and Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968)).

50. *Id.* at 757, 467 N.E.2d at 1301.

51. *Id.* at 758, 467 N.E.2d at 1302. The dissenters sharply criticized the majority's analogy. *Id.* at 776, 467 N.E.2d at 1312 (Nolan, J., dissenting). *See infra* text accompanying note 59.

harm as a result.[52] The court stated that the "special relationship" would permit private negligence actions and render the public duty rule inapplicable.[53] The court thus defeated the town's argument that the public duty rule barred the action because its police officers owed the duty to the general public only, not to the individuals injured in this case.[54]

C. *Dissent*

The dissenters[55] objected that the majority's finding amounted to the creation of a new "common law duty" owed by the municipality through its police to each individual.[56] They stressed that a majority of jurisdictions require both privity between the injured party and the police, and specific assurances of protection made by the police in order for an individual to maintain an action in tort.[57] Since neither factor existed in *Irwin*, the dissenters asserted that the plaintiffs had not demonstrated the requisite "special relationship" to defeat the public duty rule in tort actions against the police.[58] The dissenters also criticized the majority's reliance on cases concerning the liability of liquor store owners, on the grounds that the cases could not serve as analogues because the public duty rule is irrelevant when the defendant is in the private sector.[59] Finding that the majority's ruling had in effect discarded the public duty rule and with it the "special relationship" exception, the dissenters suggested that it would be wiser to abrogate the public duty rule.[60]

III. BACKGROUND

A. *Sovereign Immunity*

Prior to 1978, the common law doctrine of sovereign immunity

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52. *Irwin*, 392 Mass. at 762, 467 N.E.2d at 1303-04.

53. *Id.* at 759, 467 N.E.2d at 1302.

54. *Id.* at 754-55, 467 N.E.2d at 1299.

55. Interestingly, Justice Nolan, who wrote the dissenting opinion in *Irwin*, wrote the *Dinsky* opinion for a unanimous court. *See infra* notes 88-101 and accompanying text. Clearly, the court is determined to retain municipal immunity for some torts.

56. 392 Mass. at 776, 467 N.E.2d at 1312 (Nolan, J., dissenting).

57. *Id.* at 775, 467 N.E.2d at 1311 (Nolan, J., dissenting).

58. *Id.* at 776, 467 N.E.2d at 1311 (Nolan, J., dissenting).

59. *Id.* at 776, 476 N.E.2d at 1312 (Nolan, J., dissenting).

60. *Id.* at 777, 467 N.E.2d at 1312 (Nolan, J., dissenting) (citing Ryan v. Arizona, 134 Ariz. 308, 656 P.2d 597 (1982)). The *Ryan* court denounced the "speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty," and abolished the public duty rule. *Id.* at 310-11, 656 P.2d at 599-600.

generally shielded Massachusetts municipalities from tort liability for the acts or omission of their employees.[61] The doctrine developed from the ancient maxim "*rex non potest peccare*," meaning "the King can do no wrong."[62] England first recognized the doctrine in the case of *Russell v. The Men of Devon*.[63] In 1812 Massachusetts followed *Russell* to become the first American state to adopt the doctrine in *Mower v. Inhabitants of Leicester*.[64] The doctrine remained popular in Massachusetts because it furthered two public policies. First, immu-

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61. The terms "sovereign immunity" and "municipal immunity" refer to the common law rule precluding recovery in tort from a governmental entity. The distinction between the two forms of immunity lies in whether an individual seeks recovery from the government at the state or the local level. *See* Whitney v. City of Worcestor, 373 Mass. 208, 212, 366 N.E.2d 1210, 1213 (1977). While municipalities traditionally held a governmental immunity in tort, their immunity differed both in scope and in origin from the immunity of the sovereign. W. KEETON, PROSSER AND KEETON ON TORTS § 131, at 1051 (5th ed. 1984). In discussing the two forms of immunity in the case of Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 296 N.E.2d 461 (1973), the supreme judicial court said:

> While it is true that there is a distinct difference in the legal basis, the difference is of no significance in our reasoning here. The separate reasons why the rule of immunity was established for the municipality, on the one hand, and for the sovereign, on the other hand, may have been sound in their inception but they have long since lost their validity.

Id. at 616, 296 N.E.2d at 464.

For the sake of simplicity, this note uses the term "sovereign immunity."

For a detailed history of sovereign immunity in England and its development in early American law, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). Borchard, *Government Liability in Tort*, 34 YALE L.J. 1-45, 129-143, 229-258 (1924) presents an excellent and exhaustive discussion of sovereign immunity. For a brief history of the doctrine in Massachusetts, see Note, 3 W. NEW ENG. L. REV. 609, 610-14 (1981).

62. Comment, *Municipal Tort Liability For Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 538 (1982).

Professor Borchard maintains that a serious misconseption of the origin of the maxim perverted its historical meaning. The professor claims that originally the maxim meant that the king was not privileged to do wrong and that its modern counterpart means that he is incapable of doing wrong. *See* Borchard, *supra*, note 61, at 17-35.

63. 2 T.R. 667, 100 Eng. Rep. 359 (1788). In *Russell*, the court granted immunity to an unincorporated political subdivision of a county because of the lack of a fund from which to pay the judgment coupled with the inequity of imposing liability upon the citizenry of the county. *Id.* at 672-73, 100 Eng. Rep. at 362. Because the concept of a municipal corporation was new at the time, suit had been brought against the entire population of the county. *Id.* at 667, 100 Eng. Rep. at 359. The House of Lords reasoned that because "the inhabitants of a county are a fluctuating body," it would be unjust to impose liability upon innocent parties named as defendants. *Id.* at 668, 100 Eng. Rep. at 360. The court failed to explain its requirement that there be a specific fund from which to collect the judgment. *Id.* at 672-73, 100 Eng. Rep. at 362. *See generally* W. KEETON, *supra* note 61, § 131, at 1051 (discussing *Russell*).

64. 9 Mass. 247 (1812). In *Mower*, plaintiffs brought an action for the loss of a horse due to negligent bridge maintenance. *Id.* at 250. On appeal, the court reversed a verdict

nity reflected the theory that municipal functions benefited the public rather than individuals or the municipality itself;[65] second, immunity insulated governmental administrative decision-making from *post-facto* judicial analysis which might impede governmental operations.[66]

To alleviate the sometimes harsh results reached under the doctrine,[67] the courts created numerous exceptions.[68] As the doctrine became "riddled with exceptions,"[69] courts increasingly questioned whether its underlying premise remained compatible with the basic tort principle that liability follows wrongdoing.[70]

Recognizing that blind loyalty to *stare decisis* would predicate modern law upon an "[e]ighteenth century anachronism," the Supreme Court of Florida abolished sovereign immunity in 1957.[71] Other jurisdictions soon followed Florida.[72] As early as 1973, the Supreme Judicial Court of Massachusetts expressed its dissatisfaction

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for the plaintiffs on the grounds that the municipality neglected a duty to the general public only. *Id.* at 249.

The supreme judicial court followed *Russell* although "the only similiarity between the situation[s] . . . lay in the fact that the defendants were counties." Borchard, *supra* note 61, at 42.

65. Whitney v. City of Worcester, 373 Mass. 208, 216, 366 N.E.2d 1210, 1215 (1977).

66. *Id.* at 217, 366 N.E.2d at 1215.

67. Perhaps the most notorious case is Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969)(en banc)(duty of sheriff to arrest intoxicated drag-racing motorists owed to general public and not to individual plaintiffs). The court subsequently overruled *Massengill* in Ryan v. Arizona, 134 Ariz. 308, 656 P.2d 597 (1982)(en banc)(state liable for injuries inflicted by escapee from juvenile corrections facility).

68. Most prevalent was the governmental/proprietary distinction: insofar as municipalities exercise a governmental function, they are immune from tort liability, but when acting in a proprietary capacity, they are held accountable for their acts under ordinary tort law standards. E. MCQUILLAN, *supra* note 16, § 53.02, at 133. *See, e.g.*, Bolster v. City of Lawrence, 225 Mass. 387, 114 N.E. 722 (1917)(public baths constitue a governmental function when provided gratuitously by municipality).

69. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961)(discussion of the origin and history of sovereign immunity).

70. E. MCQUILLAN, *supra* note 16, § 53.02, at 133. "That an individual injured by the negligence of the employees of a municipality should bear his loss himself instead of having it borne by the public treasury to which he and all other citizens contribute, offends the basic principles of equality of burdens and of elementary justice." *Id.*, § 53.02, at 142 n.11 (quoting Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970)(citing other jurisdictions which questioned the doctrine on similiar grounds)).

71. E. MCQUILLAN, *supra* note 16, § 53.02, at 135 (quoting Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133, 134 (Fla. 1957)(en banc)(plaintiff could maintain an action against city for wrongful death of husband caused by alleged negligence of a police officer acting in the course of his employment)).

72. *See, e.g.*, Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)(abrogating municipal immunity from tort liability); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961)(rejecting doctrine of governmental immunity from tort liability as mistaken and unjust); Molitor v. Kaneland Community Unit Dist., 18

with the doctrine, but found that comprehensive legislative action was preferrable to judicial abrogation of the doctrine.[73] In the four years following its deferral to the legislature, the court declined two opportunities to abolish the doctrine, reiterating on each occasion its preference for legislative reform.[74]

B. *The Massachusetts Tort Claims Act*

In 1978, following pressure from the court,[75] the state legislature passed the Massachusetts Torts Claims Act,[76] which provided that "[p]ublic employers shall be liable for . . . the negligent or wrongful act or omission of any public employee . . . in the same manner and to the same extent as a private individual under like circumstances."[77] The Act did not specify the situations in which municipalities could be held liable.[78] It simply removed the defense of sovereign immunity,[79] leaving to the court the difficult task of applying the statutory language to a wide variety of public functions.[80]

Ill. 2d 25, 163 N.E.2d 96 (1959)(discarding traditional rule of school district tort immunity).

73. Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 614, 296 N.E.2d 461, 463 (1973)(Commonwealth does not enjoy immunity from liability if it creates or maintains a private nuisance which causes injury to real property of another).

74. *See* Note, *supra* note 61, at 609, 611 n. 24 (1981). In Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, 367 Mass. 658, 327 N.E.2d 882 (1975), plaintiff alleged that injuries sustained in a fall on a state college campus were due to the Commonwealth's negligence. The court stated that it would decline to abolish immunity until the legislature either acted or demonstrated an intent not to act. *Id.* at 662, 327 N.E.2d at 885. In Caine v. Commonwealth, 368 Mass. 815, 335 N.E.2d 340 (1975), the plaintiff in a wrongful death action alleged that the Commonwealth negligently caused her intestate's death by failing to remove an excessive accumulation of ice from a highway. The court again declined to abolish the immunity, on the grounds that the legislature had not yet demonstrated an intent by inaction. *Id.* at 816, 335 N.E.2d at 341.

75. *See Whitney*, 373 Mass 208, 210, 366 N.E.2d 1210, 1212 (1977)(declaring intention to abrogate sovereign immunity in the first appropriate case presented after the conclusion of the 1978 session of the legislature, if at that time the legislature had not acted definitively; the court handed down its decision in August, 1977, and the Act was passed in July, 1978).

76. MASS. GEN. LAWS ANN. ch. 258 (West Supp. 1981). The House and the Senate endorsed bill 1647 was endorsed by the House and Senate on July 11, 1978, and the governor signed it on July 20, 1978. Note, *Sovereign Immunity in Massachusetts*, 13 NEW ENG. L. REV. 877 (1978).

77. MASS. GEN. LAWS ANN. ch. 258, § 2 (West Supp. 1981).

78. The Act did, however, specify several exceptions to the waiver of immunity: claims in which the public employee exercised due care in the performance of a statutory duty; claims arising from the exercise or failure to exercise a discretionary function or duty by a public employee; claims arising out of intentional torts; and claims arising in respect of the assessment of taxes. MASS. GEN. LAWS ANN. ch. 258, § 10 (West Supp. 1981).

79. *See supra* notes 61-74 and accompanying text.

80. Glannon, *The Scope of Public Liabilty Under the Tort Claims Act: Beyond the*

The lack of legislative history accompanying the Act further complicated the court's task.[81] The only statement of legislative intent exists in the legislature's declaration that "[t]he provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof."[82] According to subsequent court opinions, the legislature intended a two-fold purpose: first, "to provide an effective remedy for persons injured as a result of the negligence of governmental entities;"[83] and second, "to preserve the stability and effectiveness of government by providing a mechanism which will result in payment of only those claims against governmental entities which are valid, in amounts which are reasonable and not inflated."[84] The statement of a dual purpose reflects the court's position that issues of municipal liability must be resolved such that "[a]n appropriate balance [is] struck between the public interest in fairness to injured persons and in promoting effective government."[85] To effectuate the intended result, the court has maintained that ". . . the Act simply removed the defense of immunity in certain tort actions . . . [and] did not create any new theory of liability for a municipality."[86] Actions brought under the Act are thus governed by the same theories of liability that apply to tort actions involving private parties.[87]

Public Duty Rule, 67 MASS. L. REV. 159 (1982)(discussing the public duty rule as a means of reinstating municipal immunity and concluding that Dinsky v. Framingham, 386 Mass. 801, 438 N.E.2d 51 (1982) does not portend broad reestablishment of immunity).

81. Note, *supra* note 61, at 613. The sponsors of the original bill declared that they intended "to abolish governmental immunity." Journal of the House of Rep., H.R. 1394, 2330 (1978).

82. Act of July 20, 1978, ch. 512, § 18, 1978 Mass. Acts 848.

83. Vasys v. Metropolitan Dist. Comm'n., 387 Mass. 51, 55, 438 N.E.2d 836, 839 (1982).

84. *Id.* at 57, 438 N.E.2d at 840.

85. Whitney v. City of Worcestor, 373 Mass. 208, 216, 366 N.E.2d 1210, 1215 (1977).

86. Dinsky v. Town of Framingham, 386 Mass. 801, 805, 438 N.E.2d 51, 53 (1982). Other jurisdictions follow the *Dinsky* rule. *See* Porter v. Urbana, 88 Ill. App. 3d 443, 410 N.E.2d 610 (1980)(city not liable to rape victim for officer's failure to question or arrest assailant absent officer's knowledge of dangerous circumstances or control over the rape site); Coffey v. Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976)(although complaint against municipality for negligence inspection stated a cause of action, municipal immunity may be retained for public policy reasons); Duran v. Tuscon, 20 Ariz. App. 22, 509 P.2d 1059 (1973)(city not liable for injuries arising from its alleged negligent violation of fire code by permitting open flame heater in body shop); Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, 199 N.W.2d 158 (1972)(city not liable for injuries sustained in motel fire although city issued building permit to motel not in complaince with building code; building codes are not insurance policies by which municipality guarantees compliance).

87. Dinsky v. Framingham, 386 Mass. 801, 804-05, 438 N.E.2d 51, 53 (1982); Beur-

C. Dinsky *and the Public Duty Rule*

Two years before the *Irwin* decision, the court adopted the public duty rule in *Dinsky v. Framingham*,[88] thereby signaling an apparent willingness to limit municipal tort liability drastically. The plaintiffs in *Dinsky* purchased a residence that suffered water damage as a result of improper grading by the builder.[89] The builder subsequently sold the residence to the Dinskys without first conducting a grading inspection as required by the Board of Health.[90] Plaintiffs sought damages from the municipality for having negligently issued an occupancy permit to the builder. The superior court directed a verdict for the town; the supreme judicial court took the case on direct appellate review and affirmed.[91]

The public duty rule provides that to maintain a tort action against a municipality, plaintiffs must show that it breached a duty owed to them as individuals, and not a duty owed to the general public.[92] Where the harm suffered by plaintiff resulted from an activity

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klian v. Allen, 385 Mass. 1009, 432 N.E.2d 707 (1982). *See* E. MCQUILLAN, *supra* note 16, § 53.02, at 138 n.4.

88. 386 Mass. 801, 438 N.E.2d 51 (1982).

89. *Id* at 801-02, 438 N.E.2d at 51-52.

90. *Id.*

91. *Id.* at 801, 438 N.E.2d at 51.

92. E. MCQUILLAN, *supra* note 16, § 53.04b, at 165. *See also* Glannon, *supra* note 80, at 159; Note, *Municipal Tort Liability and the Public Duty Rule: A Matter of Statutory Analysis*, 6 WM. MITCHELL L. REV 391 (1980)(discussing the public duty rule as applied to negligent inspections); Comment, *supra* note 62, at 548-552 (discussing the public duty rule as applied to negligent inspections).

Numerous cases cite the public duty rule. *See, e.g.*, Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979) (city ordinance requiring inspection for fire code violations and correction of them was intended to protect municipality as a whole, thus creating only a "public" duty to inspect rather than a "special" duty to individual members of the public); Hannon v. Counihan, 54 Ill. App. 3d 509, 369 N.E.2d 917 (1977) (plaintiff's complaint for damages against the municipality for inspector's failure to inspect adequately building foundation dismissed for failure to state a cause of action); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (city not liable for failure to provide police protection to individual who was threatened with, and suffered, severe injury, on grounds that imposing a duty on police to protect the general public was unsound as a matter of public policy); Moudlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967) (city not liable for inspector's negligence in failing to inspect or negligently inspecting store mezzanine which fell and killed patron); *but see* Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982) (en banc) (state liable for injuries inflicted by escapee from juvenile correction facility); Stewart v. Schieder, 386 So. 2d 1351 (La. 1980) (building inspector's failure to examine plans prior to issuance of building permit as required by law rendered municipality liable for injuries caused when building collapsed); Adams v. State, 555 P.2d 235 (Alaska 1976)(state was liable for injuries sustained by hotel guests in fire because state assumed duty to correct fire hazards discovered by undertaking fire inspection and thereafter breached its duty by failing to take action with respect to several fire hazards); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976)(although complaint against

designed or executed solely for the benefit of the general public, the action fails.[93] The majority of jurisdictions currently follow the *Dinsky* rule.[94]

The municipality in *Dinsky* argued that the duty of its building commissioner consisted of ensuring compliance with the building code for the benefit of the general public and that its duty did not run to individual property owners in their private capacities.[95] While noting that the applicable statutes imposed specific duties upon the municipality, the court emphasized that the statutes imposed no specific duties upon building authorities with respect to individual property owners.[96] The court did not find that the municipality owed the plaintiffs a duty of due care. Relying upon the stated purpose of the building code to "insure public safety, health and welfare,"[97] the court concluded that the duties imposed under the statute were purely "public" in nature.[98] Unable to find any statutory language or legislative history indicating a legislative intent to create private causes of action for property owners,[99] the court held that "in the absence of a special duty owed to the plaintiffs, different from that owed to the public at large, no cause of action for negligent inspection can be maintained."[100] To hold otherwise, the court reasoned, would in effect make the municipality an insurer of construction projects, subject it to oppressive liability, and inhibit the passage of regulations designed for

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municipality for negligence stated a cause of action, municipal immunity may be retained for public policy reasons).

93. Comment, *supra* note 62, at 548.

94. *See* cases cited *supra* note 92.

95. *Dinsky*, 386 Mass. at 805, 438 N.E.2d at 53.

96. *Id.* at 809-10, 438 N.E.2d at 55-56. *Dinsky* presented a question of first impression and the court looked to other jurisdictions for guidance. *Id.* at 805, 438 N.E.2d at 53. In basing its analysis upon the premise that "the purpose of a building code has been considered traditionally to be the protection of the general public," the court observed that it followed the majority rule. *Id.* The court continued by reviewing cases from various jurisdictions which had invoked the traditional rule and dismissed the actions for want of an actionable duty. *Id.* at 805-08, 438 N.E.2d at 53-55.

For a discussion of the application of the public duty rule to the issues of municipal liability raised in *Dinsky*, see Comment, *supra* note 62.

97. *Id.* at 809 n.3, 438 N.E.2d at 55 n.3 (citing MASS. ADMIN. CODE tit. 780, § 100.4 (1974)).

98. *Id.* at 809-10, 438 N.E.2d at 55-56.

99. *Id.* at 809-10, 438 N.E.2d at 55-56. In the words of the court: "There does not appear to be any language in the enactments which would warrant a finding that the Legislature intended to create private causes of action for property owners *on the facts of this case*." *Id.* at 809, 438 N.E.2d at 55 (emphasis added). Query whether the court would still apply the public duty rule to a case involving serious physical injury or death arising as the result of a municipality's grossly negligent enforcement of a building code.

100. *Id.* at 810, 438 N.E.2d at 56.

the protection of the public.[101]

IV. ANALYSIS

A. *Statutory Intent*

In its discussion, the *Dinsky* court employed broad language which arguably constitutes precedent for applying its reasoning to other "public" functions, such as police and fire protection.[102] In placing particular emphasis upon the statutory language of the State Building Code,[103] the court appeared willing to base the public/private duty distinction on the intent behind the statute which prompted a public employee to act when harm was caused.[104] If the building codes make reference to the "public," courts construing the intent behind them remain unwilling to broaden the statutory language to the extent necessary to find an actionable or "private" duty.[105] Because legislatures draft most highway safety statutes to emphasize the benefit to the "public" or the "general public," courts relying on the legislative intent theory must liberally construe the language to find the intent necessary to impose an actionable, private duty upon a municipality. As in the cases involving building codes, a determination of municipal nonliability ought to obtain in highway safety cases under a statutory intent theory because most statutes intend to benefit the "public."

The recent case of *Bailey v. Town of Forks*[106] illustrates the point. The plaintiff in *Bailey* sued the town because its police officer allegedly negligently failed to detain an intoxicated motorist with whom the officer had been in "official contact" shortly before the motorist's car struck the plaintiff.[107] The court rejected plaintiff's contention that

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101. *Id.*

102. Glannon, *supra* note 80, at 159 n.4.

103. MASS. ADMIN. CODE tit. 780, § 100.4 (1974).

104. As to the intent of the State Building Code, the code provides that

> This code shall be construed to secure its expressed intent which is to insure public safety, health and welfare insofar as they are affected by building construction through structural strength, adequate egress facilities, sanitary conditions, equipment, light and ventilation and fire safety; and, in general, to secure safety to life and property.

MASS. ADMIN. CODE tit. 780, § 100.4 (1974).

105. A recent survey of actions against municipalities for negligent building inspections could find no case in which a plaintiff prevailed on a theory of legislative intent. Comment, *supra* note 62, at 550 n.68.

106. — Wash. App. —, 688 P.2d 526 (1984). The facts of *Bailey* bear a similiarity to the facts of *Irwin*; *see infra* note 97.

107. *Id.* at —, 688 P.2d at 528. The plaintiff's complaint asserted that the police officer made "official contact" with the intoxicated motorist because the officer had arrived

the criminal statutes governing the operation of motor vehicles revealed a legislative intent to confer a cause of action upon individuals of a protected class. The court noted that the statutes "evidence a legislative concern only for the public in general and not for any particuliar member thereof or identified class."[108]

In contrast to *Bailey*, however, the court in *Irwin* found that the applicable statutes revealed a legislative intent to impose a private duty upon a municipality for the benefit of an identifiable class, the class being "intoxicated persons and other users of the highway."[109] The class of "other users" comprises an extremely large number of people, encompassing almost every member of the public at one time or another. It is difficult to see how the class differs in any significant way from the "general public" denied a cause of action under the building codes in *Dinsky*.[110] The statutory intent analysis which initiated the public duty rule in *Dinsky* constitutes binding precedent, however, which required the same methodology to be employed in *Irwin*.

The few cases resting explicitly upon the statutory intent rationale to find a private duty owed by a municipality to a particular class typically involve extremely narrow situations, such as the duty to designate properly each election candidate on a ballot,[111] or the duty to comply with local ordinances authorizing property assessments to make public improvements.[112] In such cases, the class of potential plaintiffs remains small, easily identifiable, and clearly subject to direct

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at the scene of an altercation in which the intoxicated motorist was involved, had ordered him to depart, and had observed his departure. *Id.* at —, 688 P.2d at 528, 530. Shortly afterwards, the motorist's vehicle struck the vehicle in which the plaintiff was a passenger. *Id.* at —, 688 P.2d at 528 (quoting plaintiff's brief).

The court entered judgment on the pleadings for the town and the plaintiff appealed. *Id.* at —, 688 P.2d at 527. On appeal, the plaintiff claimed that the officer had, by virtue of his "official contact" with the intoxicated motorist, "taken charge" of the tortfeasor. *Id.* at —, 688 P.2d at 530. Apparently plaintiff was attempting to bring the action within the scope of RESTATEMENT (SECOND) OF TORTS § 319 (1965), which imposes an individual duty upon "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled." *Bailey*, 38 Wash. App. at —, 688 P.2d at 530 (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1965)). Because the court could find no facts in the complaint to support the plaintiff's claim, it found that a duty under § 319 did not arise. *Id.* Because the court had before it merely plaintiff's complaint, a fair inquiry arises as to whether more substantial pleading of facts would have rendered a different result.

108. *Bailey*, — Wash. App. at —, 688 P.2d at 529.

109. 392 Mass. at 762, 476 N.E.2d at 1304.

110. 386 Mass. at 810, 438 N.E.2d at 56.

111. Larson v. Marsh, 144 Neb. 644, 14 N.W.2d 189 (1944).

112. Gage v. Springer, 211 Ill. 200, 201, 71 N.E. 860, 862 (1904).

harm as a result of neglect of the statutory duty.[113] In contrast, applying the statutory intent rationale to *Irwin* effectively created a large class containing all users of the highways.[114] The analysis falters because the causal link between the breach of the statutory duty and the harm suffered is extremely tenuous.[115] The end result, according to *Dinsky*, holds the municipality as an insurer to those harmed by regulated activity and discourages laws designed to protect the public.[116]

B. *The Special Relationship in* Irwin

The *Irwin* court, however, rejected Ware's effort to apply the rationale of *Dinsky*.[117] Realizing that increased application of the public duty rule could reintroduce sovereign immunity, the court stated that it had not intended its prior decision to be so broadly read.[118] The court also found *Dinsky* to be factually distinguishable: whereas the *Dinsky* plaintiffs faced the threat of long-term property damage from which they might reasonably protect themselves, the plaintiffs faced the threat in *Irwin* of "immediate and forseeable physical injury to persons who [could not] reasonably protect themselves"[119] such that "a duty of care reasonably should be found."[120] Most importantly, however, the court circumvented the public duty rule and the *Dinsky* result on the theory that a "special relationship" existed between the plaintiffs and the police[121] and the relationship served as the basis of a duty to act with reasonable care to prevent harm to the particular plaintiffs.[122]

Most courts that disavow the public duty rule do so by finding a "special relationship" between the public employee and the injured

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113. Glannon, *supra* note 80, at 163.

114. *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1304 (Nolan, J., dissenting).

115. For an example of a court applying legal test of proximate cause to limit municipal liability for inadequate police protection against intoxicated motorists, see *infra* notes 156-160 and accompanying text.

116. 386 Mass. at 810, 438 N.E.2d at 56.

117. 392 Mass. at 754, 467 N.E.2d at 1299-1300.

118. *Id.*

119. *Id.* at 756, 467 N.E.2d at 1300.

120. *Id.*

121. *Id.* at 762, 467 N.E.2d at 1303-04.

122. *Id.* at 756, 467 N.E.2d at 1300. The RESTATEMENT (SECOND) OF TORTS § 315 (1965) sets forth the "special relationship" doctrine, providing that:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right of protection.

Id.

party, either on the grounds that the employee acts in a manner that enhances the danger to the victim,[123] or fails to act in circumstances of known and immediate danger to a particular person.[124] The former situation is best illustrated by the leading case *Schuster v. City of New York*,[125] in which the city was held liable for failing to provide adequate protection to a citizen murdered after it became public knowledge that he had helped apprehend the noted criminal Willie Sutton.[126] In another context, the Supreme Court of Connecticut applied the same theory to defeat an action arising from circumstances nearly identical to the *Irwin* case. In *Shore v. Town of Stonington*,[127] the highest Connecticut court did not hold liable a police officer who failed to detain an intoxicated motorist whom he had stopped but permitted to continue absent "a showing of imminent harm to an *identifiable* victim."[128] The *Irwin* court, however, discarded both the traditional theories and grounded its theory of a special relationship upon the legislative intent behind the applicable statutes.[129] In doing so, the court avoided the public duty rule by the same analysis under which it had invoked the rule in the *Dinsky* case.[130]

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123. *See infra* notes 125-127 and accompanying text.

124. *See, e.g.*, Lorshbough v. Township of Buzzle, 258 N.W.2d 96 (Minn. 1977)(municipality liable when aware that a dangerous condition sanctioned by the town violated pollution control regulations); Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975)(municipality liable when inspector knew of improperly wired floodlights submerged in creek and failed to disconnect the wiring). *See also* Shore v. Town of Stonington, 187 Conn. 147, 156, 444 A.2d 1379, 1383 (1982) (general duty to public does not become duty to individual absent showing of imminent harm to identifiable victim).

125. 5 N.Y. 75, 154 N.E.2d 534, 180 N.Y.S. 265 (1958).

126. *Id.* at 80-81, 154 N.E.2d at 537, 180 N.Y.S. at 269. The court reasoned that since citizens have a duty to aid government, government owes them a reciprocal duty of protection when such aid places them in danger. For a general discussion of the case, see Comment, Municipal Liability for Failure to Provide Adequate Police Protection, 28 FORD. L. REV. 316 (1959).

Cf. Riss v. City of New York, 22 N.Y.2d 579, 581-83, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 899-900 (1968) (no cause of action against police for inadequate protection despite police knowledge of threats against plaintiff, on the grounds that imposition of liability upon a showing of probable need for and request for police protection was an unwarranted judicial allocation of resources absent legislative authorization).

127. 187 Conn. 147, 444 A.2d 1379 (1982).

128. *Id.* at 156, 444 A.2d at 1383 (emphasis added). *See generally*, Note, *The Official Responsibility Rule and Its Implications For Municipal Liability In Connecticut: Shore v. Town of Stonington*, 15 CONN. L. REV. 641 (1983)(arguing for judicial and legislative action to restrict application of the doctrine of municipal immunity in the context of drunken driving).

129. 392 Mass. at 762, 467 N.E.2d at 1304.

130. In both *Dinsky* and *Irwin* the court claimed to look to the language of the applicable statutes to ascertain whether legislative intent to create a private duty between the injured party and the municipality existed. *Dinsky*, 386 Mass. at 809, 438 N.E.2d at 55, 56; *Irwin*, 392 Mass. at 755, 467 N.E.2d at 1300, 1302-04.

C. *Future Cases Under* Irwin

The court could decide future cases involving municipal liability by determining whether the legislature intended the statute under which the municipal employee acted to create a private duty or a "special relationship."[131] Application of the principle could produce inequitable results; for example, it could shield a municipality from liability for harm caused by one of its employees acting under purely "public" duty, even in instances in which, because the public employee knew of a dangerous condition,[132] interests of fairness would warrant compensation to a victim.[133] Similiarly, rigid application of the principle would destroy the flexibility that has enabled some courts to hold municipalities liable for the grossly negligent performance of purely "public" duties.[134]

D. *Policy Considerations*

When a court finds that the applicable statute creates a private duty or a special relationship, but the legislature drafted the statute to protect the "general public," the resulting liability may present the municipality with considerable administrative difficulty[135] and economic hardship.[136] For the courts to encourage the enforcement of drunk driving laws through the imposition of tort liability prior to an

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131. *See generally* Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 807 n.10 (Minn. 1979)(citing cases finding private duty to plaintiffs based on statutes intended to benefit designated class, such as statutes requiring prison maintenance to ensure health and safety of prisoners).

132. *See, e.g.*, Riss, v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 140, 204 N.E.2d 635, 637, 256 N.Y.S.2d 595, 598 (1965)(noting that municipality may be liable where special relationship exists but finding no liability despite fire department's knowledge of defective stove which caused fire).

133. *See* Riss v. City of New York, 22 N.Y.2d 579, 588-89, 240 N.E.2d 860, 864-65, 293 N.Y.S.2d 897, 903-04 (1968)(Keating, J., dissenting).

134. *See, e.g.*, Lorshbough v. Township of Buzzle, 258 N.W.2d 96 (Minn. 1977)(finding municipality liable when aware that dangerous condition sanctioned by the town violated pollution control regulations); Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975)(finding municipality liable when inspector knew of improperly wired floodlights submerged in creek and failed to disconnect the wiring). Professor Glannon suggests that the knowledge or culpability of the defendant may in some cases be the factor determinitive of the issue of liability. Glannon, *supra* note 80, at 163 n.40.

135. The court in *Irwin* rejected the town's argument that the administrative difficulties inherent in determining when a motorist is intoxicated should be a significant factor in the determination of municipal liability. *See infra* text accompanying notes 146-154.

136. The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably

explicit legislative determination of municipal responsibility invites criticism as exceeding the reasonable limits of judicial discretion.[137] The *Dinsky* court acknowledged such policy considerations[138] but the *Irwin* court dismissed them as not being relevant to the issue of whether the police had a duty.[139]

Courts frequently cite the disastrous financial consequences of broad municipal tort liability as a justification for the public duty rule.[140] The widespread availability of insurance, however, can minimize the costs of liability.[141] The *Irwin* court sought to address this financial concern by limiting damages under the Act to $100,000 per plaintiff, even when the plaintiff has more than one claim.[142] In many states, the legislative enactments waiving sovereign immunity place ceilings upon damages.[143] In jurisdictions which do not, the question may arise as to whether a municipality may avoid satisfaction of a tort judgment under federal bankruptcy laws.

Expanded municipal liability for police activity will force governments to allocate additional funds for increased insurance premiums or damage judgments but could ultimately reduce the societal costs associated with intoxicated motorists.[144] The result depends on whether the police modify their practices and enhance their efficiency in order to reduce the number of incidents of actionable police

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determine how the limited police resources of the community should be allocated and without predictable limits.

Riss v. City of New York, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968).

137. *Id.* at 588-89, 240 N.E.2d at 864-65, 293 N.Y.S.2d at 903-04 (Keating, J., dissenting).

138. *Dinsky*, 386 Mass. at 810, 438 N.E.2d at 56.

139. 392 Mass. at 763, 467 N.E.2d at 1304. The court refuted the implication that it had exceeded the limits of judicial power by noting that in passing the Act, the legislature had chosen to put the public funds at risk. *Id.*

140. *See, e.g.*, Massengill v. Yuma County, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

141. *See* Note, *An Insurance Program To Effectuate Waiver of Sovereign Tort Immunity*, 26 U. FLA. L. REV. 89, 90 (1973)(arguing that an insurance program must be implemented in order to satisfy judgments against governmental entities and suggesting a model statute).

142. 392 Mass. at 766, 776, 467 N.E.2d at 1306, 1311.

143. *See, e.g.*, ALA. CODE, § 11-93-2 (Supp. 1983)($100,000 per claimant, $300,000 per incident); FLA. STAT. ANN., § 768.28 (West Supp. 1984)($100,000 per claimant, $200,000 per incident); UTAH CODE ANN., § 63-30-34 (Supp. 1983)($250,000 per claimant, $500,000 per incident); *cf.* R.I. GEN. LAWS, § 9-31-2 (Supp. 1983)($100,000 per incident limit waived when state is engaged in a proprietary function).

144. Note, *Police Liability For Negligent Failure To Prevent Crime*, 94 HARV. L. REV. 821, 833 (1981) (arguing the police should be held liable for negligent failure to prevent crime and suggesting alternative approaches to the issue of police liability).

negligence.[145]

Ware asserted that imposition of liability upon the police would lead to an increase in arrests[146] and a loss of police discretion[147] because police officers would have to arrest suspected intoxicated motorists rather than risk a negligence action.[148] Ware's argument implies that the courts lack the necessary expertise to review police conduct.[149] Courts already have experience in reviewing police actions, however, including claims for false arrest,[150] section 1983 claims of police misconduct,[151] and charges of fourth amendment violations.[152] The court rejected Ware's position as speculative.[153] As a policy matter, the court appears unconcerned about preserving police discretion when considering intoxicated motorists. While this policy may be necessary, it complicates a situation in which the demand for regulation frequently exceeds the capacity for enforcement.[154]

E. *Evaluation*

The *Dinsky* and *Irwin* decisions base municipal liability on a policy judgment in which the court balances society's need to compensate injured parties against the fear of excessive municipal liability.[155] In *Dinsky* the harm involved property and the plaintiffs were clearly able to protect themselves;[156] in contrast, the harm in *Irwin* was physical and the threat posed was an imminent, transitiory threat from which the plaintiffs could not reasonably protect themselves.[157] The closely-

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145. *Id.* The likelihood of arrest while driving under the influence is so low that a fair inquiry considers whether the imposition of tort liability will achieve the result of reducing the number of incidents of actionable police negligence. *See supra* note 5.

146. 392 Mass. at 762, 467 N.E.2d at 1304.

147. *Id. See supra* note 5.

148. *Id.*

149. Note, *supra* note 144, at 832.

150. *See, e.g.*, Ortiz v. Hampden County, 16 Mass. App. Ct. 138, 449 N.E.2d 1227 (1983) (negligent record keeping by county employees which led to plaintiff's improper arrest stated a cause of action in negligence under the Act).

151. *See, e.g.*, Archibald v. Mosel, 677 F.2d 5 (1st Cir. 1982)(warrantless search justified under fourth amendment when police could reasonably have believed that robbery suspect was hiding in plaintiff's apartment and fact that police were wrong and that only a child was there did not give plaintiff a right to damages under section 1983).

152. *See, e.g.*, Commissioner v. Barrett, 17 Mass. App. Ct. 970, 458 N.E.2d 348 (1984)(police officer's seizure of pistol from person's trousers did not violate fourth amendment); Commissioner v. Amaral, 16 Mass. App. Ct. 230, 450 N.E.2d 656 (1983) (warrantless search by police justified upon a showing of exigent circumstances).

153. 392 Mass. at 763, 476 N.E.2d at 1304.

154. *See supra* note 5.

155. *See supra* text accompanying notes 83-84.

156. Glannon, *supra* note 80, at 160.

157. 392 Mass. at 756, 476 N.E.2d at 1300.

worded holdings of both cases indicate that the court intends to define the limits of municipal liability on an *ad hoc* basis.[158] The *Irwin* court's discussion, which left the public duty rule intact, further supports the *ad hoc* theory. *Dinsky* and *Irwin* merely begin a line of undoubtedly difficult cases.[159]

At present, however, the strained analysis necessitated by the *Irwin* court to circumvent the public duty rule suggests that the rule should be discarded.[160] The rule only serves to prevent an individual from maintaining an action against a municipality for failing to provide adequate services.[161] The rule, therefore, functions as nothing more than a restoration of the doctrine of sovereign immunity which was abolished in 1978.[162] The specious distinction the rule creates between duties owed to the public in general and duties owed to individual members of the public, while appearing probative, represents merely "a shorthand statement of a conclusion, rather than an aid to analysis in itself."[163] Since the application of the rule precludes any further inquiry into the specific facts which bear upon the reasonableness of a public employee's conduct, courts desirous of addressing the reasonableness issue must engage in elaborate analysis to circumvent

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158. *See supra* note 99. Compare the intention in the *ad hoc* approach of *Irwin* and *Dinsky* with this statement by the court in Whitney v. City of Worcestor, 373 Mass. 208, 366 N.E.2d 1210 (1977):

> On various occasions we have voiced our conclusion that the governmental immunity doctrine and the convoluted scheme of rules and exceptions which have developed over the years are unjust and indefensible as a matter of logic and sound public policy. However, on those occasions we further concluded that comprehensive legislative action was preferable to judicial abrogation followed by an attenuated process of defining the limits of governmental liability through case by case adjudication.

Id. at 209, 366 N.E.2d at 1211.

159. Since the court unanimously endorsed the public duty rule in *Dinsky* and split 4-3 over its applicability in *Irwin*, it appears that the court is determined to retain the rule for certain torts; there is, however, no workable principle as to whether the rule should apply to specific torts. *See* Glannon, *supra* note 80, at 159.

160. Motyka v. City of Amsterdam, 15 N.Y.2d 134, 140-41, 204 N.E.2d 635, 637-38, 256 N.Y.S. 2d 595, 598-600 (1965)(Desmond, J., dissenting)(public duty rule should be discarded on grounds that "its injustice and unreality are so evident as to produce exceptions. . .and inconsistencies galore . . . [c]ities should be held to the same standards of conduct as apply to private persons, since risk of liability (and insurance against the risk) is incidental to municipal activities.")

161. Comment, *Urban Law—Municipality Held To Have No Duty To Provide Police Protection To Individual Members of the Public*, 44 N.Y.U. L. REV. 646, 650 (1969)(asserting that the public duty rule should be discarded with respect to the negligent failure of police to prevent crime).

162. *Id.*

163. W. KEETON, *supra* note 61, § 131, at 1051.

the rule and thus reach the more relevant issue of reasonableness.[164]

Fairness to victims, police accountability, and equitable distribution between the government and individuals of the high costs associated with intoxicated motorists provide cogent arguments for holding municipalities liable for the negligent provision of police services.[165] The question then arises of how to accomodate the competing interests of victim compensation and efficient government.

V. ALTERNATIVE THEORIES OF LIABILITY

The following discussion proposes alternative approaches to the issue of municipal liability that may strike a balance between the competing interests of victim compensation and effective government.

A. *Damage Limitation*

In considering the scope of a municipality's duty to enforce the law by ensuring that third persons comply with the law, the initial premise must be that the goal of any system of liability is to compensate the victims of municipal negligence justly, particularly when such negligence poses the threat of severe physical harm.[166] If courts adopt the initial premise, a substantial increase in the scope of municipal liability will result. To combat the effects, a ceiling on damage awards could be set by legislative enactment[167] or judicial pronouncement;[168] alternatively, damages could be limited to actual damages.

B. *Police Malpractice*

Under a theory of police malpractice, courts could measure police conduct against objective standards of conduct contained in statutes and internal police regulations.[169] Their violations would give rise to a

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164. Comment, *supra* note 161, at 652-53.

165. Note, *supra* 144, at 832-35.

166. Perhaps this is why more commentators advocate the abrogation of the public duty rule in the context of police failure to prevent crime than adopt this position in the building inspection situation. *See* Note, *supra* note 144, at 835; Comment, *supra* note 161, at 652-53.

167. *See supra* note 143 and accompanying text.

168. *Irwin*, 392 Mass. at 766, 776, 467 N.E.2d at 1306, 1311.

169. For an example of model police regulations, see N. POMRENKE, LAW ENFORCEMENT MANUAL: RULES AND REGULATIONS (1967). For a thoughtful discussion of the need for regulations and their role in restraining police discretion, see K.DAVIS, POLICE DISCRETION 121-163 (1975). The professional standards model is discussed in Note, *supra* note 144, at 838-40.

Judicial review of police conduct in the course of roadside checks for potential violations of the driving while intoxicated statute would be facilitated by an articulation of the facts upon which an officer bases his conclusion that a motor vehicle operator is or is not

cause of action under state tort law.[170] Reliance upon objective standards as evidence of due care would permit judicial review of police activity, while affording a reasonable degree of police discretion.[171] The standard would preserve police discretion because the police themselves would define the standard of care.[172] Only when the police establish a self-serving or non-existent standard would the courts be justified in imposing liability.[173] The New York Court of Appeals essentially followed the objective standard approach in *Florence v. Goldberg*,[174] finding police negligent for having failed to comply with department regulations governing the supervision of school crossings.[175]

C. *Traditional Negligence*

The use of a negligence standard would afford a measure of police discretion and would broaden the scope of judicial review of police activity beyond that afforded under the professional standards model. The abrogation of the public duty rule would permit the court in every instance to inquire into the reasonableness of the municipal officer's conduct in light of the circumstances, thus saving judicial resources.[176] The approach would replace the current inquiry of whether the police owe an actionable duty with the more relevant inquiry of whether, under the circumstances, the police have a duty to act.[177]

Using a traditional negligence approach, the *Irwin* court would have reached the same result without necessitating the strained "special relationship" analysis. The police, having stopped the motorist and determined that he was intoxicated, became aware of a forseeable risk of harm and the municipality at that point incurred an obligation to act through its servant. The uncertainties inherent under most negligence determinations would be mitigated by the court's clear position that "waste of life due to drunken driving on the highways

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driving while under the influence. Reese, *Drunk Driving: Recommendations for Safety Highways*, 19 TRIAL 60, 65 (June 1983). Police officers should be encouraged to fill out forms with each such roadside stop. *Id.* The Traffic Institute at Northwestern University has drafted a standard form for police use in such situations that "specifies the various field sobriety tests that should be given and provides space to list or diagram observations." The form, however, is rarely used. *Id.* at 61.

170. Note, *supra* note 144, at 838-39.
171. *Id.* at 838.
172. Note, *supra* note 144, at 839.
173. W. KEETON, *supra* note 61, § 33, at 195.
174. 44 N.Y.2d 189, 373 N.E.2d 763, 404 N.Y.S.2d 583 (1978).
175. *Id.* at 193, 196, 373 N.E.2d at 765, 767, 404 N.Y.S. at 585, 587.
176. Comment, *supra* note 161, at 652.
177. *Id.* at 652-53.

[does not lie] outside the scope of forseeable risk."[178]

The causation requirement of a traditional negligence scheme would function as a self-limiting principle to keep municipal liability within reasonable limits. *Evers v. Westerberg*[179] illustrated the point: the court reversed a jury verdict against the police for insufficient evidence of causation.[180] Police had investigated an accident caused by an intoxicated motorist but had not arrested him.[181] About twenty minutes after leaving the scene of the first accident, the motorist caused a second accident in which the plaintiff's decedent was killed.[182] The court held that not enough evidence existed to show that the failure of the police to detain the driver after the first accident proximately caused the second accident.[183] *Evers* supports the notion that the self-limiting nature of a negligence analysis may operate to keep municipal liability within reasonable limits.[184]

D. *Legislative Action*

The supreme judicial court would prefer comprehensive legislative action to define the limits of municipal liability rather than have the definition evolve through judicial abrogation followed by modification through adjudication.[185] Legislative action could take one of three forms.

1. Victim Compensation Statutes

Providing compensation to victims according to a schedule similiar to that used to fix workers' compensation[186] awards would provide several advantages. The compensatory goals of tort law

178. Adamian v. Three Sons, Inc., 353 Mass. 498, 500-01, 233 N.E.2d 18, 20 (1968). *See Irwin*, 392 Mass. at 762, 476 N.E.2d at 1304. ("as to the most crucial factor—forseeability—the calamitous consequences to the victims of accidents caused by drunken driving are all too predictable.")

179. 38 A.D.2d 751, 329 N.Y.S.2d 615 (N.Y. App. Div. 1972), *aff'd mem.*, 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (1973).

180. *Id.* at 752, 329 N.Y.S.2d at 618.

181. *Id.* at 751, 329 N.Y.S.2d at 618.

182. *Id.*

183. *Id.* at 752, 329 N.Y.S.2d at 618. "Even assuming *arguendo*, that the Village owed [plaintiffs] a duty, there was no proof . . . that its negligence constituted a concurrent proximate cause of the second accident." *Id.*

184. *See* Riss v. City of New York, 22 N.Y.2d 579, 586, 240 N.E.2d 860, 863, 293 N.Y.S.2d 897, 902 (1968) (Keating, J., dissenting) (arguing that legal principles of fault, proximate cause and forseeability operate to keep liability within reasonable limits).

185. *See supra* notes 73-74 and accompanying text; *see also supra* note 163.

186. The term "workmen's compensation" or "worker's compensation" refers to "state statutes which provide for fixed awards to employees or their dependents in case of employment related accidents and diseases, dispensing with proof of negligence and legal

would be advanced allowing all victims of municipal negligence to recover for their injuries.[187] Proximate cause would cease to be a limiting factor, thereby avoiding the apparent inequities presented in *Evers*.[188] The administrative agency in charge of the system[189] would possess expertise absent in the court, resulting in administrative efficiency and rapid recovery for victims.[190] Statutory ceilings on damage awards could avoid depletion of municipal funds.[191]

Because victim compensation statutes resemble strict liability, however, this alternative would possess little deterrent value.[192] Since a general insurance fund would most likely support compensatory awards, little incentive would exist for police officers to adopt a more prudent standard of care when dealing with intoxicated motorists. For that reason, this approach would not be preferred.

2. Abrogation of Immunity and the "Due Care" Exception

Enactment of a statute similiar to Iowa's Tort Liability of Governmental Subdivisions Act[193] would settle the ambiguities raised by the *Irwin* decision and set a firm standard for the courts to use to determine the limits of municipal liability. Under the Iowa statute, a municipality assumes liability for the negligence of its officers and employees, whether arising out of a governmental or proprietary function, unless one of the statutory exceptions applies.[194] The principle exception exempts claims based upon the act or omission of an officer or employee who exercises due care in the execution of a statute, ordinance, or regulation.[195] If Massachusetts had a similiar statute, a Massachusetts municipality would be liable for the torts of its officers who failed to use due care in the performance of their statutory duties. No requirement would exist that an officer foresee harm to a particuliar individual or class of persons, nor would a "special relationship" need to exist between the officer or employee and the injured party.

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actions." BLACK'S LAW DICTIONARY 1439, (5th ed. 1979). The workmen's compensation laws of Massachusetts are codified in MASS. GEN. LAWS ANN. ch. 152 (West 1958).

187. Note, *supra* note 144, at 836.

188. *See supra* notes 179-182 and accompanying text.

189. This administrative agency could be similar to the Industrial Accident Board which oversees the administration of the workmen's compensation laws. MASS. GEN. LAWS ANN. ch. 23, § 16 (West 1958).

190. Note, *supra* note 144, at 836..

191. *Id.*

192. *Id.*

193. IOWA CODE ANN., §§ 613.A1-613.A13 (West Supp. 1984).

194. *Id.* § 613.A2.

195. *Id.* § 613.A4(3).

Moreover, the financial status of the municipalities would cease to be of concern to the court and could be placed in the hands of the legislature.[196]

3. Imposition of specific liability

A specific liability statute could waive municipal immunity for failure to enforce the drunk driving laws.[197] To establish a claim under the statute, the plaintiff would be required to show that the officer knew of a violation of the drunk driving statute and failed to use reasonable care in the enforcement of the statute.[198] Compensatory goals of tort law would be advanced while the scope of municipal liability for other, less dangerous torts could be avoided. Such a statute constitutes the most narrow means of effectuating the intent of the courts, the legislature, and the citizens' groups that have contributed to the national reform of drunk driving laws.

VI. CONCLUSION

In 1978, the Massachusetts legislature enacted the Massachusetts Torts Claims Act, which purported to abrogate sovereign immunity.[199] The Supreme Judicial Court of Massachusetts took a step toward reinstating that immunity in *Dinsky* when it held that a municipality could not be liable for negligent building inspections.[200] In *Irwin*, the court held that a municipality could be liable for negligent enforcement of drunk driving laws, explicitly limiting *Dinsky* and finding an exception to the public duty rule adopted in *Dinsky*.[201] The policy considerations which aided the abrogation of sovereign immunity apply with equal force to the abrogation of the public duty rule.[202] The rule should be discarded and legislative action or judicial adoption of a negligence or professional standards model should be instituted in its place.[203] Reforms would end the uncertainties of municipalities and potential plaintiffs alike.

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196. *See* Wilson v. Nepsted, 282 N.W.2d 664, 674 (Iowa 1979).
197. *See* Note, *supra* note 128, at 657.
198. *Id.* at 658.
199. *See supra* notes 61-87 and accompanying text.
200. *See supra* notes 88-101 and accompanying text.
201. *See supra* notes 102-130 and accompanying text.
202. *See supra* notes 135-154 and accompanying text.
203. *See supra* notes 160-165 and accompanying text.