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INSULATING NEGLIGENT POLICE BEHAVIOR IN INDIANA: WHY THE VICTIMS OF A DRUNK DRIVER NEGLIGENTLY RELEASED BY A POLICE OFFICER HAVE NO REMEDY

I. INTRODUCTION

The Indiana Supreme Court eliminated the doctrine of sovereign immunity in 1972.1 Yet, more than fifteen years later, Indiana still immunizes negligent police behavior.2 Recognizing that the victim could obtain no relief in Indiana courts,3 consider the following hypothetical situation.4 Officer Jones’ Friday night shift ends at 10:00 p.m. At 9:50 p.m. Officer Jones sees Mr. Smith run a red light and pulls him over. Officer Jones detects a strong odor of alcohol when Mr. Smith rolls down his car window. After speaking with Mr. Smith for a few moments, Officer Jones realizes that Mr. Smith is intoxicated. It is now 9:55 p.m. and Officer Jones begins his extra job as a warehouse security guard in only twenty minutes.

Officer Jones knows that the paperwork for a driving under the influence arrest will take him at least one hour to complete. Officer Jones also

1. Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972). The doctrine of sovereign immunity precludes action against a governmental unit unless the governmental unit consents to suit. Abolition of sovereign immunity results in the ability of a plaintiff to sue the governmental unit without its specific consent. See infra notes 34-39 and accompanying text.

2. Application of the public duty and special duty rules, and provisions of the Indiana Tort Claims Act, work to insulate negligent police behavior from suit. See infra notes 60-117 and accompanying text.


   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1982 & Supp. III 1985).

   For a good summary of federal action against the police, see H. BERRINGER, CIVIL LIABILITY AND THE POLICE 20, 34 (1987).

4. The hypothetical proposed herein is not based on any specific case, nor is it intended to resemble any case which may have in fact occurred.
knows that no other police units are available to handle Mr. Smith's arrest. Officer Jones suggests that Mr. Smith take a taxi home, but Mr. Smith refuses this advice. Officer Jones then suggests that Mr. Smith go to a nearby coffee shop to sober up. Officer Jones issues Mr. Smith a citation for running the red light and heads back to the station.

Mr. Smith never goes to the coffee shop but instead continues driving. Five minutes later Mr. Smith runs head-on into another car and seriously injures Mr. and Mrs. Doe, occupants of the other vehicle. Hospital personnel treating the intoxicated Mr. Smith find the ticket written by Officer Jones. Should Officer Jones and the municipality\(^5\) for which he works be held liable?

Under Indiana law, it appears that Officer Jones would not be held liable for the Does' injuries. No Indiana appellate level cases have dealt with the specific issue of police and municipal liability for failure to arrest or detain intoxicated drivers.\(^6\) The conclusion that Officer Jones would probably not be held liable for the Does' injuries stems from Indiana's reliance on the public duty rule,\(^7\) the special duty rule,\(^8\) and the Indiana Tort Claims Act.\(^9\) Through the use of common law and statutory rules, Indiana effectively insulates police from liability for failure to arrest or detain intoxicated drivers.\(^10\)

The public duty rule provides that a governmental unit will not be held liable when the duty violated is one owed to the public generally and not to

5. The terms "governmental unit" and "municipality" will be used interchangeably within this note.

6. \textit{But cf.} Sports, Inc. v. Gilbert, 431 N.E.2d 534 (Ind. Ct. App. 1982). The plaintiff in \textit{Sports, Inc.} brought suit after Riggs, a customer at a racetrack, hit the car in which the Gilbert family rode. The defendant in the case, Sports, Inc., owned a racetrack and employed off-duty police officers as security guards. \textit{Id.} at 535. While in the racetrack parking lot, Riggs had hit a parked car with his pickup truck. \textit{Id.} The security guards investigated the parking lot collision and found Riggs to be intoxicated, but released him and later saw him being driven from the racetrack by a relative. \textit{Id.} Two blocks from the racetrack, Riggs, now driving, ran a red light and hit the plaintiff's car. \textit{Id.} The Indiana Appellate Court held that Sports, Inc. had no duty to detain Riggs when it discovered that he was intoxicated on its property. \textit{Id.} at 539-40. While the \textit{Sports, Inc.} case may appear to decide the issue, the case is different from the type of situation at issue here for a number of reasons. Most significantly, \textit{Sports, Inc.} involved off-duty police officers and a non-governmental private employer. For further discussion concerning the \textit{Sports, Inc.} case see generally \textit{Survey of Recent Developments in Indiana Law}, 16 Ind. L. Rev. 379 (1983).

7. \textit{See infra} notes 60-92 and accompanying text for further discussion regarding the public duty rule.

8. \textit{See infra} notes 93-139 and accompanying text for additional discussion regarding the special duty rule.

9. \textit{See infra} notes 140-58 and accompanying text for further discussion pertaining to the Indiana Tort Claims Act.

10. \textit{See infra} notes 159-71 and accompanying text.
a particular individual. For example, if the public duty rule were applied to the Officer Jones hypothetical, no liability would result. Because Officer Jones owed only a general duty to the public to remove the intoxicated Mr. Smith from the road, Officer Jones owed no specific duty to the Does as individuals. Since Officer Jones owed no individual duty to the Does, no duty existed for Officer Jones to breach. Therefore, Officer Jones and the municipality for which he works could not be held liable. States which utilize the public duty rule most frequently apply it in cases where the police allegedly fail to provide adequate protection from crime. A limited number of courts have utilized the public duty rule within the context of cases involving police failure to arrest or detain intoxicated drivers.

11. See W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 131, at 1049 n.81 (5th ed. 1984) ("[T]he doctrine holds that some unspecified duties are owed only to the public and private individuals have no redress for their violation."). See also Tinsley, Governmental Entity's Liability for Failure to Prevent Crime, 30 P.O.F. 2d 429, 437 (1982) (The general rule, which is followed in most states, is that a municipality or other governmental entity has no duty to provide protection to particular individuals and that negligent failure to provide such protection is therefore not a basis for tort liability.).

12. See infra notes 60-92 and accompanying text.

13. The most celebrated case wherein a court found no liability for failure to provide police protection is Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (Keating, J., dissenting). In Riss, a young woman repeatedly called police over a six month period asking for protection from her ex-boyfriend who threatened to maim her unless she returned to him. Id. at 585, 240 N.E.2d at 862, 293 N.Y.S.2d at 901. After the woman became engaged to another man, the rejected suitor threatened her again. The woman called the police to ask for protection, but she received no help. The next day a man hired by the rejected suitor threw lye in the woman's face, permanently disfiguring her. Id. Despite a strong dissent by Judge Keating, wherein he declared: "To say that there is no duty is, of course, to start with the conclusion," id., the New York Court of Appeals held that the city could not be held liable for failure to provide adequate police protection. Id. at 579, 240 N.E.2d at 860, 293 N.Y.S.2d at 879. See, e.g., Cuffy v. City of New York, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987) (landlord and sons injured in confrontation with tenant could not recover against the city for alleged failure to provide adequate police protection); Sawicki v. Village of Ottawa Hills, 37 Ohio St. 3d 222, 525 N.E.2d 468 (1988) (no liability for village after police officer decided not to dispatch help outside the village's jurisdiction even though the crime was committed within 300 yards of the village police station). See generally Annotation, Modern Status of Rule Excusing Governmental Unit From Tort Liability on Theory That Only General, Not Particular, Duty Was Owed Under Circumstances, 38 A.L.R. 4th 1194 (1985); Note, Municipal Tort Liability for Failure to Provide Adequate Police Protection in New York State, 39 A.B.A. L. REV. 599 (1975) [hereinafter Note, Police Protection] (analyzes New York law regarding municipal tort liability for the failure to provide adequate police protection against the criminal acts of third parties); Note, Police Liability for Negligent Failure to Prevent Crime, 94 HARY. L. REV. 821 (1981) [hereinafter Note, Failure to Prevent Crime] (courts have generally shielded police officers and their employers from liability for failure to provide reasonable protection from crime).

14. The State of Missouri recognizes the pure form of the public duty rule. Missouri courts faced with police failure to arrest or detain intoxicated drivers have not imposed liability. Two 1987 Missouri decisions involving police officers failing to arrest or detain intoxicated drivers applied the public duty rule, resulting in favorable judgments for the police. In Spotts v. City of Kansas City, a highway patrolman stopped an allegedly intoxicated driver and is-
Many courts attempt to avoid the harsh effects\(^{15}\) of the public duty rule by applying an exception known as the special duty rule.\(^{16}\) The special duty rule provides that if a special relationship\(^{17}\) develops between a municipality and a plaintiff—a relationship wherein the municipality assumes a responsibility toward the plaintiff—liability will attach for breach of the established duty.\(^{18}\) For example, if the police receive information from a

sued him a citation for expired license plates. Spotts v. City of Kansas City, 728 S.W.2d 242, 244 (Mo. Ct. App. 1987). The plaintiff in the case was a passenger in another car stopped on a road where traffic had stopped due to an accident obstructing the roadway. While the plaintiff waited to proceed, the driver released by the highway patrolman ran into the rear of the car in which the plaintiff sat, with the resulting accident rendering the plaintiff-passenger a paraplegic. Id. at 244-45.

In Schutte v. Sitton, Sitton, a police officer, was called to a pizzeria to investigate a disturbance. Schutte v. Sitton, 729 S.W.2d 208, 209 (Mo. Ct. App. 1987). Sitton spoke to Hall, who allegedly caused the disturbance, and told him to leave. Id. Hall left the pizzeria shortly thereafter and, while driving in an intoxicated condition, crossed the center line of the highway and struck the Schutte vehicle. Id. The Missouri court applied the public duty rule to insulate Officer Sitton from liability and stated that "any duty Sitton may have had to prevent Hall from driving while intoxicated was a duty owed to the general public." Id. at 211.

15. Application of the public duty rule is considered a harsh blow to the plaintiff because the plaintiff is left remediless. See Comment, The Special Duty Doctrine: A Just Compromise, 31 ST. LOUIS U. L.J. 409, 421 (1987) (application of the special duty rule allows courts to retain elements of the public duty rule yet mitigate its harshness); Note, Government Liability and the Public Duty Doctrine, 32 VILL. L. REV. 505, 513 (1987) [hereinafter Note, Government Liability] (the public duty doctrine has come under increasing criticism in recent years for its harsh effect upon victims). See, e.g., Hartzler v. City of San Jose, 46 Cal. App. 3d, 120 Cal. Rptr. 5 (1975) (police not liable for failing to respond to woman's call for protection 45 minutes before she was killed even though police had responded to 20 calls from the same woman in the past); Trautman v. City of Stamford, 32 Conn. Supp. 258, 350 A.2d 782 (1975) (patrolmen owed a duty to the public generally in the enforcement of traffic ordinances against drag racing; bystander who was hit while watching the drag races could not recover); Crouch v. Hall, 406 N.E.2d 303, 304 (1980) (an individual cannot obtain damages where an officer owes a duty to the public as a whole and no special relationship is established); Schutte v. Sitton, 729 S.W.2d 208, 211 (Mo. Ct. App. 1987) ("any duty [a police officer may have had to prevent Hall from driving was a duty owed to the general public"); Doe v. Hendricks, 92 N.M. 499, 590 P.2d 647 (1979) (city could not be held liable for police failure to apprehend sexual assault suspect because the police duty was only owed to the general public).

16. Crosby v. Town of Bethlehem, 90 A.D.2d 134, 135, 457 N.Y.S.2d 618, 619 (1982) (the exception to the rule occurs where a duty of care results from the establishment of a special relationship between the municipality and the individual). See, e.g., Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (police owe a special duty to a citizen who collaborates with the police and is placed in danger because of the collaboration); DeLong v. County of Erie, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983) (special relationship existed between murder victim and police where victim phoned police to report a burglar was breaking into her house and police responded to the wrong address); Tanasieviich v. City of Hammond, 178 Ind. App. 669, 383 N.E.2d 1081 (1978) (subsequent to cooperation with police in an official investigation a special duty to protect that individual may arise if retaliation appears possible).

17. The special duty rule is often referred to as the special relationship rule or the special duty exception. For purposes of this note, the terms are interchangeable.

citizen leading to the arrest of a dangerous criminal, promise to protect that citizen, and then fail to provide protection, liability will attach. Essentially, the governmental unit becomes obligated to a particular citizen through the government's own conduct and not through the existence of a "duty."

This note explores the validity of the continued use of the public duty rule as it exists in Indiana within the context of police failure to arrest or detain intoxicated drivers. This note concludes that the public duty and special duty rules should be eliminated by Indiana courts because these rules immunize negligent police behavior. Elimination of the public duty and special duty rules by Indiana courts could stimulate legislative thought regarding the abolition of portions of the Indiana Tort Claims Act which currently immunize negligent police behavior in favor of a traditional negligence analysis.

(a particularized assumption of responsibility creates a special duty on the part of the municipality, liability may attach for a breach of that duty).


20. Tvicevic v. City of Glendale, 26 Ariz. App. 460, 461, 549 P.2d 240, 241 (1976) ("[t]here are] situations where a government or governmental agency can by its own conduct narrow an obligation to an individual for the breach of which [it] is answerable in damages.") (citing Duran v. City of Tucson, 20 Ariz. App. 22, 25, 509 P.2d 1059, 1062 (1973)). See also Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 378 (1969). "Simply stated, there are situations where a government, or agency thereof, can by its conduct, narrow an obligation owing to the general public into a special duty to an individual, for the breach of which it is responsive in damages." Id. at 523, 456 P.2d at 381; Cuffy v. City of New York, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987). In Cuffy, the New York Court of Appeals defined the elements of a special relationship as:

1. an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
2. knowledge on the part of the municipality's agents that inaction could lead to harm;
3. some form of direct contact between the municipality's agents and the injured party;
4. that party's justifiable reliance on the municipality's affirmative undertaking.

Id. at 260, 505 N.E.2d at 940, 513 N.Y.S.2d at 375. Therefore, as defined in New York, the actions or knowledge of the municipality determine the nature of the relationship between the municipality and the injured party. Note, Police Protection, supra note 13, at 604.

21. See infra notes 60-92 and accompanying text for further discussion regarding the public duty rule.

22. As a general proposition, negligent police behavior, particularly grossly negligent police behavior, serves no public purpose. See infra notes 60-139 and accompanying text for additional information pertaining to the immunization of police behavior in Indiana.

23. By taking the step of abolishing the public duty and special duty rules, Indiana courts would be engaging in what Professors Tarr and Porter have described as "agenda setting policy making." State Supreme Courts: Policymakers in the Federal System xvi-xvii (M. Porter, G. Tarr eds. 1982). For a more detailed discussion of "agenda setting policy making," see infra note 256.

24. See infra notes 201-02 and accompanying text for additional comment regarding the use of traditional negligence analysis in scrutinizing police action.
Section two of this note examines the current status of Indiana law concerning the public duty rule, the special duty rule, and the Indiana Tort Claims Act.\textsuperscript{25} Section three discusses why the public duty rule, as a vestige of sovereign immunity, should be abolished in Indiana.\textsuperscript{26} This section then explores the possible adoption of a judicial standard from which to examine negligent police conduct and determine municipal liability.\textsuperscript{27} Finally, this note examines current trends in policing and proposes that a flexible "para-professional" standard be applied to negligent police behavior in Indiana.\textsuperscript{28}

II. POLICE AND MUNICIPAL IMMUNITY IN INDIANA

In order to recover in a traditional tort negligence action, one must show that a duty existed.\textsuperscript{29} A duty is the obligation of one entity to conform to a particular legally recognized standard of conduct when dealing with another entity.\textsuperscript{30} An action arises in tort where one party breaches a duty to a second party and the second party, suffers injuries caused by the breach of duty.\textsuperscript{31} A tort action cannot be brought, however, if the party to be sued is immune under the law.\textsuperscript{32} This section explores the current status of Indiana law which immunizes police officers and municipalities from suit, including the public duty and special duty rules, and the Indiana Tort Claims

\footnotesize

25. \textit{See infra} notes 60-158 and accompanying text.
27. \textit{See infra} notes 209-29 and accompanying text.
29. W. KEETON, supra note 11, § 30, at 164.
30. \textit{Id. at 356. See also} M. SHAPO, THE DUTY TO ACT xii-xiii (1977). Shapo discusses alternative theories of duty, analyzing the numerous doctrines relating to certain fact patterns and situations. Shapo explores the duties of both private persons and governmental entities in his work and notes that relationships giving rise to the establishment of a duty may stem from contractual, commercial, employment, other relationships, or emergency situations. \textit{Id.}
31. W. KEETON, supra note 11, § 30, at 164. Keeton describes the elements of a cause of action in negligence as follows:
1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a breach of the duty . . . .
3. A reasonably close causal connection between the conduct and the resulting injury . . . or "proximate cause" . . . .
4. Actual loss or damage resulting to the interests of another. \textit{Id.}
32. W. KEETON, supra note 11, § 131, at 1032. Immunity can generally be defined as "a total or partial lack of amenability to the processes of the legal system that redress civil wrongdoing," whereas liability can be defined as legal responsibility. S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 6:1, at 14 (1985). Immunity has been extended to a number of groups. \textit{See, e.g.,} Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators free from liability for what they do or say in legislative proceedings); Pierson v. Ray, 386 U.S. 547 (1967) (judges immune from liability for judicial acts); Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960) (charities (although most states have now abolished this immunity)).
A. Sovereign Immunity

In order to fully understand the ramifications of the public duty rule in Indiana, the status of sovereign immunity of the state must be explored. The common law doctrine of sovereign immunity exempts a governmental unit from tort liability. The doctrine, based on the notion that "the King could do no wrong," gradually gained acceptance throughout the United States including Indiana. Historically, only federal and state governmental action derived tort exemption from the doctrine. Eventually, munici-

33. The Indiana Tort Claims Act states in pertinent part:
A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from:

. . .

(6) the performance of a discretionary function;
(7) the adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment;

34. See infra notes 60-139 and accompanying text (discussing the public duty and special duty rules).
35. W. KEETON, supra note 11, § 131, at 1033.
36. Id. See also Borchard, Governmental Liability in Tort, 36 YALE L.J. 1 (1926). While the theory that "the King can do no wrong" has been generally accepted as a rationale for sovereign immunity, Borchard notes that "the doctrine rests upon a serious misconception of the origin of the dictum." Id. at 17. Borchard also notes a second justification for state immunity, the concept that the state cannot be sued in tort because the authority "that makes the law cannot be subject to the law." Id. Parker, The King Does Not Wrong-Liability for Misadministration, 5 VAND. L. REV. 167 (1952). Parker discusses the maxims that "the King can do no wrong" and "the sovereign cannot be sued without his consent." Id.
38. The sovereign immunity doctrine precludes [the] litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless [the] sovereign consents to suit. Historically, the federal and state governments, and derivatively cities and towns, were immune from tort liability arising from activities which were governmental in nature. Most jurisdictions, however, have abandoned this doctrine in favor of permitting tort actions with certain limitations and restrictions.
palities also received protection under the sovereign immunity doctrine.  

The erosion of sovereign immunity in Indiana began in the 19th century.  The so-called "governmental-proprietary" distinction developed during this time. Proprietary activity is any defined as activity performed in an official governmental capacity that is commercial or corporate in nature. Conversely, governmental activity is that activity which is essential to the functioning of the government in serving the public. In making the distinction between governmental and proprietary functions, Indiana courts accepted the proposition that the government could be held liable when engaged in proprietary activity, but not when the government engaged in governmental duties. However, the imposition and continued application of this distinction led to confusion and uncertainty regarding the status of sovereign immunity within the state.

In 1967, an Indiana appellate court contributed to the demise of sovereign immunity by abolishing municipal immunity. Yet another step toward the abolition of sovereign immunity came in 1968, when counties lost the protection of the sovereign immunity doctrine. As a result of these decisions, only the state retained the protection provided by the sovereign immunity doctrine. In 1969, the Indiana Supreme Court limited even


39. The first case extending the sovereign immunity doctrine to municipalities was Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788).
40. Goshen v. Myers, 119 Ind. 196, 21 N.E. 657 (1889). In Goshen, the City of Goshen failed to repair a bridge. The city was held liable for injuries the plaintiff's horse sustained as a result of the bridge's collapse. Id. at 200, 21 N.E. at 659.
41. See Note, Sovereign Immunity in Indiana—Requiem?, 6 Ind. L. Rev. 92, 93-94 (1972) ("The first inroad into Indiana's position of absolute immunity for all governmental subdivisions and the first step in the doctrine's evolutionary process manifested itself as a limited form of liability imputed to the state's municipalities for injury arising out of certain city activities.").
42. Id. at 94 (discusses the governmental-proprietary distinction).
44. Campbell v. State, 259 Ind. 55, 58, 284 N.E.2d 733, 734 (1972); Note, supra note 41, at 96.
45. Campbell v. State, 259 Ind. 53, 58, 284 N.E.2d 733, 735 (1972) (failure to establish criteria by which to determine the difference between a proprietary and a governmental function led to confusion). See Flowers v. Board of Comm'rs, 240 Ind. 668, 672, 168 N.E.2d 224, 226 (1960) (counties could be held liable under governmental-proprietary distinction). For additional discussion regarding the governmental-proprietary distinction, see Comment, The Special Duty Rule Should Be Discarded, supra note 37, at 504.
47. Klepinger v. Board of Comm'rs, 143 Ind. App. 155, 177, 239 N.E.2d 160, 173 (1968) (counties could be held liable for the torts of its officers, agents, or employees); Campbell v. State, 259 Ind. 55, 60, 284 N.E.2d 733, 736 (1972). See Note, supra note 41, at 96.
48. Campbell v. State, 259 Ind. 55, 60, 284 N.E.2d 733, 736 (1972) ("In the after-
state sovereign immunity by recognizing that the governmental-proprietary distinction could be applied to the state; thus, the state could be held liable for torts committed while performing a proprietary function.49

Motivated by a desire to eliminate confusion surrounding sovereign immunity,50 the Indiana Supreme Court rejected the doctrine completely in 1972.61 The court dismissed the argument that abolition of sovereign immunity would result in financial disaster for the state and noted that cities and counties operating without the protection of the doctrine had not collapsed.62 Furthermore, the court indicated that the state could better absorb the cost of an injury than could an individual and that the legislature could more efficiently deal with the problems that removal of the doctrine would create.63

Although the Indiana Supreme Court54 rejected sovereign immunity; the court left the public duty rule intact.65 Specifically, the court noted that governmental units should not be held liable for all damages to persons resulting from any governmental acts or omissions.66 The court further noted that the government must owe a specific duty to a private individual before damages for a breach of that duty could be awarded.67 Thus, while the court rejected sovereign immunity, other forms of immunity remained,68

math of Klepinger, all that remained of immunity was immunity to the state.").
50. Campbell v. State, 259 Ind. 55, 60, 284 N.E.2d 733, 736 (1972) ("With only a mere fraction of the original doctrine remaining, we are faced with the task of attempting to eliminate the confusion surrounding the doctrine.").
52. Id. at 737.
53. Id.
54. Id.
55. See Note, supra note 41, at 102 ("the court clearly dictated the future existence of some form of state immunity from tort liability").
56. The court stated:
[W]e do not mean to say by this opinion that all governmental units can be held liable for any and all acts or omissions which might cause damage to persons. For example, one may not claim a recovery because a city or state failed to provide adequate police protection to prevent crime. . . .

Therefore it appears that in order for one to have standing to recover in a suit against the state there must have been a breach of duty owed to a private individual. Campbell v. State, 259 Ind. 55, 62, 284 N.E.2d 733, 737 (1972).
57. Id.
58. Id. While the Campbell court eliminated sovereign immunity, the decision failed to clarify when governmental units would not be held liable for their actions. Id. One form of immunity apparently left intact by the Campbell decision is the discretionary-ministerial distinction. Extensive discussion of the discretionary-ministerial distinction is beyond the scope of this note. Many courts still use this distinction in their analysis of cases involving the failure of police officers to arrest or detain intoxicated drivers. The test has been summarized as follows: [U]nder the official immunity test, one must determine whether a particular act is discre-
including the public duty rule.\textsuperscript{59}

B. The Public Duty Rule

Despite the demise of the sovereign immunity doctrine in Indiana, the public duty rule\textsuperscript{60} continues to flourish.\textsuperscript{61} Therefore, in order to recover on a
discretionary, i.e., requiring the official to exercise his judgment as a part of a decision making process, or ministerial, i.e., required to be performed without the exercise of judgment. An official is immune from liability for torts arising out of a discretionary act but he is subject to liability for negligently performing ministerial acts.

Schutte v. Sitton, 729 S.W.2d 209, 210 (Mo. Ct. App. 1987) (citing Oberkramer v. City of Ellisville, 650 S.W.2d 286, 295 (Mo. Ct. App. 1983)). \textit{See also} Irwin v. Town of Ware, 392 Mass. 745, 753, 467 N.E.2d 1292, 1298 (1984) (decision of a police officer to remove an intoxicated person from the highway is not a discretionary act); Comment, \textit{supra} note 15, at 415 (a discretionary act requires logic and reasoning; a ministerial act requires certain prescribed performances when a particular set of facts occur); Note, \textit{Allowing the Drunk to Drive: Should the Government Pay?}, 51 Mo. L. Rev. 601, 607 (1986) (discretionary acts have been described as those which involve a high degree of discretion and judgment in weighing alternatives and making choices with respect to public policy and planning); Comment, \textit{supra} note 37, at 506 (discretionary acts involve policy formulation while ministerial acts involve the execution of policy); Annotation, \textit{Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer}, 48 A.L.R. 4th 320, 327 (1986).

\textsuperscript{59} \textit{See also} Board of Comm'rs of Delaware County v. Briggs, 167 Ind. App. 96, 337 N.E.2d 832 (1975). "The doctrine of sovereign immunity has been in an unsettled state in Indiana despite the Supreme Court's decision in Campbell v. State, . . ." \textit{Id.} at 96, 337 N.E.2d at 859. \textit{See generally} Note, \textit{supra} note 37, at 102-07; Note, \textit{Interpretation, supra} note 37, at 710.

\textsuperscript{60} The public duty rule originated in the 19th century as a common law doctrine. The Supreme Court recognized the rule in South v. Maryland, 59 U.S. (18 How.) 396 (1855). In South, the Court found that a sheriff could not be held liable for failure to keep the peace. The complaint charged that the sheriff failed to preserve the public peace. The plaintiff's complaint arose after he was kidnapped and forced to pay a ransom to be released, however, the plaintiff failed to execute any writ in which he was personally interested. \textit{Id.} at 401.

Many courts cite Thomas M. Cooley's 1880 treatise on tort law as the origin of the rule. T. COOLEY, A TREATISE ON THE LAW OF TORTS OR WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (1880). Cooley states:

The rule of official responsibility, then, appears to be this: that if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. \textit{Id.} at 379. \textit{See also} Trautman v. City of Stamford, 32 Conn. Supp. 258, 262, 350 A.2d 782, 784 (1975); Leger v. Kelley, 19 Conn. Supp. 167, 170, 110 A.2d 635, 638 (1954); Sawicki v. Village of Ottawa Hills, 37 Ohio St. 3d 222, 525 N.E.2d 468 (1988); DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986) (examples of courts citing to Cooley's treatise as the origin of the rule).

Regardless of the conflict surrounding the origin of the rule, state courts soon followed the lead of the Supreme Court in declining to attach liability to negligent acts performed within the course of official governmental employment. Comment, \textit{supra} note 15, at 418. \textit{See also} Munoz v. Cameron County, 725 S.W.2d 319, 322 (Tex. Ct. App. 1986) (noting that generally
claim, a plaintiff must show that the duty breached by the government official was not owed simply to the general public, but was a duty owed to him as an individual.\textsuperscript{63} Indiana courts have applied the public duty rule in a number of situations.\textsuperscript{64} In fact, many of the cases noted by nationwide commentators as examples of the rule's application are Indiana decisions.\textsuperscript{64}

For example, an Indiana appellate court found that the police should not be held liable for failure to halt a crime wave that resulted in the loss of a business since the police owed only a general duty to the public to stop crime.\textsuperscript{65} Because the police did not owe a specific duty to the store owners to stop crime, there could be no breach of duty or damage award.\textsuperscript{66} One year later, the Indiana Supreme Court acknowledged its approval of this

courts have held "that the victim of the crime does not have recourse against the individual policeman for failing to take action to prevent or stop the commission of a crime"). \textit{See generally Note, Tort Claims Act-The Death of the Public Duty-Special Duty Rule: Shear v. Board of County Commissioners,} 16 N.M.L. Rev. 423, 426 (1986) (the public duty rule is essentially a common law doctrine).

61. \textit{See infra} notes 93-117 and accompanying text.

62. \textit{See supra} note 11 and accompanying text.

63. Indiana courts do not utilize the pure form of the public duty rule. \textit{See, e.g.,} Hammond v. Cataldi, 449 N.E.2d 1184 (Ind. App. 1983); Estate of Tanasijevich v. Hammond, 178 Ind. App. 669, 383 N.E.2d 1081 (1978) (police owed a special duty to protect property of individual who provided information to them); Roberts v. State, 159 Ind. App. 456, 307 N.E.2d 501 (1974) (public official in charge of prisoner owes a special duty to the prisoner to take reasonable precautions to preserve the prisoner's health and safety); Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971) (police not liable for failure to halt crime wave that resulted in loss of business). \textit{See infra} notes 93-139 and accompanying text for additional discussion regarding the use of the special duty exception to the public duty rule by Indiana courts.

64. \textit{See, e.g.,} Annotation, \textit{supra} note 13, at 1198; \textit{Comment, The Special Duty Rule Should Be Discarded, supra} note 37, at 508.

65. Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971). \textit{Simpson's} involved a grocery store in Evansville, Indiana which was forced out of business at a loss of $1,000,000. \textit{Id.} at 388, 272 N.E.2d at 872. The plaintiff asserted police failure to halt a crime wave as the source of its business problems. \textit{Id.} at 389, 272 N.E.2d at 873.

66. In rejecting the plaintiff's assertions that a new theory of tort liability should be adopted and a risk spreading analysis adhered to, the court looked at other state court decisions. Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 388, 272 N.E.2d 871, 873 (1971). \textit{See, e.g.,} Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970) (city removal of extra police from scene of rally prior to riot was not negligence; damaged store owners could not recover); Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969), overruled in Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982) (en banc); Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). \textit{See also} Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967). \textit{Brinkman} involved the wrongful death of an individual who called the police to take him to the hospital because he was seriously ill. Instead of taking the individual to the hospital, the police officer, thinking the man was drunk, arrested him and took him to jail where he died. \textit{Id.}
appellate decision,\textsuperscript{67} and noted that governmental units cannot be held "absolutely liable" for all acts or omissions which might cause damage or injury to individuals.\textsuperscript{68}

Proponents of the public duty rule have advanced a number of justifications for its continued use. The chief argument centers on the idea that abolition of the rule would lead to extreme financial hardships on municipalities.\textsuperscript{69} Many proponents fear that increasingly high damage awards may bankrupt the budgets of municipalities and that possibly "staggering" liability could result.\textsuperscript{70} Additionally, the potential inability of municipalities to pay increased insurance premiums is seen as potential fallout from the rule's elimination.\textsuperscript{71}

\textsuperscript{67} Campbell v. State, 259 Ind. 55, 62, 284 N.E.2d 733, 737 (1972).

\textsuperscript{68} The public duty rule became further entrenched in Indiana law with the Simpson's decision, which shielded governmental units from liability in cases where no duty to a private individual was breached. Board of Comm'rs of Delaware County v. Briggs, 167 Ind. App. 96, 337 N.E.2d 852 (1975). The court in Briggs noted the problems inherent in the Campbell decision because, even though the case abolished sovereign immunity, some forms of immunity were left intact. The Briggs court attempted to explain the difference between a public and private duty as discussed in Campbell. Id. at 104, 337 N.E.2d at 862. After a brief discussion regarding the confusion arising from the Campbell court's statement regarding public duty, the Briggs court concluded that "the state is immune from liability only if the agent is exercising his governmental discretion in the performance of a purely public duty." Id. Once again one should note that the problem is in determining what is a public duty.

\textsuperscript{69} See Bailey v. Town of Forks, 108 Wash. 2d 262, 267, 737 P.2d 1257, 1259 (1987) ("[t]he standard rationale offered to support continued reference to the public duty doctrine [is] the risk of excessive governmental liability"); Sawicki v. Village of Ottawa Hills, 37 Ohio St. 3d 222, 231, 525 N.E.2d 468, 477 (1988) (one of the basic rationales behind the justification of the public duty rule has been that of finance); Note, Governmental Tort Liability: A New Limitation on the Public Duty Rule in Massachusetts? Irwin v. Town of Ware, 29 Suffolk U.L. Rev. 667, 677 (1985) (proponents of the public duty rule, like proponents of the doctrine of sovereign immunity, defend the rule on the basis that abolition of the rule would lead to extreme hardship for governmental units). But cf. Cracraft v. City of Saint Louis Park, 279 N.W.2d 801, 811 (Minn. 1979) (Kelly, J., dissenting) (While apprehension of increased liability of political subdivisions is understandable, the same arguments were raised in opposition to the removal of sovereign immunity. "These contentions proved to be false then and they are just as likely to be false now.").

\textsuperscript{70} Massengill v. Yuma County, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969) (the doctrine advocated by the appraisal could lead to "staggering" liability); Note, Negligence of Municipal Employees: Re-Defining the Scope of Police Liability, 35 U. Fla. L. Rev. 720, 728 (1983) (the negative impact on public budgets is immeasurable and could conceivably bankrupt municipal budgets).

\textsuperscript{71} Blodgett, Premium Hikes Stun Municipalities, 72 A.B.A. J., July 1, 1986, at 50. Insurance companies frequently cite Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984), as an example of expanded municipal insurance risks. Many members of the insurance industry have claimed "[t]his is open liability," and that the "expansion of liability and damages has made it almost impossible to predict losses with sufficient accuracy." Id. The threat of an increase in the number of lawsuits against municipalities has caused many insurance companies to stop insuring them. Both large and small governmental units are experiencing insurance problems. For example, the City of Dallas self-insured itself rather than pay a 900%
Advocates of the public duty rule also assert that abrogation of the rule would both impose an impossible burden on a municipality and congest the court system. The argument that abandoning the rule would place an overwhelming burden on a municipality stems primarily from the notion that the limited availability of community resources restricts the amount of protection that can be provided and that, therefore, government cannot guarantee the safety of every citizen. Moreover, some advocates assert that the legislative branch should deal with this issue, while others argue that courts lack the expertise necessary to evaluate police conduct. Finally, proponents of the rule allege that dismissal of the public duty rule would hamper law enforcement efforts because the police would not be able to enforce the law free from worry about potential liability.
Opponents of continued application of the public duty rule advance a number of persuasive counter arguments. Those opposing the rule assert that the same fear of increased governmental liability existed before many states moved to eliminate sovereign immunity. Because the feared increase in liability awards did not materialize with the demise of sovereign immunity, opponents assert that elimination of the public duty rule would not lead to increased liability. Additionally, opponents argue that both the courts and legislatures could limit the extent of municipal exposure to liability, thus eliminating potential financial disaster.

Equally compelling are the arguments that the public duty rule is inequitable, illogical, and that it perpetuates immunity liability in disguise.

187 Conn. 147, 444 A.2d 1379 (1982). "The adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society. Should the officer try to avoid liability by removing from the road all persons who pose any potential hazard, he may find himself liable in many instances for false arrest." Id. at 157, 444 A.2d at 1384. Law enforcement officers are faced with a constant dilemma. On the one hand they are sued for arresting without a warrant, and on the other they are pursued for failing to make such an arrest. Fusilier v. Russell, 345 So. 2d 543, 546 (La. Ct. App. 1977). In Irwin, the Town of Ware argued that the public interest would not be served if police were to avoid interfering in doubtful cases because of fear of liability. Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984).

79. See generally supra notes 34-59 for additional information concerning sovereign immunity.

80. Note, supra note 69, at 679 n.69. See also Riss v. City of New York, 22 N.Y.2d 579, 585, 240 N.E.2d 860, 863, 293 N.Y.S.2d 897, 901 (1968) (Keating, J., dissenting) ("The fear of financial disaster is a myth. The same argument was made a generation ago in opposition to proposals that the state waive its defense of 'sovereign immunity'. The prophecy proved false then and it would now."); Note, A Municipality Has a Duty to Protect an Individual if Assurances of Protection Exist and There is Privity Between the Municipal Agents and the Individual, 19 Gonz. L. Rev. 727, 736 (1983) [hereinafter Note, Duty to Protect] (essentially the same rationales used by advocates of the public duty rule were previously set forth in support of sovereign immunity); Note, Tort Law-Municipal Liability for Police Handling of Intoxicated Drivers, 6 W. New Eng. L. Rev. 1059, 1071 (1984) [hereinafter Note, Intoxicated Drivers] (traditional tort principles will limit liability).

81. Note, Intoxicated Drivers, supra note 80, at 1071 (limits are imposed by using traditional tort principles). See also 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) (courts would be able to apply general tort principles to a case; strict liability would not automatically be imposed).

82. Cf. Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984). The legislature could place a cap on liability. The statute discussed in Irwin, limited public employer liability for the negligent acts or omissions of its employer to $100,000. Id. at 766, 467 N.E.2d at 1306.

83. Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986) (the rule creates needless confusion and inequitable results); Bailey v. Town of Forks, 108 Wash. 2d 262, 267, 737 P.2d 1257, 1260 (1987) (injured plaintiff's suffer harshly under the doctrine). See, e.g., Simonds v. Tibbitts, 165 Mich. App. 480, 419 N.W.2d 5 (1987) (plaintiff's action claiming that police officer had a duty to motorist whose vehicle ran into her husband's was dismissed because police officer only owed a duty to the public at large and not to any individual). See also supra notes.
Absent application of the public duty rule, the plaintiff in a tort action against a governmental entity would be able to recover. However, if the public duty rule is applied to the case, the plaintiff will never be able to establish that a duty existed toward him because of the public status of the tortfeasor. Given such a scenario, opponents of the public duty rule believe that the harsh results of rule application are clear and that, as such, the rule is merely another form of sovereign immunity.

Continued criticism of the public duty rule has prompted many states to modify or discard the rule. Yet the rule still remains intact in its

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15-16 and accompanying text for additional discussion of the harsh effects of the application of the public duty rule.

84. Note, Police Protection, supra note 13, at 601 (noting that the rule has been criticized as being “illogical and an archaic vestige of sovereign immunity”).

85. Adams v. State, 555 P.2d 235, 241 (Alaska 1976) (“we consider that the ‘duty to all, duty to no-one’ doctrine is in reality a form of sovereign immunity”); Leake v. Cain, 720 P.2d 152, 160 (Colo. 1986) (“whether or not the public duty rule is a function of sovereign immunity the effect of the rule is identical to that of sovereign immunity”); Bailey v. Town of Forks, 108 Wash. 2d 262, 267, 737 P.2d 1257, 1259 (1987) (citing Chambers-Castanes v. King County, 100 Wash. 2d 275, 291, 669 P.2d 451, 468 (1983) (Utter, J., concurring)) (“the doctrine has been attacked as perpetuating sovereign immunity in the guise of the public duty doctrine.”); DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986) (“[t]he public-duty/special-duty rule was in essence a form of sovereign immunity. . .”). See also Scheer v. Board of County Comm’rs, 101 N.M. 671, 673, 687 P.2d 728, 730-31 (1984). The public duty/special duty rule bears a direct relationship to sovereign immunity. “The distinction between ‘public duty’ and ‘special duty is no less arbitrary and no less a vestige of the doctrine of sovereign immunity than are the ‘governmental-proprietory’ and ‘discretionary-ministerial’ distinctions.” Id. at 674, 687 P.2d at 732. Note, Government Liability, supra note 15, at 513 (“strict application of the public duty doctrine resurrected complete sovereign immunity as to public officers”). But see Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979). The distinction between a public and special duty is not a fiction, it is not artificial, and is not a relic of sovereign immunity. The Minnesota court went on to refuse to abolish the distinction between the public duty and the special duty rule. Id. at 806; Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983) (the criticism that the public duty doctrine reinstates the doctrine of sovereign immunity is unfounded).

86. Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986) (The major criticism of the public duty rule is its harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of the tortfeasor.).

87. See generally Comment, The Special Duty Rule Should Be Discarded, supra note 37, at 508-09 (while the comment discusses the special duty rule as a form of sovereign immunity instead of the public duty rule in general, the arguments advanced are applicable here); Note, Duty to Protect, supra note 80, at 733 (Justice Utter, in Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983), viewed the public duty rule as a “limited form of sovereign immunity”); Note, Public Officer’s Failure To Enforce Drunk-Driving Statute Does Not Create Actionable Duty to Injured Motorist, 20 Suffolk U.L. Rev. 282 (1986) (the court in Barratt revitalized the archaic doctrine of sovereign immunity by applying the public duty rule).

88. See, e.g., Ashburn v. Anne Arundel County, 306 Md. 617, 628, 510 A.2d 1078, 1085 (1986) (a plaintiff is not without recourse if he can establish that a special relationship with the police existed); Bailey v. Town of Forks, 108 Wash. 2d 262, 268, 737 P.2d 1257, 1260
original form in at least one state. However, the vast majority of states which still employ the rule, including Indiana, do so in a less severe form by utilizing the special duty rule.

C. The Special Duty Rule

Indiana does not adhere to pure form of the public duty rule. Instead, Indiana combines the use of the public duty rule with what is essentially an exception to the rule known as the special duty rule. A municipality will be held liable under the special duty rule when a duty established through a

(1987) (recognizing four situations when a governmental unit owes a duty to a particular individual rather than to the public at large).

89. See Adams v. State, 555 P.2d 235 (Alaska 1976); Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982) (discarded the public duty rule and stated that the exercise of determining whether a tortfeasor has a general or special duty to an injured party is a speculative one which the court would no longer engage in); Leake v. Cain, 720 P.2d 152 (Colo. 1986) (the duty of a public entity is to be determined in the same manner as if it were a private party); Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979); Scheer v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984) (trend is toward liability, there is no longer a need to distinguish between a public and a special duty); Brennen v. City of Eugene, 285 Or. 401, 409, 591 P.2d 719, 725 (1979) (any distinction between "public" and "private" duty is precluded by statute); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) ("[a]ny duty owed to the public generally is a duty owed to individual members of the public"); DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986). See also Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979); Chambers-Custanes v. King County, 100 Wash. 2d 275, 290, 669 P.2d 451, 460 (1983) (Utter, J., concurring) (there has been a trend in recent years toward rejection of the rule).

90. Missouri still adheres to the public duty rule. See Schutte v. Sitton, 729 S.W.2d 208, 210 (Mo. Ct. App. 1987); Spotts v. City of Kansas City, 728 S.W.2d 242, 247 (Mo. Ct. App. 1987). See supra note 14 for a discussion of the Schutte and Spotts decisions. See also Berger v. City of University City, 676 S.W.2d 39, 41 (Mo. Ct. App. 1984) (the court discussed the special duty rule and broke it down into four elements in dicta, but did not apply the rule). But see Tinsley, supra note 11, at 443 (all jurisdictions "apparently" recognize the special duty exception to the public duty rule).

91. Annotation, supra note 13, at 1197-98. Indiana cases explicitly support the view that governmental tort liability may be premised on a particular duty owed to an individual rather than a general duty owed to the public. See infra notes 93-139 and accompanying text for a discussion of Indiana's application of the public duty rule and special duty exception.


93. See supra notes 11-14, 60-92 and accompanying text for further discussion of the pure form of the public duty rule.

94. See supra notes 15-20 and accompanying text for further discussion of the special duty rule.
special relationship between the municipality and an individual is subsequently breached.  

While the special duty rule permits recovery in specific circumstances, application of the rule varies widely among states. Courts apply different criteria in determining the establishment of a special relationship. The two most frequently recognized indicators that a special relationship exists are when citizen cooperation with the police puts the citizen in a position of danger or when the police promise to protect a citizen and subsequently

95. See Comment, supra note 15, at 420 (the special duty doctrine imposes liability based on a special relationship between the individual and the defendant).

96. See, e.g., Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966). In Gardner, police officers took the plaintiff to identify four persons who had previously beaten up the plaintiff. The Gardner court found that the officers owed a special duty to protect the plaintiff from harm. Id. at 380, 219 N.E.2d at 150. The court also held that the officers breached their duty to protect the plaintiff when they allowed the suspects to attack the plaintiff again after he identified them. Id. Simonds v. Tibbits, 165 Mich. App. 480, 419 N.W.2d 5 (1987). The appellate court in Simonds held that no special duty existed between a police officer who released an intoxicated motorist and a third party who was killed by that motorist. Id. Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984). In Irwin, the Supreme Judicial Court of Massachusetts found that a special relationship exists between the police and the public in situations involving the failure of the police to arrest or detain intoxicated motorists. Id. See also supra notes 98-108 and accompanying text (containing various cases where the rule has been applied).

97. See Note, Failure to Prevent Crime, supra note 13, at 821. Courts have modestly expanded the special relationship exception. These expansions can be categorized into five fact patterns:

1. When the plaintiff is harmed as a consequence of his abetting the police, often as an informer or witness;
2. When police extend express promises of protection to specific individuals;
3. When the police are aware of a danger to a specific individual, but have neither jeopardized the plaintiff through their affirmative acts nor promised him protection;
4. When the police are aware of a narrowly defined and readily identifiable source of danger to the public, but cannot reasonably foresee a specific victim;
5. When the police fail to provide protection from a general threat.

Id. at 825-27.

98. In 1959, the New York Court of Appeals decided the most frequently cited case determining that a special relationship existed when a citizen assisted the police. Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). The Schuster case established the principle that the police owe a special duty to a citizen who collaborates with the police and is placed in danger because of the collaboration. Id. at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. Thus, the plaintiff in Schuster, whose son had provided the police with information leading to the arrest of a murder suspect, could recover damages. Id. For additional analysis of the case, see Note, Failure to Prevent Crime, supra note 13, at 824; Comment, Liability For Negligent Failure of Police to Protect Informer, 72 HARV. L. REV. 1386, 1387 (1959) (Schuster "is the first case to hold that there is a cause of action based solely on a negligent failure of police protection"); Note, A Governmental Duty to Protect the Citizen-The Schuster Case, 33 ST. JOHNS L. REV. 289, 297 (1959) (the majority in Schuster seems correct as a matter of theory).

In 1978, an Indiana appellate court faced the issue of the failure of the police to provide adequate protection to a citizen who had cooperated with the police. Estate of Tanasijevich v.
fail to do so.99

In addition, courts have recognized other situations from which a special relationship may arise.100 While a special relationship may exist in a particular situation, a court's willingness to find that a relationship exists and then to attach liability depends largely on the facts of the case and current public policy concerns.101 Thus, special relationships have been found in three additional areas:102 first, when the police are aware of danger

City of Hammond, 178 Ind. App. 669, 383 N.E.2d 1081 (1978). The Tanasijevich court found that a special relationship existed when a citizen cooperated with the police, and the citizen's property was later damaged by vandals in retaliation. Id. at 670, 383 N.E.2d at 1083.

99. For example in at least one case a court has found that a sheriff who promised to warn of the release of a prisoner from jail and failed to do so could be held liable, when the prisoner killed the decedent. Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964). In Silverman v. City of Fort Wayne, the court held that the trial court's dismissal for failure to state a claim was improper where the complainant had alleged that city officials promised to protect Silverman's property, protected it for some time, and then stopped providing protection. Silverman v. City of Fort Wayne, 171 Ind. App. 415, 357 N.E.2d 285 (1976). When the protection stopped, Silverman's property was damaged. The allegation of an existing promise necessitated a determination of whether the promise to protect Silverman's property rose to the level of a special relationship. The case was remanded to determine whether a special duty was established. Id. Another example is the case of DeLong v. County of Erie, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983). In DeLong, the court found the county liable after a woman called 911 to report a burglary and was assured help was on the way. Officers responded to the wrong address, and instead of attempting to determine what the problem with the address was, the dispatcher filed the call as a fake. The burglar killed the caller. Id. at 300-01, 457 N.E.2d at 719, 469 N.Y.S.2d at 614. Additionally, a Washington court has noted that the police have a duty to provide services when "(1) there is some form of privity between the police department and the victim that sets the victim apart from the general public, and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim." Chambers-Castanes v. King County, 100 Wash. 2d 275, 286, 669 P.2d 451, 458 (1983).

The case of Warren v. District of Columbia stands in contrast to the aforementioned cases. Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981) (en banc). In Warren, two men broke into a home occupied by three women. Id. at 2. While the men raped the woman living on the second floor, her roommates living on the third floor called the police. Id. The police assured the women help would be forthcoming. Id. The two women who phoned the police eventually were raped by the men because the police dispatched pursuant to the first call never entered the house, and no police were dispatched after the second call the women made. Id. The District of Columbia Court of Appeals upheld the trial court decision and dismissed the plaintiffs' complaint. Id. at 3. The court quoted from the trial court decision, stating that "a government and its agents are under no general duty to provide public services such as police protection to any particular individual citizen." Id. Another example of a case wherein a court found the police owed no special duty to the plaintiff is Henderson v. City of St. Petersburg, 247 So. 2d 23 (Fla. 1971). The Henderson court found no special duty existed where the plaintiff, who had received police assurances they would protect him as he made business deliveries in a dark and secluded part of town, was shot by unknown assailants.

100. See infra notes 102-06 and accompanying text.

101. See infra note 105 and accompanying text.

102. See Note, Failure to Prevent Crime, supra note 13, at 825-27. See also I. Silver, POLICE CIVIL LIABILITY § 907 [1]-[5] (Matthew Bender ed. 1986). Silver notes the following
to a specific individual but neither promise action nor jeopardize the plaintiff through affirmative acts; second, when the police fail to provide protection from a general crime pattern well known to the police; and fi-


types of situations in which a special relationship is usually recognized:
1. Duty to protect informers;
2. Negligent failure to protect individual under court protective order;
3. Special relationships created by statutory duties: child abuse;
4. Promise to protect/duty to warn;
5. Special duty to protect those apparently inebriated.

Id.

103. See Baker v. City of New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966) (plaintiff who had been issued a protective order by the court against her estranged husband failed to receive police protection after presenting the order to a police officer; plaintiff's estranged husband later shot her); Jones v. County of Herkimer, 51 Misc. 2d 130, 272 N.Y.S.2d 925 (1966) (failure by villages to control rejected suitor, and failure to protect victim of shooting by rejected suitor, created a special relationship between the police and victim); Tinsley, supra note 11, at 446-59; Note, Failure to Prevent Crime, supra note 13, at 824-27. But see Hartzler v. City of San Jose, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (1975) (police not liable for failing to respond to woman's call for protection 45 minutes before she was killed even though police had responded to 20 calls from the same woman in the past); Davidson v. City of Westminster, 32 Cal. 3d 197, 647 P.2d 894, 185 Cal. Rptr. 252 (1982) (no special relationship existed between police and plaintiff where plaintiff was stabbed in laundromat while officers had the laundromat under surveillance and saw the probable suspect outside before the stabbing but failed to warn the plaintiff of the suspect's presence); Bruttomesso v. Las Vegas Metro. Police Dep't, 95 Nev. 144, 591 P.2d 254 (1979) (no special relationship existed when the plaintiff was stabbed in a parking lot where the police department had been asked to provide extra security but did not due to a lack of manpower); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (plaintiff's repeated calls to police asking for protection from ex-boyfriend did not give rise to special relationship status); Doe v. Hendricks, 92 N.M. 499, 590 P.2d 647 (1979) (no duty existed between sexually assaulted 12 year old boy and police chief, who was the only officer available at the time a call was made by a witness to the police notifying the dispatcher that the boy had been dragged in a house by an unidentified man); Munoz v. Cameron County, 725 S.W.2d 319 (Tex. Ct. App. 1986) (no liability for sheriff who failed to execute arrest warrant before husband shot plaintiff's mother).

104. An example of a case wherein police failed to protect an individual from a known crime problem is Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (1969). The Bass court found the housing authority liable for assuming the duty to provide police protection in a housing project with a high crime rate and history of disorderly activity. Id. at 468-69, 305 N.Y.S.2d at 805. The court rejected the argument that providing a police presence in such a high crime area would be an unrealistic economic burden. Id. The case involved the rape and murder of a nine-year-old girl within the project when the only police officer assigned to the project was on a lunch break. Id. In 1972, the trial court decision in Bass was reversed. Bass v. City of New York, 38 A.D.2d 407, 330 N.Y.S.2d 569 (1972), aff'd, 32 N.Y.2d 894, 346 N.Y.S.2d 814 (1973). The appellate court in the Bass case stated that no special duty of protection existed. Id. at 415, 330 N.Y.S.2d at 577. An Indiana decision similar to the trial court's decision in Bass decision is Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971). In Simpson's, the plaintiff alleged that the failure of police to halt a crime wave in the area of plaintiff's grocery store forced the plaintiff to go out of business. The Indiana Appellate Court found that "governmental units cannot be 'absolutely liable' for any and all acts or omissions which might cause damage to private citizens." Id. at 394, 272 N.E.2d at 875. See Note, Failure to Prevent Crime, supra note 13, at 824-27. For
nally, when the specific victim of an identified source of danger is foreseeable.\textsuperscript{106} The failure to arrest intoxicated drivers falls into the last category.\textsuperscript{106} Therefore, a court analyzing a case involving the failure of a police officer to arrest an intoxicated driver could apply the special duty rule and reason that the injuries suffered by the victim of a drunk driver were foreseeable consequences of the release of that driver by the police.\textsuperscript{107}

additional discussion see supra notes 65-66 and accompanying text.

105. \textit{See} Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984):
A duty to act with reasonable care to prevent harm to a plaintiff which, if violated, may give rise to tort liability is based on a “special relationship” between the plaintiff and the defendant. . . . While several different categories of such special relationships are recognized at common law, they are based to a large extent on a uniform set of considerations. Foremost among these is whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff for failure to do so. . . . As the harm which safely may be considered foreseeable to the defendant changes with the evolving expectations of a maturing society, so change the “special relationships” upon which the common law will base tort liability for failure to take affirmative action with reasonable care.

We have discerned such a special relationship in cases addressing the liability of private parties to members of the general public where alcohol and driving were involved. \textit{Id.} at 756, 467 N.E.2d at 1301. Note, \textit{Failure to Prevent Crime}, supra note 13, at 824-27. \textit{See also} Bailey v. Town of Forks, 108 Wash. 2d 262, 737 P.2d 1257 (1987) (police officer who releases an intoxicated driver is releasing a dangerous instrument onto the highway). \textit{But see} Bailey v. Town of Forks, 38 Wash. App. 656, 664, 688 P.2d 526, 531 (1984), \textit{rev'd}, 108 Wash. 2d 262, 737 P.2d 1257 (1987) (“A police officer’s mere contact with an intoxicated person hardly creates the same type of relationship as exists between a psychiatrist and his patient, or a custodian and his inmate.”); Jackson v. Clements, 146 Cal. App. 3d 983, 986, 194 Cal. Rptr. 553, 556 (1983) (no special relationship was created by officers investigating a party involving alcohol and minors, after which intoxicated minors from the party were involved in an auto accident); Ashburn v. Anne Arundel County, 306 Md. 617, 622, 510 A.2d 1078, 1085 (1986) (police officer’s contact with an intoxicated driver before the driver struck a pedestrian did not rise to a level of special relationship).


107. \textit{See} Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969), \textit{overruled in} Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982) (en banc). Examination of the special duty rule application within the context of police failure to arrest or detain intoxicated drivers illustrates the varied ways in which states apply the special duty rule. Thus, in some states the rule will be applied in this situation, and in other states it will not. This footnote examines several of these cases, thus demonstrating this proposition.

The Massengill case involved a head-on collision in which five people died and six others were permanently disabled. \textit{Id.} at 519, 456 P.2d at 378. In Massengill, two individuals had left a parking lot driving their vehicles in a reckless manner down a dangerous stretch of highway. \textit{Id.} The vehicles passed a sheriff’s deputy parked alongside the road. \textit{Id.} The deputy followed the vehicles, but failed to stop or detain the drivers before the ensuing accident occurred. \textit{Id.} The plaintiffs in the case argued that the sheriff had both a duty and an opportunity to arrest the vehicle operators, but that he failed to carry out this duty. The defendant argued that no duty existed and that even if there was a duty, the breach of that duty was not the proximate cause of the accident. \textit{Id.} The court held that the duty owed to the plaintiffs by the defendant was one owed only to the public generally and not owed to the individual plaintiffs. \textit{Id.} The court further stated that because no special relationship existed between the plaintiff and the defendant, no cause of action could be maintained. \textit{Id.} at 523, 456 P.2d at

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Shore v. Town of Stonington, 187 Conn. 147, 444 A.2d 1379 (1982). In Shore, the Supreme Court of Connecticut found that a police officer owed no specific duty to the plaintiff's decedent to enforce the motor vehicle laws of Connecticut. The case involved an accident in which the plaintiff's decedent was killed by a drunk driver. Id. at 150, 444 A.2d at 1381. The motorist told the officer he was stopping at the V.F.W. to pick up his girlfriend. The officer left after telling the motorist to let his girlfriend drive. Id. While refusing to allow an action against the officer and his employer, the court did examine the approaches of other jurisdictions. The Connecticut court recognized that some courts have recently refused to strictly interpret the public duty rule, yet the court refused to follow the trend. Id. at 157, 444 A.2d at 1384. For additional analysis of the Shore decision, see Note, Intoxicated Drivers, supra note 80, at 1059; Note, Government Liability, supra note 15, at 512-13.

Other cases propose that because a special relationship has formed the special duty rule applies, and this liability exists. The first case to so hold was a Massachusetts decision. Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984). In Irwin, the Supreme Judicial Court of Massachusetts held that municipal tort liability could be predicated upon a public duty owed to the motorizing public for failing to remove drunk drivers from the road. The plaintiff brought suit after a car driven by Fuller, an intoxicated driver, struck the Irwin automobile head-on. Id. at 766, 467 N.E.2d at 1304. The accident left two passengers in the Irwin vehicle dead and two other passengers seriously injured. A Town of Ware patrolman stopped Fuller ten minutes prior to the accident for "driving too fast under the circumstances." Id. An eyewitness to the traffic stop testified that while two Town of Ware police officers conferred (another Town of Ware patrolman came to the site of the traffic stop), Fuller stood by his car swaying back and forth and holding onto the car door to steady himself. Id. The court concluded that "a town or city may be held liable in damages for the negligent failure of its police officers to remove from the highway a motor vehicle operator who is under the influence of intoxicating liquor and who subsequently causes injuries or death to other travelers." Id. at 772, 467 N.E.2d at 1310. See also Suing the Police For Drunk Driving: A Trend?, 6 L.AW. ALERT 470 (1987). Other courts have followed Massachusetts' lead and have found police officers, and the municipalities for which they work, liable for drunk driving accidents. Id.

Huhn v. Dixie Ins. Co., 453 So. 2d 70 (Fla. Dist. Ct. App. 1984), rev'd, 468 So. 2d 963 (Fla. 1985). The court in Huhn rejected the reasoning in Everton v. Willard, 426 So. 2d 996 (Fla. Dist. Ct. App. 1983). The Huhn court found that the City of Daytona Beach could be held liable for the release of an intoxicated driver by two police officers. Id. at 71. The court rejected the argument of the city that the city owed no duty to the plaintiff any different from that owed to the general public, but based its decision largely on the theory that a police officer is not exercising a discretionary function in enforcing laws. Id. at 77. For additional comment regarding the Huhn decision, see Note, supra note 58, at 601; Fudge v. City of Kansas City, 239 Kan. 369, 720 P.2d 1093 (1986). In Fudge, the Kansas Supreme Court found that Kansas City Police Officers owed a special duty to the victim of a drunk driving collision. Id. at 375, 720 P.2d at 1098. The court partially based its findings on Kansas City Police Department General Order 79-44, which outlines procedures to be followed by Kansas City Police Officers when dealing with intoxicated persons. Id. Additionally, the court held that this duty ripened into an obligation because the police should have realized that taking the intoxicated person into custody was necessary to protect third parties. Id. For additional discussion of the Fudge decision, see Lambert, Governmental Liability: Municipal Police Liable For Negligent Failure to Detain Drunk Driver, 29 A.T.L.A. REP. 294 (1986).

Kendrick v. City of Lake Charles, 500 So. 2d 866 (La. Ct. App. 1986). "A duty owed to the public in general may be transformed into a duty owed to an individual through closeness
has yielded inconsistent results. The case of Estate of Tanasijevich v. City of Hammond,\(^{108}\) provides a good example of how the public duty and special duty rules are applied. The appellate court in Tanasijevich noted that the police owed a duty to protect Tanasijevich's property from vandalism and fire,\(^{109}\) but that this was a general duty owed to the public.\(^{110}\) After stating that a general duty alone will not give rise to liability, the court considered whether a special relationship existed between Tanasijevich and the Hammond Police because Tanasijevich had provided the police with information that they had requested.\(^{111}\) Relying heavily on the desirability of encouraging citizen cooperation with the police, the court found that a general duty may become particularized to an individual where an individual has worked with the police.\(^{112}\) While Tanasijevich provides a good example of an Indiana court's utilization of the special duty rule wherein a plaintiff

in proximity or time." Id. at 870. In Kendrick, the decedent died after being involved in a one car accident. Prior to her death, the decedent was released from jail after being arrested for driving under the influence. Immediately prior to her demise, the decedent was released from jail after posting bond and given access to her vehicle despite the fact that she was still intoxicated. Id. Weldy v. Town of Kingston, 128 N.H. 325, 514 A.2d 1257 (1986). In Weldy, the Supreme Court of New Hampshire found that police officers owe a duty to the general public and that reasonable prudence dictates underage minors with alcohol should be detained. Id. at 331, 514 A.2d at 1260. For additional comment, see Lambert, Government Liability: Drunk Drivers, 29 A.T.L.A. Rep. 392 (1986). Bailey v. Town of Forks, 108 Wash. 2d 262, 737 P.2d 1257 (1987). In Bailey, the Supreme Court of Washington found a special relationship existed between the victim of a drunk driver and the police officer who had stopped the drunk driver but released him. The case involved a police officer who ordered Medley to enter his pickup truck and leave the bar's parking lot where Medley had been involved in a fight. Id. at 265, 737 P.2d at 1258. The plaintiff's complaint alleged that the officer should have realized Medley's intoxication rendered him unfit to drive. The plaintiff in the case suffered severe injuries when Medley made an illegal left turn in front of a motorcycle upon which the plaintiff rode as a passenger. Id. The driver of the motorcycle died in the accident. Id. The Court of Appeals of Washington had previously held that the public duty rule applied and that no cause of action existed. Bailey v. Town of Forks, 38 Wash. App. 656, 688 P.2d 526 (1984).


109. Tanasijevich had cooperated with the Hammond Police in their investigation of various criminal activities after the police had approached him and asked for his assistance. Id. at 670, 383 N.E.2d at 1082. As a result of this cooperation, Tanasijevich became the target of criminal retaliation in the form of vandalism and fire damage to a building owned by his estate. Id. at 670, 383 N.E.2d at 1083.

110. The Indiana Court of Appeals reversed a summary judgment ruling in favor of the city and noted that the police owed a duty to protect Tanasijevich's property but that the duty was a general one owed to the public. Id.

111. Id.

obtained relief, many cases exist wherein a plaintiff obtained no relief because no special relationship could be established.113

A good example of a case wherein a plaintiff obtained no relief as a consequence of the application of the special duty rule can be seen in Ivanovich v. Doe,114 a 1986 Indiana Appellate Court decision. In Ivanovich, the appellate court held that a police officer who offered to take an intoxicated minor home, but instead dropped him off and left him alone in the freezing weather, owed no special duty toward the minor.115 The court reasoned that no liability existed because the police officer only owed a duty to the general public and not to the individual.116

Comparing Tanasijevich and Ivanovich, the basis of liability appears to be determined by the significance of the police-victim relationship. In Tanasijevich, a reciprocal contract-like relationship existed, bringing the case within a recognized exception to the public duty rule.117 Alternatively, in Ivanovich, an intoxicated minor who had less formal contact with the police sustained injuries after relying on the officer’s representation that he would be taken home.118 The distinction between the cases, wherein both plaintiffs had contact with the police in situations where the police had knowledge of the peril that the plaintiffs faced, typifies the incongruent results which often stem from application of the special duty rule.119

Justifications for the special duty rule stem primarily from a desire to mitigate the harsh results of public duty rule application.120 Many commentators argue that acknowledging a special relationship where citizens have

113. See, e.g., Crouch v. Hall, 406 N.E.2d 303 (Ind. Ct. App. 1980) (the duty to investigate a rape is one owed to the general public); City of Hammond v. Cataldi, 449 N.E.2d 1184 (Ind. Ct. App. 1983) (no special duty existed to put out a fire in the plaintiff’s restaurant, which subsequently destroyed the entire premises); State v. Flanigan, 489 N.E.2d 1216 (Ind. Ct. App. 1986) (no special duty existed to provide traffic control or other protection for customers walking to a flea market after parking their cars on the side of the road). But see Roberts v. State, 159 Ind. App. 456, 307 N.E.2d 501 (1974) (public official in charge of a prisoner owes a special duty to the prisoner to take reasonable precautions to preserve the prisoner’s health and safety).


115. In the Ivanovich case, Ivanovich, a minor in an extreme state of intoxication, was approached by two Gary Police Officers who told him to go home. Id. at 807. The officers offered to give Ivanovich a ride after it became apparent that he could not walk. Instead of taking Ivanovich home, one of the officers dropped Ivanovich off a few blocks from where he had been picked up and left him in the freezing weather. Id. Ivanovich sued to recover damages for injuries suffered from exposure to the weather. Id. at 809.

116. Id.

117. See supra notes 98, 108-12 and accompanying text.


119. See supra note 83 and accompanying text.

120. See supra notes 14-15, 83 and accompanying text.
cooperated with police encourages further citizen cooperation. Courts have also justified application of the special duty rule on the theory that because a citizen has provided information beneficial to the police, a reciprocal duty arises whereby the police should provide additional protection. Furthermore, recognition of a special relationship within the informant-police context is seen by some commentators as merely adding to the types of relationships traditionally recognized at common law as giving rise to an affirmative duty to act.

A final justification for the special duty rule is based on the traditional tort principle of assumption of duty. An assumption of a duty occurs when "one assumes to act, even though gratuitously, [and] may thereby become subject to the duty of acting carefully, if he acts at all." Therefore, the

121. Estate of Tanasijevich v. City of Hammond, 178 Ind. App. 669, 383 N.E.2d 1081 (1978). The court in Tanasijevich noted that: The present-day unwillingness of citizens to "get involved" in the machinations of law enforcement stems in part from their fear of reprisals similar to that which Tanasijevich has alleged here. Were we to hold as a matter of law that the police had no duty to protect Tanasijevich regardless of the likelihood that he or his family would suffer some injury in retaliation for his cooperation in the criminal investigation, we would only reinforce the public's reluctance to assist in the sometimes dangerous business of law enforcement. Id. at 674, 383 N.E.2d at 1085. See also Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

[1] In our view the public (acting in this instance through the City of New York) owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears they are in danger due to their collaboration. If it were otherwise, it might well become difficult to convince the citizen to aid and co-operate with the law enforcement officers. Id. at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. See also Note, A Governmental Duty to Protect the Citizen-The Schuster Case, 33 St. Johns L. Rev. 289, 297 (1959) (from a policy standpoint the Schuster decision will encourage citizen cooperation with the police).


123. Comment, Municipality Liable for Negligent Failure to Protect Informer: The Schuster Case, 59 Col. L. Rev. 479, 494 (1959) (the city has an affirmative duty to exercise reasonable care toward those who aid in law enforcement).

124. Id. at 494. See also Florence v. Goldberg, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (the police department voluntarily assumed a duty when it began to provide crossing guards at school intersections); Note, Police Protection, supra note 13, at 604-05 (a plaintiff may recover in tort if the municipality assumed a duty towards the plaintiff although owing no duty to the general public); Cracraft v. City of Saint Louis Park, 279 N.W.2d 801 (Minn. 1979) (Kelly, J., dissenting). The dissent quoted the Restatement (Second) of Torts § 324 A:

One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to
police may become subject to a duty to act if certain action is taken. For example, if the police assume a duty to provide police protection but negligently carry out that duty, liability will attach.

The special duty rule may soften the harshness of the public duty rule, but it is subject to manipulation and distortion. Continued application of the special duty rule and its expansion to fit the needs of a changing society indicate that the longer the special duty rule exists, the greater the uncertainty surrounding the public duty rule becomes. As one state court noted, "close inspection of the doctrine and its myriad exceptions may well reveal that the exceptions have virtually consumed the rule."

The consumption of the public duty rule by special duty exceptions indicates that courts generally are dissatisfied with the public duty rule. This dissatisfaction resembles arguments advanced prior to the abolition of sovereign immunity in many states, like Indiana, where the immunity had been eroded with exceptions to such a point that only confusion remained. States that have overturned the special duty rule have refused to further engage "in the speculative exercise of determining whether the tortfeasor has a general duty to the injured party or if he had a specific individual duty which means recovery." Despite the uncertainty created by the continued application of the special duty rule, courts still use the rule, and many more courts are using the rule within the context of police failure to arrest intoxicated drivers.

exercise reasonable care to protect his undertaking if:
(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or
(c) the harm is suffered because of the other to the third person upon the undertaking.

Id. at 809.

125. Cf. Note, Police Protection, supra note 13, at 604 ("When the relationship between municipality and individual has created a justifiable reliance by the individual in police protection, the municipality should be found to have assumed a duty to provide adequate police protection to him.").


127. Cf. Note, supra note 70, at 730 (so long as the special relationship exception is applied on an ad hoc basis, the scope of police duty remains undefined).

128. Id.


130. Note, Duty to Protect, supra note 80, at 728 (the Washington Supreme Court's continual effort to make exceptions to the public duty rule indicates its dissatisfaction with the rule's application).

131. See Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972). "The [sovereign immunity] doctrine has been amended and eroded until the most that remains is an abstract and confusing principle which finds no continuity between jurisdictions." Id. at 57, 284 N.E.2d at 734.


133. See supra note 107 and accompanying text. See also Hucko v. City of San Diego,
The majority of states that have recognized the special duty exception

179 Cal. App. 3d 520, 224 Cal. Rptr. 552 (1986). In Hucko, the court felt that given California Supreme Court precedent on the issue, the trial court properly granted the defendant's summary judgment motion in a case where an officer stopped a motorcyclist for speeding, but failed to recognize that the motorcyclist was drunk, and failed to administer a field sobriety test. Id. at 522, 224 Cal. Rptr. at 554. The motorcyclist, whose blood alcohol content was .24%, crashed ten minutes after the traffic stop and sustained serious injuries. Id. at 520, 224 Cal. Rptr. at 552. Lehto v. City of Oxnard, 171 Cal. App. 3d 285, 217 Cal. Rptr. 450 (1985). The Lehto court held that the police officers who stopped a vehicle and released an intoxicated driver owed no duty to the plaintiff who was a passenger in a vehicle later hit by that driver. Id. Harris v. Smith, 157 Cal. App. 3d 100, 203 Cal. Rptr. 541 (1983). The Harris court held that foreseeability alone is not enough to create a special relationship. Id. Where a sheriff deputy stopped a speeding vehicle, administered field sobriety tests, and then released the driver who shortly thereafter collided with the plaintiff, the deputy did not create the peril to the plaintiff, take any affirmative action, increase the risk which already existed, and made no promises upon which the plaintiff relied, therefore no liability existed. Id. at 105, 203 Cal. Rptr. at 546.

Jackson v. Clements, 146 Cal. App. 3d 983, 194 Cal. Rptr. 553 (1983). The court in Jackson found that a police officer's observation of conduct which may foreseeably create a risk to others or an officer's temporary detention of a citizen does not create a special duty to control the citizen's subsequent behavior. Id. at 986, 194 Cal. Rptr. at 556. Evett v. City of Inverness, 224 So. 2d 365 (Fla. Dist. Ct. App. 1969). The court in Evett found that a police officer who stopped an intoxicated driver for speeding and then released the driver could not be held liable for a later accident in which plaintiff's decedent was killed. The court noted that the police officer owed no duty to plaintiff's decedent different from that owed to any other member of the public. Id. at 366. Drushella v. City of Elgin, No. 86 C 2307, memorandum op. at 4 (N.D. Ill. Jan. 26, 1987). The Drushella court stated that a police officer had no special duty to protect the plaintiff's decedent from an intoxicated driver released by the police after being issued a speeding ticket. Id. The plaintiff failed to show that the municipality was uniquely aware of the particular risk or danger to which the plaintiff was exposed, or that the injury occurred while the plaintiff was under the direct and immediate control of the employee of the municipality. Id. Marshall v. Ellison, 132 Ill. App. 3d 732, 477 N.E.2d 830 (1985). The court in Marshall stated that foreseeability should not be confused with the concept of duty. No special duty existed wherein the police had the responsibility to remove an intoxicated individual from the roadway. Id. at 736, 477 N.E.2d at 833. Fusilier v. Russell, 345 So. 2d 543 (La. Ct. App. 1977). The Fusilier court held that no special duty existed in a case wherein two sheriff deputies observed Russell in an intoxicated state in the parking lot of a bar but did not arrest him. Id. The deputies did not see Russell enter his car or drive away from the bar. Russell later ran into a vehicle in which Fusilier was a passenger. Id. at 544. Ashburn v. Anne Arundel County, 306 Md. 617, 510 A.2d 1078 (1986). The court in Ashburn found that no special relationship existed between the police officer who failed to arrest/detain a drunk driver and a pedestrian who lost a leg after being hit by the driver. The plaintiff failed to show that the officer acted for the plaintiff's benefit or that the officer's action induced the plaintiff's reliance. Id. at 622, 510 A.2d at 1085. Crosby v. Town of Bethlehem, 90 A.D. 2d 134, 457 N.Y.S.2d 618 (N.Y. App. Div. 1982). The court in Crosby found that no special duty existed where an off-duty police officer observed an intoxicated person leave a party on a motorcycle. The officer phoned in information to on-duty officers that people were driving away from the party drunk. The motorcyclist struck and killed a pedestrian shortly after leaving the party. Id. at 135, 457 N.Y.S.2d at 619. Barratt v. Burlington, 492 A.2d 1219 (R.I. 1985). The Barratt court found that no special relationship existed where a special police officer working in a bar parking lot released three young men who were all intoxicated. Id. at 1221. The officer released the three to the custody of the most sober driver, who failed to produce a
to the public duty rule have found that no special relationship exists between the police and the injured party in the drunk driving situation.\textsuperscript{134} Prompted by the immense public interest in the problem of drunk driving in recent years,\textsuperscript{138} some courts have found that a special relationship does exist driver's license when asked and was in fact not a licensed driver. The young men unsuc-

\textsuperscript{134} See, e.g., Schaffrath v. Village of Buffalo Grove, 160 Ill. App. 3d 999, 513 N.E.2d 1026 (1987). In \textit{Schaffrath}, the Illinois Appellate Court rejected the plaintiff's arguments that a special relationship existed between a police officer and the plaintiff's decedent. \textit{Id.} at 1006, 513 N.E.2d at 1030. The \textit{Schaffrath} case involved a police officer who had stopped a motorist because of a loud muffler, but who did not issue the motorist a citation or arrest him. \textit{Id.} at 1001, 513 N.E.2d at 1027. Approximately 28 minutes after being stopped by the police officer, the motorist ran into a concrete abutment. \textit{Id.} One passenger in the car was killed, while the other passenger and the driver were injured. \textit{Id.} Fessler v. R.E.J. Inc., 161 Ill. App. 3d 290, 514 N.E.2d 515 (1987). In \textit{Fessler}, the Illinois Appellate Court held that a police officer who encountered an intoxicated individual one hour prior to the individual's involvement in a deadly accident owed no particular duty of care to the decedents and dismissed the action. \textit{Id.} Phillips v. City of Billings, 758 P.2d 772 (Mont. 1988). The court in \textit{Phillips} found that no duty existed toward the plaintiff based on a police officer's general duty to protect the traveling public. \textit{Id.} at 775. \textit{Phillips} involved a situation where two police officers spoke to an intoxicated motorist two hours before the motorist ran a red light and hit another vehicle. \textit{Id.} at 773-74. The officers did not arrest the motorist because they did not see him driving and therefore believed that they had no probable cause to arrest him. \textit{Id.} at 774. \textit{See also supra} notes 107, 133 and accompanying text.

135. Within the last ten years, drunk driving has become a major social issue in the United States. Like many other states, Indiana has taken steps to address the problem. For example, in 1982, Governor Orr established a task force to reduce drunk driving. In 1983, as a result of task force efforts and the Indiana General Assembly's work, Indiana's drunk driving laws were changed significantly. According to The Governor's Task Force to Reduce Drunk Driving, the major points of the law are:

1. It is a crime to drive while under the influence of alcohol, drugs, a controlled substance or a combination of the three. The penalty for driving while intoxicated is up to one year in prison and a $5,000 fine. It is also now a crime to drive with a blood alcohol content level that is .10 percent or greater. The penalty for this violation is up to 60 days in prison and a $300 fine. If serious personal injury results from either crime, the crime becomes a felony with prison time increased to 1-4 years, plus a $10,000 fine. If death results, the prison time is increased to 2-8 years, plus a $10,000 fine.

2. A person's driving license will be automatically suspended if he/she either refuses a police officer's request for a breathalyzer test or takes a breathalyzer and fails. A person refusing the test will have his/her license suspended for one year by the Bureau of Motor Vehicles. If a person takes a breathalyzer test and fails, his/her license is automatically suspended for 180 days or until the case is decided by a court of law.

3. The absolute minimum amount of time a person is prohibited from driving is 30 days.

4. A person who continues to drive after his/her license has been suspended for a drunk driving conviction will be automatically sentenced to a mandatory 60-day jail term.

5. After conviction of a drunk driving offense, a person must pay a $20 fee in order to have his/her license reinstated. This money will be used to further law enforcement and public education efforts.

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between a police officer who released a drunk driver and the subsequent victim of an accident caused by that driver. These courts have found that liability may attach, but courts so holding are in the minority.\textsuperscript{136} Given Indiana decisions such as \textit{Ivanovich v. Doe},\textsuperscript{137} where the court held that no special relationship existed when the police had contact with the plaintiff, an Indiana court would be unlikely to find that a special relationship existed between a police officer and the victim of a drunk driver where the officer and victim have never met.\textsuperscript{138} Not only does Indiana insulate arguably negligent acts of its police officers under the public duty and special duty rules, the state has codified this shield of immunity in the Indiana Tort Claims Act.\textsuperscript{139}

\textbf{D. The Indiana Tort Claims Act}

With sovereign immunity gone, and the status of state immunity in question,\textsuperscript{140} the Indiana Legislature enacted the Indiana Tort Claims Act in 1973.\textsuperscript{141} The Act immunizes police activity when a police officer engages in “the adoption and enforcement of or failure to adopt or enforce a law,” but not if his action constitutes false arrest or imprisonment.\textsuperscript{142} The most important Indiana case to interpret the police activity section of the Act is

The Governor's Task Force to Reduce Drunk Driving, Indiana Drunk Driving Fact Sheet (available by writing to the Governor's Task Force to Reduce Drunk Driving, One American Square, Suite 1055, P.O. Box 82072, Indianapolis, Indiana 46282).

The task force projects that 8,234 deaths and injuries have been prevented since the law changed. A projected $113,000,000 savings to Indiana taxpayers resulted. Still, an estimated 268 Indiana residents died in alcohol related accidents in 1986 and more than 8,000 were injured. \textit{Id.} An Indiana State Police fact sheet indicates that drinking was the number one circumstance contributing to fatal traffic accidents in Indiana. \textit{INDIANA ST. POLICE, 1986 INDIANA TRAFFIC DEATHS 10} (1986).

All 50 states have now raised the drinking age to 21. McAllister, \textit{The Drunken Driving Crackdown Is It Working?}, A.B.A. J. Sept. 1, 1988, at 54. Additionally, in 1985, 223 laws relating to driving while intoxicated were passed in 45 states. \textit{Id.} at 55.

136. \textit{See supra} notes 107, 133 and accompanying text.


138. \textit{See supra} notes 108-17 and accompanying text.


140. Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972). \textit{See supra} notes 58, 60 and accompanying text.


Seymour National Bank v. State.\textsuperscript{143}

Seymour National Bank involved an action against the State of Indiana for the alleged negligence of an Indiana State Trooper who was involved in an accident during a high speed chase.\textsuperscript{144} In applying the Tort Claims Act to this case, the Indiana appellate court suggested that the case be analyzed using traditional tort principles.\textsuperscript{145} The court refused to acknowledge that the legislature intended "enforcement" to shield negligent and reckless conduct in enforcing the law.\textsuperscript{146} In 1981, however, upon reviewing the appellate court's decision,\textsuperscript{147} the Indiana Supreme Court stated that given the plain meaning of the word "enforcement," enforcing a law included making an arrest; therefore, because the trooper was engaged in an arrest,\textsuperscript{148} the Tort Claims Act prevented suit.\textsuperscript{149}

The Indiana Supreme Court later granted rehearing on the case and modified its original opinion.\textsuperscript{150} Upon rehearing, the majority explained that if an employee's acts are so outrageous as to be incompatible with the duty

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144. During the chase, wherein the suspect vehicle reached speeds far in excess of the speed limit, the State Trooper, while reducing his speed near traffic, collided with a vehicle he attempted to pass. The driver of the vehicle made a left hand turn into the path of the police car. \textit{Id.} at 1180.
145. The appellate court first decided that a two-pronged analysis had evolved. Thus, a plaintiff would have to show:
   (1) the officer was acting in a ministerial capacity; or
   (2) the officer owed a private duty to the plaintiff to exercise due care.
Seymour Nat'l Bank v. State, 384 N.E.2d 1177, 1183 (1979). The court decided that the trooper owed a private duty to the plaintiff, and that his actions were ministerial; therefore, a common law action existed. \textit{Id.} at 1184-85. In reaching the decision that the trooper owed a private duty to the plaintiff, the appellate court found that under INDIANA CODE § 9-4-1-25, relating to the operation of emergency vehicles, there was a duty imposed by statute on the state trooper. \textit{Id.} at 1189. This analysis tends to indicate that such a finding could be made in regard to the duty of a police officer to arrest or detain a drunk driver when a statute to so arrest is involved. Even if such a finding was made by a court, this would merely place the duty within a special duty exception to the public duty rule. The plaintiff would still face proving breach of a duty, proximate cause, and damage to be successful in an action. The Indiana Supreme Court did not address the issue in its subsequent rulings on the case. See infra note 152 and accompanying text. Furthermore, unlike the statute relating to emergency vehicle operation, no Indiana statute exists that regulates police behavior mandating the arrest of drunk drivers.
146. \textit{Id.} at 1186.
148. \textit{Id.} at 1226.
149. \textit{Id. But see} Justice Hunter's dissent, where he proposes that this interpretation of "enforcement" means that Indiana has returned to the notion that "the King can do no wrong." Such blanket immunity prevents recovery from actions of gross negligence or reckless- ness by police officers. \textit{Id.} at 1227.
\end{verbatim}
undertaken, no duty is performed and the act is thus beyond the scope of employment.\textsuperscript{151} In all other respects the majority affirmed its prior decision.\textsuperscript{152} However, the dissenting opinion argued that the wording of the statute was ambiguous, called upon the legislature to re-examine the wording of the Act, and astutely noted that “troublesome questions surrounding the issue before us lie ahead.”\textsuperscript{153}

Unfortunately the dissent’s vision of troublesome questions and inequitable results in future cases has materialized. As one commentator has indicated, the police immunity portion of the Indiana Tort Claims Act is “an inadequate attempt to address the issue of immunity in a law enforcement setting.”\textsuperscript{154} Recent Indiana cases insulate police action from detailed scrutiny by applying the Tort Claims Act.\textsuperscript{155} While no cases regarding the failure of the police to arrest or detain intoxicated drivers have been addressed under the Act,\textsuperscript{156} if the words of the Act are taken literally,\textsuperscript{157} the failure to enforce drunk driving laws by a police officer in Indiana would not be ac-

\begin{footnotesize}
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  \item \textsuperscript{151} Id. at 204.
  \item \textsuperscript{152} Id. at 204-05.
  \item \textsuperscript{153} Id. at 206. Note, Interpretation, supra note 37, at 719 (discussing Justice Hunter’s dissent).
  \item \textsuperscript{154} Note, Interpretation, supra note 37, at 721-25 (discussing additional problems resulting from use of the statute as it exists).
  \item \textsuperscript{155} See McFarlin v. State, 524 N.E.2d 807 (Ind. Ct. App. 1988). In McFarlin, an individual was struck by a car while assisting a state trooper placing flares at an accident scene. The court held that the plaintiff had no cause of action because the state trooper’s actions were within the scope of enforcing the law. \textit{Id.} at 809. City of Gary v. Cox, 512 N.E.2d 452 (Ind. Ct. App. 1987). In Cox the plaintiff was shot by a prisoner who escaped from a hospital while being guarded by a Gary Police Officer. \textit{Id.} at 453. The Indiana Appellate Court held that the police officer involved was engaged in the enforcement of the law, and that therefore the City of Gary was immune from suit. \textit{Id.} at 454. Indiana State Police Dep’t v. Swaggerty, 507 N.E.2d 649 (Ind. Ct. App. 1987). In Swaggerty, a state trooper enroute to assist a Gary Police Officer pursuing a suspect collided with the plaintiff's vehicle at an intersection. The provisions of the Tort Claims Act applied to the trooper's activity because he was acting within the scope of his employment. \textit{Id.} at 652. Crews v. Brockman, 510 N.E.2d 707 (Ind. Ct. App. 1987). In Crews, a police officer enroute to a domestic disturbance collided with the plaintiff's vehicle after the officer ran a red light. Since the officer was acting within the scope of his employment while enforcing a law, no liability existed. \textit{Id.} at 711. Weber v. City of Fort Wayne, 511 N.E.2d 1074 (Ind. Ct. App. 1987). In Weber, a police officer struck the plaintiff's car while enroute to an accident. The officer was immune from suit under the Tort Claims Act because he was in the process of enforcing a law. \textit{Id.} at 1080. Indiana State Police v. May, 469 N.E.2d 1183 (Ind. Ct. App. 1984). The Indiana State Police were not held liable under the Indiana Tort Claims Act when they used tear gas to flush a fleeing murder suspect from May's home and caused damage to the home. \textit{Id.}
  \item \textsuperscript{156} No published Indiana case has been found. \textit{See supra} note 6 and accompanying text.
  \item \textsuperscript{157} If the sentence in paragraph (7) is taken literally, that “(7) the adoption and enforcement of or failure to adopt or enforce a law,” (emphasis added) the same result as in Seymour Nat'l. Bank is likely.
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tionable in tort.\textsuperscript{158}

If the Officer Jones scenario in the introduction occurred in Indiana, the result would be as follows.\textsuperscript{159} Applying the words "or failure to adopt or enforce a law"\textsuperscript{160} of the Indiana Tort Claims Act,\textsuperscript{161} a court might conclude that the Act effectively immunizes from suit both Officer Jones and the municipality for which he works. Given the dissent in \textit{Seymour National Bank},\textsuperscript{162} one could argue that the words of the Act as applied to an omission, here the failure to enforce Indiana driving while intoxicated laws, are ambiguous and the Act should not apply.\textsuperscript{163} Given the majority decision in \textit{Seymour National Bank}, however, any Indiana court faced with the question would most likely reject this argument and apply the Tort Claims Act.\textsuperscript{164}

If a court held that the Indiana Tort Claims Act did not apply,\textsuperscript{165} it would then have to decide whether the public duty and special duty rules applied.\textsuperscript{166} In applying the public duty rule, analysis of the special duty exception as applied in Indiana indicates that the relationship between the victim and the officer does not rise to the level of a special relationship.\textsuperscript{167} Therefore, under the earlier stated scenario, Officer Jones would not be liable for the Does' injuries.

Alternatively, a court could reason that because driving while intoxicated is such a serious public policy issue in Indiana,\textsuperscript{168} the Does should not be without remedy. Thus, a court could attempt to fit the situation into a special duty exception recognized by other state courts. Such a court could hold that because the Does' injuries resulted from a clearly foreseeable series of events, and a special relationship existed between Officer Jones and

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\item \textsuperscript{158} The state trooper and State of Indiana in \textit{Seymour Nat'l Bank} were not held liable. \textit{Seymour Nat'l Bank v. State}, 422 N.E.2d 1223 (Ind. 1981). In \textit{Seymour Nat'l Bank}, the Indiana Supreme Court placed heavy emphasis on the plain meaning of the word "enforcement" in arriving at the final outcome and in interpreting the meaning of the Indiana Tort Claims Act. \textit{See supra} notes 144-50 and accompanying text.
\item \textsuperscript{159} \textit{See supra} note 4 and accompanying text.
\item \textsuperscript{160} \textit{See supra} note 33.
\item \textsuperscript{161} \textit{IND. CODE ANN.} \S\S 34-4-16.5-1 to -19 (West 1983 & Supp. 1988).
\item \textsuperscript{162} 422 N.E.2d 1223, 1227 (Ind. 1981) (DeBruler, J., and Hunter, J., dissenting).
\item \textsuperscript{163} \textit{Id}.
\item \textsuperscript{164} \textit{See supra} notes 143-53 and accompanying text.
\item \textsuperscript{166} \textit{See supra} notes 60-139 and accompanying text.
\item \textsuperscript{167} Examination of Indiana decisions wherein the public duty and special duty rules have been applied indicate that this would be the probable outcome. Specifically, in considering Indiana cases such as Estate of Tanasijevich v. City of Hammond, 108 Ind. App. 669, 383 N.E.2d 1081 (1978), Ivanovich v. Doe, 499 N.E.2d 806 (Ind. Ct. App. 1986), and Sports, Inc. v. Gilbert, 431 N.E.2d 534 (Ind. Ct. App. 1982), it appears that the plaintiff would be without a remedy. \textit{See also supra} notes 6, 108-17 and accompanying text.
\item \textsuperscript{168} \textit{See supra} note 135 and accompanying text.
\end{itemize}
the Does, that Officer Jones owed a duty to remove Mr. Smith from the road.\textsuperscript{169} This alternative, while theoretically possible, is highly unlikely given the current state of Indiana law.\textsuperscript{170} Thus, under Indiana law, there are a number of possible outcomes to the Officer Jones problem, all more complex than a traditional tort analysis, and all likely to insulate Officer Jones from liability.\textsuperscript{171}

\section*{III. Alternative Proposals}

An action initiated by the victims of a drunk driver negligently released by a police officer in Indiana would be barred by the application of the public duty and special duty rules and the Indiana Tort Claims Act.\textsuperscript{172} Given the important public policy concerns surrounding the driving while intoxicated issue, Indiana courts should abolish the public duty and special duty rules rather than perpetuate the confusion surrounding the application of the rules and their use as another form of sovereign immunity.\textsuperscript{173} Courts could then engage in more rigorous analysis using traditional negligence principles, while encouraging legislative thought regarding means other than the Indiana Tort Claims Act to pursue policy objectives.\textsuperscript{174}

Given the fact that a court faced with this issue would probably apply the Indiana Tort Claims Act, the court should reject the public duty and special duty rules when presented with a case where the rules could be applied.\textsuperscript{175} The following section of this note examines the failure of police to arrest or detain intoxicated drivers in states where the public duty rule has been abolished.\textsuperscript{176} Additionally, this section examines an appropriate stan-

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\item[169.] See supra notes 107, 133.
\item[170.] See supra notes 118-20, 138 and accompanying text.
\item[171.] See supra notes 105-70 and accompanying text.
\item[172.] See supra notes 60-158 and accompanying text.
\item[173.] See Burleigh, \textit{DUI since MADD}, \textit{Student Lawyer}, Jan. 1989, at 7. Certainly there are many public policy concerns surrounding this issue, chief among them being that 23,990 people died in alcohol-related accidents on American highways in 1986. \textit{Id.} Since the push against drunk driving began in 1982, all 50 states have raised the drinking age to 21, and most have adopted a per se level of intoxication of .10%. \textit{Id.} For additional comment regarding the public duty rule as another form of sovereign immunity, see supra notes 85, 87 and accompanying text.
\item[174.] By taking this step, courts would be engaging in what professors Tarr & Porter have described as agenda setting policymaking, or forcing political authorities to reform public policies by upsetting existing policies. \textit{State Supreme Courts: Policymakers in the Federal System} xvi-xvii (M. Porter & G. Tarr eds. 1982). The attention within this action focuses on unacceptable inequities in current policy. \textit{Id.} See infra note 256 and accompanying text for additional discussion regarding agenda setting policy making.
\item[175.] See supra note 23 and accompanying text.
\item[176.] As previously noted, the public duty rule has been abolished in a number of states including Arizona, Alaska, Colorado, Florida, Iowa, New Mexico, Oregon, Wisconsin, and Wyoming. \textit{See supra} note 89 and accompanying text. The Supreme Court of Colorado abol-
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dard of negligence to be used by Indiana courts in place of the public duty and special duty rules and the Indiana Tort Claims Act. Finally, this section discusses the abolition of the portions of the Indiana Tort Claims Act which insulate negligent police action from liability.

A. Abolishing the Public Duty Rule

A number of states have abolished the public duty and special duty rules. In states where the rules no longer exist, the failure to arrest or detain an intoxicated motorist subjects the police officer and his employer to possible suit under ordinary negligence principles. Rather than attempting to squeeze such a situation into a recognized special duty rule exception, or to further distort the public duty rule by creating a new exception, these states no longer recognize these rules. An excellent example of the abolition of the public duty rule is found in a recent Colorado Supreme Court decision where the court not only examined a case using traditional negligence principles, but also took the further step of eliminating the public duty rule.

Leake v. Cain, a 1986 Colorado Supreme Court decision, involved a wrongful death action initiated by the parents of two children struck and

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177. See infra notes 209-51 and accompanying text.
178. See infra notes 252-59 and accompanying text.
179. See Note, Government Liability, supra note 15, at 520 ("there are a small but growing minority of jurisdictions that have explicitly rejected the public duty doctrine"). See supra notes 89, 176 and accompanying text.
180. See, e.g., Leake v. Cain, 720 P.2d 152, 160 (Colo. 1986) ("Having discarded the concept that the existence and extent of the police officers' duty is dependent on status, we now analyze the duty question by applying conventional tort principles."); Note, Government Liability, supra note 15, at 508 (several jurisdictions have abandoned the public duty doctrine in favor of a traditional negligence analysis). See supra notes 89, 119 and accompanying text.
181. As previously indicated, there are a number of recognized exceptions to the public duty rule which take form as the special duty rule. For example, in Washington, courts have identified four situations wherein a governmental unit owes a special duty of care to certain individuals rather than a general duty of care to the public. Bailey v. Town of Forks, 108 Wash. 2d 262, 268, 737 P.2d 1257, 1260 (1987). See also supra notes 97-105 and accompanying text.
182. See, e.g., Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982) (overruling Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969), which involved the failure of the police to arrest or detain an intoxicated individual); DeWald v. State, 719 P.2d 643 (Wyo. 1986) (the court found that the public duty/special duty rule was no longer viable in Wyoming in a case involving an accident where the plaintiff's decedent was killed). See supra note 107.
184. Id.
185. 720 P.2d 152 (Colo. 1986).
killed by a vehicle driven by a drunk teenager, Ralph Crowe.\textsuperscript{186} Prior to the accident, city police investigated a large party involving intoxicated teenagers.\textsuperscript{187} While at the party, the officers handcuffed and detained Ralph Crowe, who had become loud and disruptive.\textsuperscript{188} Thereafter, Eddie Crowe, Ralph's younger brother, approached the officers and asked for permission to take his brother home.\textsuperscript{189} After noting that Eddie had a valid driver's license and appeared sober, the officers released Ralph to Eddie's custody.\textsuperscript{190} Ralph and Eddie then switched positions so that Ralph now drove.\textsuperscript{191} The brothers then drove to a site where the party that the police had disbanded reassembled.\textsuperscript{192} Ralph, with a blood alcohol content of .20%, struck six pedestrians at the new party site, killing two children.\textsuperscript{193}

The parents of the deceased children sued the police officers who had responded to the party as well as their employer.\textsuperscript{194} The plaintiffs specifically alleged that the police officers negligently released Ralph Crowe to his brother Eddie.\textsuperscript{195} In deciding the issue of whether the officers owed a duty to the deceased children, the Colorado Supreme Court thoroughly examined the public duty rule.\textsuperscript{196} The court reasoned that the benefits of the rule failed to justify the problems associated with its use.\textsuperscript{197} Additionally, the court rejected the idea that abolition of the rule would result in interference with governmental operations.\textsuperscript{198} Noting that the rule operated in much the same way as sovereign immunity, the court rejected the rule.\textsuperscript{199}

After rejecting the rule, the court analyzed the case using traditional

\begin{enumerate}
\item[(186)] Id. at 154.
\item[(187)] Id.
\item[(188)] Id.
\item[(189)] Id.
\item[(190)] Id.
\item[(191)] Id.
\item[(192)] Id.
\item[(193)] Id. (the legal presumption of intoxication in Colorado at the time of the incident was .10% or 0.10 or more grams of alcohol per one hundred milliliters of blood).
\item[(194)] Id.
\item[(195)] Id. The trial court, in granting the officers' and the city's motions for summary judgment, relied on the public duty rule. Id. The court reasoned that the officers owed no special duty to the deceased children. Id. The appellate court reversed this decision and held that the officers and the city were not immune from suit. Cain v. Leake, 695 P.2d 798 (Colo. Ct. App. 1984). The appellate decision relied heavily on the theory that the officers had not made a discretionary decision to release Ralph Crowe. Leake v. Cain, 720 P.2d 152, 155 (Colo. 1986). The Colorado Supreme Court noted that the appellate court failed to address the trial court's reliance on the public duty and special duty rules. Id.
\item[(196)] Leake, 720 P.2d at 155-57. The court explored both the general history of the public duty rule and its development in Colorado. Additionally, the court detailed the expansion of the special duty rule and its justifications and criticisms. Id. at 158-60.
\item[(197)] Id. at 160.
\item[(198)] Id.
\item[(199)] Id.
\end{enumerate}
negligence principles. The court decided that the police officers who restrained Ralph at the party and their employer, the City of Commerce City, could not be held liable. The court reasoned that any duty owed to the plaintiff's decedent by the officers began and ended at the party because the officers discharged their duty when they released Ralph Crowe to the custody of his younger brother.

The Colorado decision is significant because the court eliminated further application of the public duty and special duty rules, thus removing the confusion surrounding their application. The court also refused to further confuse the rules by manipulating this fact pattern into an existing or new exception to the rules. The decision permits Colorado courts to utilize traditional negligence analysis in deciding cases involving police officers and their employing governmental unit.

Applying the reasoning of the Colorado Supreme Court to the Officer Jones hypothetical, both Officer Jones and the municipality could be held liable for damages. Since Officer Jones stopped Mr. Smith for a traffic violation and subsequently determined that Mr. Smith was highly intoxicated, Officer Jones owed a duty to the public to remove Mr. Smith from the highway. Therefore, Officer Jones owed a duty to Mr. and Mrs. Doe to protect them from Mr. Smith. Officer Jones breached this duty by failing to adequately detain or arrest Mr. Smith.

Officer Jones' release of Mr. Smith proximately caused the injuries to Mr. and Mrs. Doe. The Does suffered damages as a result of Officer

200. Id.
201. Id. at 163. Because the respondents failed to establish that the police officers or the City of Commerce City owed a duty to their decedents, they failed to establish a prima facie case of negligence, and therefore no liability could attach. Id. See generally Comment, supra note 37, at 524. By using a traditional negligence analysis, police action would be scrutinized under traditional proximate cause and foreseeability principles, thus being held to a standard of due care. Id.
202. Leake v. Cain, 720 P.2d 152, 162 (Colo. 1986). Commentators have taken various positions regarding the Leake decision. For example, one recent note supported the Leake decision and Colorado's abrogation of the public duty doctrine, stating that such a move "enhances justice, equity, and the relationship between the police and the public. . . ." Note, Government Liability, supra note 15, at 540. Yet another commentator has argued that the Leake decision goes too far in narrowing governmental immunity. Note, Leake v. Cain; Abolition of Governmental Immunity in Colorado, 64 DEN. U.L. REV. 733 (1988). The author further asserts that a traditional tort analysis, encompassing a foreseeability and proximate cause analysis, serves as a weak replacement for the public duty rule. Id. at 748. Additionally, the author notes that the Leake decision goes against the legislative position on the issue. Id. at 750.
204. See supra note 4 and accompanying text.
205. This note will not attempt to enter a detailed analysis of proximate causation. Proximate cause has been defined as a reasonably close causal connection between the conduct and
Jones' actions because, had Officer Jones removed Mr. Smith from the roadway, the accident would not have occurred. Therefore, Officer Jones and the municipality for which he works could be held liable because Officer Jones failed to discharge his duty.

The results in the Officer Jones scenario and the Colorado Supreme Court decision are different. Yet, the difference in result adds further support to this analysis. In the Colorado decision, the court found that the police officers could not be held liable because they discharged their duty at the first party by releasing Ralph to his younger brother. Therefore, while a court could find liability using this analysis in the Officer Jones

the resulting injury. W. KEETON, supra note 11, ¶ 30, at 165. Continued application of the public duty and special duty rules instead of traditional tort analysis raises a number of questions. For example, why should courts be concerned with the public duty and special duty rules when the doctrine of proximate cause has provided a traditional legal means of limiting liability despite technical factual causation? There does not appear to be any basis for using the public duty and special duty rules in place of a traditional proximate cause analysis other than to perpetuate governmental immunity in a common law form. Two recent state supreme court decisions, wherein the courts abolished the public duty and special duty rules in their respective states and yet still found no liability should attach to the police activities involved, demonstrate this proposition. See DeWald v. State, 719 P.2d 643, 652 (Wyo. 1986) (the officers' actions were not the proximate cause of the accident); Leake v. Cain, 720 P.2d 152 (Colo. 1986) (the police owed a duty to the plaintiff's but discharged the duty). One commentator has even suggested that "the causation requirement of a traditional negligence scheme would function as a self-limiting principle to keep municipal liability within reasonable limits." Note, Municipal Liability for Negligent Enforcement of Driving While Intoxicated Statutes: Massachusetts Leads the Way in Irwin v. Town of Ware, 7 W. New Eng. L. Rev. 239, 262 (1984).

Additionally, the public duty and special duty rules do not add anything to a negligence analysis that a proximate cause analysis would not address. Indeed, courts adhering to the public duty and special duty rules will never reach the issue of proximate causation if the determination is made that no duty exists. The question of negligence is generally a question of fact for the jury to decide. Irwin v. Town of Ware, 392 Mass. 745, 765, 467 N.E.2d 1292, 1305 (1984). Given the fact that every incident contains numerous causes, the court in a negligence action does not focus on what may be determined to be the sole cause of an occurrence, but rather attempts to determine whether the "defendant's conduct played such part as to make him responsible." GREEN, PROXIMATE CAUSE 134 (1927). Thus, use of the public duty and special duty rules not only fails to the properly dispose of a negligence action, they in fact take away from the analysis by prohibiting the causation question from being addressed.

Having concluded, as did Judge Keating in his dissent in Riss v. City of New York, 22 N.Y.2d 579, 591, 240 N.E.2d 860, 866, 293 N.Y.S.2d 897, 890 (1968) (Keating, J., dissenting), that "[t]o deny liability on ordinary principles of tort law offers a far better approach to the question of municipal tort liability than the fiction that there is no duty running to the general public," why impose the para-professional standard in the intoxicated motorist situation when traditional proximate causation analysis might suffice? Unlike the public duty and special duty rules, the para-professional standard, as later proposed in this note, provides an additional basis from which a court may proceed with its negligence analysis, instead of prohibiting the analysis from ever occurring.

206. See supra notes 4, 183-203 and accompanying text.
207. See supra notes 190, 200 and accompanying text.
situation, the Colorado decision, wherein the police officers and their employer were not held liable, demonstrates that use of this analysis will not trigger automatic liability. The flexibility of this approach could be applied in many states which currently adhere to the public duty and special duty rules, including Indiana.208

B. Negligence Analysis

1. Alternative Negligence Standards

The use of a traditional negligence analysis within the context of police and governmental liability for police action has been proposed in various forms by both courts and commentators.209 Some advocates of the use of a negligence analysis claim that a due care standard should be applied.210 The due care approach examines police actions in light of what an ordinary prudent person would have done given the same circumstances.211 Some proponents of the due care standard believe that current police standards could be used to determine when due care exists212 Even though the due care standard is an improvement over the use of the public and special duty rules, the standard is an inadequate solution in Indiana given the state’s concern with encouraging vigorous law enforcement.213

208. See supra notes 60-139 and accompanying text.
209. See, e.g., Note, supra note 70 (advocating the use of a gross negligence standard); Note, supra note 205, at 264 (the public duty rule should be discarded and a negligence or professional standards model should be used instead); Note, supra note 58, at 622 (not advocating a standard, but questioning whether a police officer should be subject to a professional’s standard of care); Comment, The Special Duty Rule Should Be Discarded, supra note 37, at 524 (use of a negligence standard would be appropriate and not impose an absolute duty on a police department to enforce all laws or protect all citizens); Note, Failure to Prevent Crime, supra note 13, at 840 (containing an excellent discussion of alternative liability approaches for police liability for failure to prevent crime, and advocating the professional standards model as “impos[ing] on the police a duty of reasonable protection while at the same time affording sufficient deference to police discretion”).
210. See Note, Interpretation, supra note 37, at 724. One commentator advocated the application of a due care standard instead of blanket immunity for police as provided by the Indiana Tort Claims Act. Use of the standard was seen as a way to balance concerns of the Indiana legislature regarding the encouragement of vigorous law enforcement and protecting citizens from negligent acts of such law enforcement officials. Id. Note, supra note 205, at 261. “Reliance upon objective standards as evidence of due care would permit judicial review of police activity, while affording a reasonable degree of police discretion.” Id.
211. See Note, Interpretation, supra note 37, at 724-25. The ordinary prudent person standard is also referred to as the reasonable person standard. W. Keeton, supra note 11, § 32, at 174.
212. Comment, The Special Duty Rule Should Be Discarded, supra note 37, at 524. A breach of a general duty to provide police protection would exist if formal standards were violated. The author further noted that self-serving standards would be invalid on their face. Id. at 525 n.125.
213. “The Indiana General Assembly’s policy favor[s] vigorous law enforcement.” Note,
Some of those who have rejected the use of a due care standard to judge the police liability problem have proposed the use of a gross negligence standard.214 Gross negligence has been defined as signifying more than ordinary inadvertence or inattention, but less than conscious indifference to the consequences.215 Thus, gross negligence differs from ordinary negligence only in degree, not in kind.216 The gross negligence standard has gained support from those who feel that victims of official or police negligence should receive compensation, but that a standard that would not impede performance of risky work carried out in good faith would enhance police effectiveness.217 Advocates of the gross negligence standard also assert that since grossly negligent police acts further no public interest, such acts should not be protected.218

While adoption of a gross negligence standard in place of the public and special duty rules appears to be a sound solution, a better alternative exists. The gross negligence standard has been criticized as failing to provide victim compensation for police misconduct which fails to reach the level of gross negligence.219 Moreover, because gross negligence has never been clearly differentiated from simple negligence, the standard would be difficult to apply, would produce widely varying results, and would be subject to manipulation.220 Like proponents of the due care standard, advocates of the gross negligence standard point to police department operation manuals and the conduct of other departments as guides from which to judge police conduct.221 By looking to such materials as evidence of negligence, the determination of a professional standard ultimately results.

Interpretation, supra note 37, at 725.

214. See, e.g., Note, supra note 70, at 735-37 (advocating the use of a gross negligence standard).

215. W. Keeton, supra note 11, § 34, at 212. Gross negligence has been said to have no generally accepted meaning, which has prompted many courts to avoid the use of such a standard. Id.

216. Id.

217. The gross negligence standard is a compromise between providing compensation for victims of official wrongdoing and providing adequate public service. Note, supra note 70, at 735.

218. No justification exists for insulating grossly negligent police conduct from liability. Id. at 737.

219. "The system would fail to provide compensation and promote efficiency in the many cases in which police culpability rises only to the level of simple negligence." Note, Failure to Prevent Crime, supra note 13, at 837.

220. Id. (a "fuzzy line" separates simple and gross negligence, making a gross negligence standard difficult to administer).

221. Good faith effort is a defense to gross negligence, and one way to measure good faith is to look to departmental procedures, regulations, and practice to judge compliance. See Note, supra note 70, at 736.
2. The Professional Negligence Standard

A professional standard of care may be used to determine negligence if a person possesses superior knowledge, skill, or other attributes above that of the ordinary citizen. Professional persons must use the degree of care which is reasonable in light of their superior knowledge, skills, or training. The law requires that the conduct of a person deemed "professional" be consistent with that level of ability. If a professional person undertakes a task or duty, he must both exercise reasonable care and possess the minimum qualifications of a person within that particular profession. The professional standards model has been applied most frequently in cases involving doctors, lawyers, and clergymen.

Controversy over whether a professional standards model should be applied to police conduct stems from a number of sources. Traditionally the professional standards model has been applied to a very limited number of professionals. Also, police analysts have long debated the extent of professionalism within police departments. Recent developments within po-

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222. W. Keeton, supra note 11, § 32, at 185.
223. Id.
224. Id.
225. Id.
226. Id.
227. Keeton also notes that the standard may be applied to persons who have superior skills or training than that of an ordinary person. Id. The traditional model of a professional to which the standard has been applied, has not, however, been extended to many groups. As one author noted, law, medicine, and theology have historically been noted as the "three learned professions." Brannon, Professional Development of Law Enforcement Personnel, in POLICE AND COMMUNITY RELATIONS: A SOURCEBOOK 302, 303 (1968).

By profession such as the ministry, medicine, law, teaching, we mean much more than a calling which has a certain traditional dignity and certain other callings which in recent times have achieved or claim a like dignity. The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service is the primary purpose.

Id. Rosdy & Anderson, Introduction, in PROFESSIONAL NEGLIGENCE vi n.9 (1960) (citing POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)). A few commentators have advocated the professional standards model as a replacement for the public duty rule. See, e.g., Note, Failure to Prevent Crime, supra note 13, at 838-40. Note, supra note 205, at 261, 264. In the latter note, the author advocates the use of either the professional standards model or the use of a negligence standard, but believed that "[t]he use of a negligence standard would afford a measure of police discretion and would broaden the scope of judicial review of police beyond that afforded under the professional standards model."

228. The professional model of a police agency developed largely around the notion that operational efficiency was the key to a successful agency. This model stressed clear organization, personnel management, mobility, better equipment and technology, and improved training. During the 1960s, major advancements were made in technological and operational areas, but development of the professional model during this time occurred unevenly and did not reach many departments. H. Goldstein, POLICING A FREE SOCIETY 2-3 (1977). Professionalization efforts have most often lead to departmental or staff professionalization but not line
licensing do, however, point toward further professionalization of the police, thus making the professional standards model not only a more appropriate standard, but also a more workable model within the context of determining police negligence and subsequent liability. Discussion by police administrators regarding recent developments in policing also demonstrates the movement toward further professionalism.\textsuperscript{229}

One of the most visible movements toward standardization and professionalization of police practices in recent years has been the accreditation of police departments. The accreditation process, similar to that through which colleges and universities pass, essentially involves a self-assessment program coupled with the development of departmental standards to meet Accreditation Commission requirements.\textsuperscript{230} The Accreditation Commission reviews all steps taken by the candidate department before the police department can be accredited.\textsuperscript{231} While controversy exists over the accreditation program,\textsuperscript{232} many police chiefs and executives see it as a useful tool in enhancing the quality of police service delivered, in the legitimization of

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officer professionalization. Reiss, \textit{Professionalization of the Police}, in \textit{Police and Community Relations: A Sourcebook} 215, 224 (1968). Police departments are actually comprised of persons in many different occupations, from clerical and maintenance to professional and technical. The patrol function is comprised of aspects which are both technical and professional. Reiss also discusses the areas in which a patrolman must exercise professional judgment, how such decisions resemble decisions made by other professionals, and the role of the patrolman in the criminal justice system. \textit{Id.}

\textit{See also} Brannon, \textit{supra} note 227, at 311, 315. Brannon states that police work deserves the status of a profession in American society. Brannon outlines steps which might be undertaken to improve the professional status of the police, including a discussion of accreditation and a proposal for a Uniform Law Enforcement Examination Act. \textit{Id.} J. Ahern, \textit{Police in Trouble} 176 (1972). Ahern notes that: "The policeman's task, as it is now performed is by definition the kind of work that is performed in our society by professionals." \textit{Id.} For discussion of the early development toward police professionalism, see Deutsch, \textit{From Flatfoot to Professional}, in \textit{The Police} 125 (G. Leinwand ed. 1972).

\textsuperscript{229} \textit{See infra} notes 230-38 and accompanying text.

\textsuperscript{230} "Accreditation, in a general sense, can be thought of both as a process and as a status. Accreditation is a process by which agencies bring themselves into compliance with a body of established standards." Remarks by Gerald Williams at the International Association of Chiefs of Police Conference, \textit{Accreditation: Impact on Police Departments}, \textit{Police Chief}, Mar. 1987, at 39.

\textsuperscript{231} "Compliance is subsequently verified by a recognized accrediting authority." \textit{Id.}

policing as a profession, and as a step toward further establishment of, and reflection concerning, currently accepted police procedures and practices.\footnote{233} Imposition of higher educational standards has been recognized as a method of upgrading police performance since 1931.\footnote{234} In 1967, the Commission on Law Enforcement and the Administration of Justice recommended that eventually all police personnel should be required to have a baccalaureate degree.\footnote{235} While police departments are far from reaching this goal, many departments require that new recruits possess specified amounts of college level course work.\footnote{236} Similarly, many departments offer incentive pay to officers who have obtained degrees or advanced training.\footnote{237} Additionally, the increased utilization of in-service training for officers by police departments points toward an increase in training and skill development for a greater number of officers. While the number of annually required hours of in-service training varies widely between departments, some states are enacting legislation which requires a mandatory number of training hours per year for officers.\footnote{238} Thus, the increase in both education and in-service training for police indicates a strong movement toward further professionalization.

Finally, some states have initiated licensing procedures as a mode of legitimizing the police function in society. Licensing involves the fulfillment of specified requirements to become a police officer within the state.\footnote{239} Some states currently require officers to meet specified requirements in ad-

\begin{footnotes}


\item[235] Id.

\item[236] National Employment Listing Service, The Police Employment Guide 28, 49, 112, 120, 122, 128, 132, 142, 230, 621 (1982). For example, the Scottsdale, Arizona; Berkeley, California; San Mateo, California; Sunnyvale, California; Vallejo, California; Whittier, California; Arvada, Colorado; Lakewood, Colorado; Boise, Idaho; and Dallas, Texas Police Departments all require some college work before an applicant will be considered for employment.

\item[237] Id. at 21, 25, 26, 47, 134, 154, 186, 212, 264, 267, 634. For example, the Mesa, Arizona; Little Rock, Arkansas; Anchorage, Alaska; Phoenix, Arizona; Aurora, Colorado; Greenwich, Connecticut; Hialeah, Florida; Athens, Georgia; Evansville, Indiana; Indianapolis, Indiana; and Houston, Texas Police Departments all provide educational incentive pay for officers. These lists are by no means exhaustive.

\item[238] Discussion of proposed legislation mandating an annual amount of in-service training each year for each police officer in the state has occurred in Texas. Telephone conversation with Sally A. Beels, Texas Commission on Law Enforcement Standards and Education (Nov. 1, 1987). The effectiveness of certain forms of in-service training limited to lectures in a formal classroom setting has been criticized as being unproductive and costly. Increased emphasis on college level programs for police is seen as a more effective means of upgrading personnel. H. Goldstein, supra note 228, at 278-79.

\item[239] Texas is an example. Telephone conversation with Sally A. Beels, Texas Commission on Law Enforcement Officer Standards and Education (Nov. 1, 1987).
\end{footnotes}
dition to passing a state licensing exam. For example, in Texas a police officer must meet all standards prescribed by law and pass the Texas Commission of Law Enforcement Standards and Education exam before being permanently licensed as a peace officer.240

C. Proposed Standard For Indiana: A Para-Professional Standard

Use of a professional standard to determine police negligence, and resultant liability for a governmental unit, is enhanced by the general development and standardization in the police profession.241 Courts have turned to police experts, manuals, and departmental orders in the past to determine the appropriateness of police behavior.242 The adoption of a professional standards model in place of frequently random application of these touchstone guidelines is appropriate. The application of the public duty and special duty rules and the Indiana Tort Claims Act in cases involving the failure of the police to arrest or detain intoxicated motorists would leave a plaintiff with no remedy. The adoption of a para-professional standard in place of the public duty and special duty rules and the Indiana Tort Claims Act would provide a workable model for Indiana courts faced with this situation.

Like departments elsewhere in the United States, a number of police departments in Indiana have been accredited, while others are working toward accreditation.243 Similarly, many Indiana departments are increasing the number of in-service training schools for officers and are working toward modernization and professionalization of police personnel and their respective departments. However, many factors indicate that policing in Indiana has not reached a level where a pure professional standard is capable of application. First, Indiana does not license officers. Second, Indiana is not dominated by a few highly professional major metropolitan departments. Third, the state does not require a certain number of in-service training hours per year per officer. Finally, the state currently allows any person hired by a police department one year in which to complete the required training.244

241. See supra notes 231-39 and accompanying text.
242. See, e.g., Fudge v. City of Kansas City, 720 P.2d 1093, 1098 (Kan. 1986) (the court looked to Kansas City Police Department General Order 79-44 in part of the opinion).
243. The Elkhart Indiana Police Department has been accredited and a number of other Indiana departments, including the Indianapolis Police Department, are in the process. Telephone conversation with Mr. Charles Birch, Indiana State Police (Nov. 2, 1987).
244. Police standards in Indiana are largely governed by the Law Enforcement Training Board. The Indiana Administrative Code, Ind. Admin. Code tit. 250 (1984), and Indiana Code §§ 5-2-1-1 to -12, Ind. Code Ann. § 5-2-1-1 to -2 (West 1982 & Supp. 1987), govern the creation of the Law Enforcement Training Board and mandatory training for law enforce-
Two reasons exist for not applying a pure professional standard to the assessment of negligent police behavior. First, while police professionalism is an admirable goal, policing in the United States does not exist at a level at which a pure professional standard should be applied.\textsuperscript{246} Second, the professional standards model has historically only been applied to doctors, lawyers, and clergy.\textsuperscript{246} While some commentators have argued that a professional standard can be applied to anyone possessing education, training, or experience superior to that of an ordinary person, it has also been argued that such application fails to distinguish between a common service and a more specialized service or occupation.\textsuperscript{247} Given the uneven movement of policing toward professionalization, and given the traditional reluctance to expand the use of the professional standard much beyond its historical application, the preferred solution is to apply a “para-professional” standard.\textsuperscript{248}

The term “para” has been defined to mean “closely resembling/almost.”\textsuperscript{249} Thus, the term “para-professional” acknowledges that a person may have slightly more experience or skill than the average person, but not enough to be deemed a true professional in the strictest sense of the term.\textsuperscript{250}

ment officers. The Indiana Administrative Code provides:

All law enforcement officers appointed by the State of Indiana or any of its political subdivisions on or after 2:00 p.m., E.S.T., on Thursday, July 6, 1972, whether said appointment is on a probationary, permanent, or other than probationary or permanent basis, shall, within one year of the date of appointment, successfully complete the appropriate minimum basic training course prescribed by the law enforcement training board. . . .

\textsuperscript{245} See supra note 228 and accompanying text.

\textsuperscript{246} See, e.g., Brannon, supra note 227, at 303.

\textsuperscript{247} Both Wade and Prosser have broadly construed the term profession to include not only professions, but also almost any full-time occupation. FRIEDSON, PROFESSIONAL POWERS 104 (1986). Friedson criticizes this broad use of “profession” because the definition fails to distinguish between a “common and an esoteric service.” Id. Friedson also notes that:

[t]he specialized service occupations and perhaps especially the established professions, are judged by the standards of the occupations themselves, while the common service occupations are not. Both are disadvantaged by being held to a stricter standard than the ordinary tradesperson is, but the former have the advantage and privilege of being judged by what are in a sense their own standards, while the latter do not have that privilege.

\textsuperscript{248} Id. at 105.

\textsuperscript{249} Certainly the argument can be advanced that the designation of something as “para-professional” is to merely engage in an exercise in semantics. Examination of the use of the word “profession” in the English language indicates, however, that much of the confusion surrounding the use of the term is a matter of semantics. For example, consider the use of the words amateur, expert, and occupation in connection with the word profession. For a more detailed semantic history of the word profession, see FRIEDSON, PROFESSIONAL POWERS 21 (1986). Obviously the term “para-professional” as used in this note is intended to clarify and not contribute to this confusion.

\textsuperscript{249} WEBSTER'S NEW COLLEGIATE DICTIONARY 830 (1977).

\textsuperscript{250} As previously indicated, as strictly applied, the term professional only referred to
Thus, the standard proposed herein bridges the gap between the due care, or reasonable person standard, and a pure professional standard, and thereby permits a more accurate and complete assessment of police activity.\textsuperscript{251}

If a court applied the para-professional standard to the Officer Jones hypothetical, the legal analysis would proceed along the lines set forth below.\textsuperscript{252} Assume that Officer Jones has been a police officer in a suburban Indiana town for six months and has not yet completed the training prescribed by the state. Officer Jones' conduct in determining Mr. Smith's intoxication and then releasing him after issuing the traffic citation would present the court with two immediate issues: first, whether Officer Jones possessed the minimum level of knowledge of someone with that level of education, training, skill, and experience; and second, whether Officer Jones acted reasonably. This determination could be made through the use of expert witnesses and reference to state guidelines.\textsuperscript{253}

Under a traditional negligence analysis, the court would determine whether Officer Jones owed a duty to the Does' to remove Mr. Smith from the highway. The court would also determine whether Officer Jones breached the duty to the Does when he released Mr. Smith from custody. Officer Jones arguably caused the Does' injuries, and the Does suffered damages as a result of the accident. Using the para-professional standard, the court would be able to utilize additional information such as police training information, other police officer's practices, police manuals, and expert witnesses to determine whether or not Officer Jones acted in a manner consistent with how other police officers with the same amount of training and experience would have acted in the same situation.

\textbf{D. Abolishing Portions of the Indiana Tort Claims Act}

The status of the public duty and special duty rules in Indiana in combination with the Indiana Tort Claims Act presents an inequitable barrier to recovery by the victim of an intoxicated driver improperly released by a police officer. Given the importance of the drunk driving issue within the state, potentially negligent police behavior and subsequent governmental liability should not be insulated from suit on the initial premise that the Indiana Tort Claims Act protects negligent police behavior.\textsuperscript{254} Even if a court decided that the wording of the Tort Claims Act is too ambiguous to apply

\begin{itemize}
\item doctors, lawyers, and the clergy.
\item \textbf{FRIEDSON, PROFESSIONAL POWERS} 22 (1986).
\item \textit{See supra} notes 209-18 and accompanying text for general discussion regarding negligence standards.
\item \textit{See supra} note 4 and accompanying text.
\item \textit{See supra} notes 135, 158-60 and accompanying text.
\item \textit{See supra} notes 162-67 and accompanying text.
\end{itemize}
to the negligent omission of the failure of a police officer to enforce Indiana driving while intoxicated laws, the public duty and special duty rules would apply, thus preventing recovery.256

Indiana courts can take the first step toward remedying the situation by rejecting the public duty and special duty rules.256 In place of the public duty and special duty rules, the courts should adopt a “para-professional” standards model to determine police negligence in Indiana.257 This standard not only legitimizes police efforts toward professionalization but also recognizes that policing in Indiana has not reached a level at which a full professional standard should be applied.258 Furthermore, the standard gives courts faced with issues currently handled under the public and special duty rules a workable model from which analysis may properly stem. Perhaps a pure professional standards model could eventually be applied to police negligence such as Officer Jones’ as further steps toward professionalization are taken in both Indiana and throughout the United States, and as the use of a pure professional standard is more readily applied to occupations other than the traditional, learned professions.259

255. See supra notes 179-200 and accompanying text.

256. The elimination of the public duty and special duty rules by the Indiana courts would be similar to the action taken by the Colorado Supreme Court in its decision eliminating the public duty rule in Colorado. Leake v. Cain, 720 P.2d 152 (Colo. 1986). Like Indiana, Colorado had a tort immunity act at the time the Leake decision was rendered. Note, Leake v. Cain: Abolition of the Public Duty Rule and the Status of Governmental Immunity in Colorado, 64 DENO. U.L. REV. 750 (1988). At least one commentator has argued that the position taken by the Colorado Supreme Court is contrary to the legislative intent of limiting government liability. Id. On the other hand, support does exist for the proposition that state supreme courts should act in a fashion which encourages legislative thought regarding an issue. See supra note 23 and accompanying text. STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM xvi-xvii (M. Porter & G. Tarr eds. 1982). Professors Porter and Tarr list six categories of state supreme court policymaking. These are: innovative policymaking (that which fills a gap in state policy or overthrows existing policy); agenda-setting policymaking (forcing political authorities to reform public policies by upsetting long-standing policies, attention is focused on unacceptable inequities in current policy); complementary policymaking (rulings that either aid state legislative goals or relieve state legislatures of the onus of taking politically awkward stands); elaborative policymaking (extension of U.S. Supreme Court precedent); restrictive policymaking (limitation and/or evasion of policies developed by the U.S. Supreme Court, usually to protect state policies from invalidation); and institutional policymaking (directed toward preserving the autonomy and integrity of the courts and judicial process). See generally Blomquist, Solar Energy Development, State Constitutional Interpretation and Mount Laurel II: Second-Order Consequences of Innovative Policymaking by the New Jersey Supreme Court, 15 RUTGERS L.J. 573, 576 nn.3-5 (1984) (discussing state supreme court action and Professors Porter’s and Tarr’s categorization within the context of the Mount Laurel II decision).

257. See supra notes 241-51 and accompanying text.

258. See supra notes 244-46 and accompanying text.

259. See supra note 242 and accompanying text. The determination of whether a pure professional standard should ever be applied to policing in Indiana could be made by looking at improved and increased standards as promulgated by the Indiana Law Enforcement Train-
Adoption of a para-professional standard by the courts would provide a solution to the inequitable consequences of Tort Claims Act application. Just as the standard could be used in place of the public duty and special duty rules, it could also be used in place of those sections of the Indiana Tort Claims Act which insulate negligent police action from detailed scrutiny. Therefore, the Indiana General Assembly should abolish those portions of the Indiana Tort Claims Act which insulate negligent police behavior and permit courts to utilize the para-professional standard.

IV. CONCLUSION

The victim of a drunk driver negligently released by a police officer in Indiana currently has no remedy. A negligence action against such a police officer is barred by Indiana’s use of the public duty and special duty rules, and the Indiana Tort Claims Act. While other states have abolished the public duty and special duty rules, Indiana continues to adhere to both rules and the antiquated concept of sovereign immunity which they represent.

Ultimately the final disposition of the issue presented in this note rests with the Indiana General Assembly. Through the initial abolition of the public duty and special duty rules, the courts will alleviate inequitable results in cases where the rules are currently applied. In place of the public duty and special duty rules, the Indiana courts should adopt a para-professional standard. The Indiana General Assembly should remedy the problems stemming from the application of the Indiana Tort Claims Act by abolishing sections of the Act which immunize police behavior and by

[260] See supra notes 140-58 and accompanying text.
[261] See supra notes 33, 173, 174, 179-203 and accompanying text. As a final note regarding the provisions of the Indiana Tort Claims Act which immunize negligent police activity, brief reference to the American Bar Association Project on Standards for Criminal Justice Standards Relating to The Urban Police Function is helpful. Section 5.5 of the Project, Tort Liability, states in part:

In order to strengthen the effectiveness of the tort remedy for improper police activities, governmental immunity, where it still exists, should be eliminated, and legislation should be enacted providing that governmental subdivisions shall be fully liable for the actions of police officers who are acting within the scope of their employment.

[262] See supra notes 60-171 and accompanying text.
[263] See supra notes 85-87 and accompanying text.
adopting a para-professional standard. Law enforcement officers provide vital services to the people of Indiana. Negligence within the context of life and death situations must be subjected to detailed analysis and should not be condoned under a shield of immunity.

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