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Governmental Liability for Negligent Failure to Detain Drunk Drivers

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GOVERNMENTAL LIABILITY FOR NEGLIGENT FAILURE TO DETAIN DRUNK DRIVERS

Alcohol impaired driving seriously threatens public health and safety in the United States. In 1990 alone, nearly twenty-three thousand people lost their lives in traffic accidents involving drivers who had some degree of alcohol in their blood.[1] In fact, an alcohol related fatality occurs every twenty-four minutes, and two of every five Americans will be involved in an alcohol related accident at some time during their lives.[2] The costs of these accidents are astronomical—between ten and fifteen billion dollars per year.[3] Thus, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the [s]tates' interest in eradicating it."[4]

In response to the seriousness of the drunk driving problem, many groups, including the insurance industry,[5] citizen groups such as Mothers Against Drunk Driving (MADD),[6] and both federal and state governments,[7] have taken severe measures to limit the extent of drunk driving and its inevitable consequences.[8] For example, in 1984 President Reagan signed legislation requiring states to raise the legal drinking age to 21 or lose federal highway funds.[9] In 1988, Congress enacted the Drunk Driving Prevention Act of 1988 which

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1 NATIONAL CTR. FOR STATISTICS AND ANALYSIS, U.S. DEP'T OF TRANS., DRUNK DRIVING FACTS 1 (July 1991). The National Highway Traffic Safety Administration reported that 22,084 people were killed in alcohol related accidents. This number represents approximately 50% of all traffic deaths in 1990.

2 *Id.* Former Surgeon General C. Everett Koop also reported that an additional 534,000 people are injured annually in alcohol related accidents—an average of one per minute. *See Press Conference Concerning Drunk Driving by C. Everett Koop, United States Surgeon General*, Fed. News. Serv., May 31, 1989, *available in* LEXIS, Nexis library, Fedrew file [hereinafter *Koop Press Conference*].

3 *Koop Press Conference*, *supra* note 2.

4 Michigan v. Sitz, 110 S. Ct. 2481, 2485 (1990).

5 For example, some major insurers (one as part of a six million dollar anti-drunk driving campaign) have supplied passive alcohol sensors to local law enforcement agencies. These sensors, which measure the alcohol on a driver's breath, can be used as preliminary screening mechanisms. *See* Ruth Gastel, *Drunk Driving and Liquor Liability*, INS. INFO. INST. REP., Jan. 1992, *available in* LEXIS, Nexis library, IIRPRT file.

6 MADD, a nonprofit corporation with over 2.95 million members, seeks to solve the drunk driving crisis by lobbying state and federal governments for strict drinking and driving laws and by implementing programs aimed at increasing public awareness of the drunk driving problem's seriousness. MADD's History, Oct. 1990, at 1.

7 Since 1981, more than 1250 laws to combat drunk driving have been enacted across the United States. *Id.*

8 Gastel, *supra* note 5.

9 *Id.* By 1988, all states had increased the drinking age to 21 (although Ohio and South Dakota allowed those younger than 21 to buy beer). *Id.*

awards states additional federal highway funds for adopting certain drunk driving countermeasures.[10]

Several state legislatures have also passed a variety of laws to combat drunk driving, including "dram shop" laws that affix liability to alcohol vendors for injuries caused by drunk drivers,[11] laws that increase penalties for driving while intoxicated ("DWI"),[12] laws that authorize police roadblocks to check for drunk drivers, and restitution laws that require drunk drivers to pay for the cost of drunk driving arrests and emergency services.[13]

Courts have responded to this national crisis as well.[14] Recently, the United States Supreme Court ruled that sobriety checkpoints do not violate the Fourth Amendment and are a valid tool for combating drunk driving.[15] The New Jersey Supreme Court ruled that social hosts may be liable to injured third persons for serving alcohol to a visibly intoxicated guest and allowing him to drive drunk.[16] Moreover, an increasing number of state courts are finding the police, and their government employers, liable for negligent failure to detain a drunk driver who subsequently injures or kills a

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10 Pub. L. No. 100-690, §§ 9001-9005, 102 Stat. 4181, 4521-27 (codified at 23 U.S.C. § 410). This incentive legislation suspends a drunk driver's license, establishes an anti-drunk driving program, and requires a police officer to administer a blood-alcohol level test if he has probable cause to believe that a driver involved in a serious accident has been drinking. Gastel, *supra* note 5.

11 By 1989, all but 11 states had either judicially or legislatively imposed liability upon sellers of alcohol; the following states had not imposed liability: Arkansas, Connecticut, California, Delaware, Georgia, Illinois, Kansas, Maryland, Nebraska, Nevada, and North Dakota. *See* Denise J. Lord, Note, *Beyond Social Host Liability: Accomplice Liability*, 19 CUMB. L. REV. 553, 559 n.32 (1989); Mary H. Seminara, Note, *When the Party's Over:* McGuiggan v. New England Telephone & Telegraph Co. *and the Emergence of a Social Host Liability Standard in Massachusetts*, 68 B.U. L. REV. 193, 194-96 (1988).

12 Maine, Oregon, Utah, Vermont and Califoruia have decreased the percentage of blood alcohol content from .10 to .08 in their definition of drunk driving. First time DWI offenders are automatically jailed in 14 states, and in Rhode Island and 20 other states, first offenders are required to face a panel of victims' families. *See* Gastel, *supra* note 5.

13 *Id.*

14 Although many, including President Bush and Congress, consider this problem a national crisis, Surgeon General Koop refused to officially declare it as such because a declaration of a crisis by the surgeon general would raise expectations "of immediate success against drunk driving" which would only be disappointed. *Koop Press Conference*, *supra* note 2.

15 *See* Michigan v. Sitz, 110 S. Ct. 2481, 2488 (1990) (holding that checkpoint stops to detect drunk drivers do not violate the Fourth Amendment because the government's interest in preventing drunk driving outweighs any intrusion on the motorist's right to privacy).

16 *See* Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984); *see also* McGuiggan v. New Eng. Tel. & Tel. Co., 496 N.E.2d 141, 146 (Mass. 1986) (stating that a social host may be liable for death caused by intoxicated guest's negligent operation of motor vehicle shortly after leaving host's home).

third party.[17] This approach helps reduce the drunk driving problem by encouraging law enforcement to at least eliminate the known drunk driving risks. Many courts, however, continue to shield the government from liability in such situations,[18] because they do not want to expose the police to liability for action or inaction in the field, even though the resulting death or injury could have been avoided had the officer simply done his job properly.

This Note examines police liability for negligent failure to detain drunk drivers. Part I describes the two legal doctrines on which courts have traditionally relied in granting police immunity from negligence suits for failure to arrest drunk drivers: qualified governmental immunity for discretionary functions[19] and the public duty doctrine.[20]

Part II argues that court reliance on discretionary act immunity and the public duty doctrine to insulate the government from liability for negligent failure to detain a drunk driver is ill-founded. Neither of these doctrines should provide the government with immunity when an officer knew that a particular driver was intoxicated. Further, this section argues that when courts erect these artificial barriers to protect the government, they contribute to the drunk driving problem rather than providing an additional source of drunk driving deterence. By recoguizing governmental liability for negligent failure to detain drunk drivers, courts serve tort law's compensatory[21] and deterrent purposes. At the same time, they promote the national goal of keeping intoxicated drivers off the road[22] without unduly inhibiting police behavior[23] or bankrupting the government employer.[24]

Part III proposes solutions that would prevent courts from applying discretionary act immunity and the public duty doctrine to immunize the government and thus would ensure that these doctrines do not stand in the way of governmental liability. These

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17 *See* Ransom v. City of Garden City, 743 P.2d 70 (Idaho 1987); Fudge v. City of Kansas City, 720 P.2d 1093 (Kan. 1986); Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984); Weldy v. Town of Kingston, 514 A.2d 1257 (N.H. 1986); Bailey v. Town of Forks, 737 P.2d 1257 (1987), *modified*, 753 P.2d 523 (Wash. 1988).

18 *See* Shore v. Town of Stonington, 444 A.2d 1379 (Conn. 1982); Everton v. Willard, 468 So. 2d 936 (Fla. 1985); Fessler v. R.E.J., Inc., 514 N.E.2d 515 (Ill. App. Ct. 1987), *appeal denied*, 520 N.E.2d 385 (Ill. 1988); Jones v. Maryland-Nat'l Capital Park & Planning Comm'n, 571 A.2d 859 (Md. Ct. Spec. App.), *cert. denied*, 571 A.2d 191 (Md. 1990); Schutte v. Sitton, 729 S.W.2d 208 (Mo. 1987); Crosby v. Town of Bethlehem, 457 N.Y.S.2d 618 (N.Y. App. Div. 1982).

19 *See infra* notes 31-91 and accompanying text.

20 *See infra* notes 92-135 and accompanying text.

21 *See infra* notes 155-60 and accompanying text.

22 *See infra* notes 161-64 and accompanying text.

23 *See infra* notes 146-51 and accompanying text.

24 *See infra* notes 165-75 and accompanying text.

measures would prevent courts from relying on these artificial barriers to immunize police and their government employers for negligent failure to detain drunk drivers—a practice which is justified in neither principle nor policy.

I
BACKGROUND

The primary purposes of civil tort actions are to compensate the injured party for damage caused by another at the wrongdoer's expense,[25] and to deter future barm by the wrongdoer himself and other potential defendants.[26]

Negligence, the cause of action for unintended torts,[27] is defined as conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm."[28] A

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25 RESTATEMENT (SECOND) OF TORTS § 901 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984 & Supp. 1988) [hereinafter PROSSER AND KEETON]. *See* Schear v. Board of County Comm'rs, 687 P.2d 728, 734 (N.M. 1984) ("We have consistently demonstrated our support for . . . the compensatory nature of tort remedies."); O'Connor v. City of New York, 447 N.E.2d 33, 36 (N.Y. 1983) (Wachtler, J., dissenting) (describing a basic tenet of tort law as: "[A] plaintiff is entitled to compensation when he has been injured by the defendant's failure to observe standards of reasonable care under the circumstances.").

26 RESTATEMENT (SECOND) OF TORTS § 901 (1977); PROSSER AND KEETON, *supra* note 25, § 4, at 25. ("The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm."). *See also* Peoples Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107 (N.J. 1985); C.S. v. Nielson, 767 P.2d 504, 517 (Utah 1988) (Durham, J., concurring in part and dissenting in part); Barr v. Interbay Citizens Bank of Tampa, 635 P.2d 441 (Wash. 1981), modified, 649 P.2d 827 (1982).

27 PROSSER AND KEETON, *supra* note 25, § 28, at 161. *See also* Crotwell v. Cowan, 198 So. 126, 127 (Ala. 1940) (Negligence is the foundation for liability for injury resulting from the unintentional application of force, whether the act is affirmative or omissive); Cahill v. Illinois C.R. Co., 125 N.W. 331, 333 (Iowa 1910) ("the very essence of negligence is inadvertence"); Harris v. Penninger, 613 S.W.2d 211, 214 (Mo. 1981) (" 'negligence' is strictly nonfeasance or a wrongful act resulting from inattention or carelessness and not from design.").

28 RESTATEMENT (SECOND) OF TORTS § 282 (1964). "Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances[.]" BLACK'S LAW DICTIONARY 1032 (6th ed. 1990). An unreasonable risk is created when there exists both a recognizable danger based on knowledge of facts and a reasonable belief that harm may result. PROSSER AND KEETON, *supra* note 25, § 31, at 170. "To make conduct negligent the risk involved in it must be unreasonably great; some injurious consequences of it must be not only possible or in a sense probable, but unreasonably probable. . . . The essence of negligence is unreasonableness; due care is simply reasonable conduct." Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42 (1915). *See also* Blyth v. Birmingham Water Works, 156 Eng. Rep. 1047, 1049 (1856) ("Negligence is the omission to do something which a reasonable man, gnided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."); Brown v. Kendall, 60 Mass. (6 Cush.) 292, 296 (1850) ("In general, [ordinary care] means that kind and de-

traditional negligence action may be brought when one party breaches a duty to adhere to those standards of conduct toward another, and this breach causes injury to the second party.[29] Negligent conduct which causes injury creates liability on behalf of the wrongdoer.

Some parties, however, are insulated from liability; no tort action may be brought against them, regardless of their indifference to the risk of serious harm to innocent victims.[30] Courts often place police officers and their government employers within this category and shield the government from liability even though the officer negligently failed to prevent an intoxicated individual from driving.

This section presents the current state of tort liability of police officers and their government employers who negligently who fail to detain drunk drivers. Although the traditional doctrine of absolute sovereign immunity has been largely eroded, courts continue to shield negligent police behavior from liability by relying on two doctrines: government immunity for discretionary acts and the public duty doctrine.

A. Governmental Immunity

The common-law doctrine of sovereign immunity exempts the government from tort liability unless the government explicitly con-

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gree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger.").

29 PROSSER AND KEETON, *supra* note 25, § 30, at 164-65. Four elements are required to show negligence:

1. Duty: a legal obligation to adhere to certain standards of conduct for the protection of others against unreasonable risks.
2. Breach: failure, by act or omission, to conform to the standard of conduct prescribed by law.
3. Cause: a reasonably close causal connection between the deficient conduct and the injury to another.
4. Damage: actual loss or injury to another resulting from the breach of the duty.

Id.

30 *See* PROSSER AND KEETON, *supra* note 25, § 131, at 1032; Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 823 (1981); EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, §§ 53.79a, at 441 (3d rev. ed. 1984). *See also* County of Sacramento v. Superior Court, 503 P.2d 1382, 1384 (Cal. 1972) (Statutory immunity against tort claims is absolute and must be given effect unless manifestly contrary to legislative intent.); Hyde v. Buckalew, 393 N.W.2d 800, 802 (state may be sued in tort only to extent of the limited liability provided in the Tort Claims Act) (Iowa 1986).

sents to being sued.[31] Accepted early on by American courts,[32] this doctrine reflected the belief that judicial review of executive action in tort suits threatened the independence of the executive branch and the separation of powers.[33] Originally, sovereign immunity only applied to state and federal government action, but eventually the doctrine was extended to immunize municipalities as well.[34]

Today most states, either through legislative action or judicial decisions, have waived absolute governmental immunity and allow injured plaintiffs to maintain civil causes of action against public officials.[35] State legislation in the form of tort claims acts provides a basis for holding the state or local governments liable for torts committed by their employees.[36] Although there are some statutorily or

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31 PROSSER AND KEETON, *supra* note 25, § 131, at 1033. *See also* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the laws on which the right depends."); United States v. McLemore, 45 U.S. (4 How.) 286, 287-88 (1846) (circuit court bad no jurisdiction to entertain suit against government, which cannot be sued except by its consent through law).

32 PROSSER AND KEETON, *supra* note 25, § 131, at 1033 (citing Osborn v. Bank of United States, 22 U.S. (9 Wbeat.) 738 (1824)); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924-25). *See* Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); United States v. McLemore, 45 U.S. (4 How.) 286 (1846).

33 *Id.* PROSSER AND KEETON, *supra* note 25, § 131, at 1033. The sovereign immunity doctrine originated with the English jurisprndent notion that "the King can do no wrong." Gary L. Sellers, Note, *State Liability for Negligent Fire Inspection*, 13 COLUM. J.L. & SOC. PROBS. 303, 306-07 (1977); Jayme S. Walker, Note, *Insulating Negligent Police Behavior in Indiana: Why the Victims of a Drunk Driver Negligently Released by a Police Officer Have No Remedy*, 23 VAL. U.L. REV. 665, 671 (1989). For an extensive discussion of the doctrine of sovereign immunity and its bistorical background, see Borchard, *supra* note 32; Daniel C. Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795.

34 Walker, *supra* note 33, at 672-73. The terms sovereign immunity and government immunity, though used interchangeably in court opinions, are actually distinct concepts. Sovereign immunity applies only to the state, the sovereign. Governmental immunity extends this immunity to local governments and other political subdivisions of the state. *See* AM. JUR. 2D *Municipal, County, School and State Tort Liability* § 3, at 29-30 (1988). For purposes of this Note, the term "governmental immunity" applies to both state and local government immunity.

35 All states nevertheless retain immunity for discretionary decisions. PROSSER AND KEETON, *supra* note 25, § 131, at 1044.

36 *See* ALA. CODE §§ 11-93-1 to 11-93-3 (1985); ALA. CODE §§ 41-9-60 to 41-9-74 (1991); ALASKA STAT. §§ 09.50.250 to 09.50.300 (1983 & Supp. 1991); ARIZ. REV. STAT. ANN. §§ 12-820 to 12-826 (1982 & Supp. 1991); ARK. CODE ANN. §§ 21-9-201 to 21-9-304 (Michie 1987 & Supp. 1991); CAL. GOV'T CODE §§ 810 to 997.6 (West 1980 & Supp. 1992); COLO. REV. STAT. §§ 24-10-101 to 24-10-120 (1988 & Supp. 1991); CONN. GEN STAT. ANN. §§ 4-141 to 4-165b (West 1988 & Supp. 1991); DEL. CODE ANN. tit. 10, §§ 4001 to 4013 (Supp. 1991); D.C. CODE ANN. §§ 1-1201 to 1-1225 (1987); FLA. STAT. ANN. § 768.28 to 768.30 (West 1986 & Supp. 1992); GA. CODE ANN. §§ 36-33-1 to 36-33-6 (1987); HAW. REV. STAT. §§ 662-1 to 662-17 (1988 & Supp. 1991); IDAHO CODE §§ 6-901 to 6-929 (1990); ILL. ANN. STAT. ch. 85, paras. 1-101 to 10-101 (Smith-Hurd 1987 & Supp. 1991); IND. CODE ANN. §§ 34-4-16.5-1 to 34-4-16.5-22 (Burns 1986 & Supp. 1991); IOWA CODE ANN. §§ 25.1 to 25A.24 (West 1989 & Supp. 1991); IOWA CODE

judicially implemented limitations,[37] these statutory waivers of immunity generally subject the government to the same liability as nongovernmental entities. For example, the state, like the private inspector, may be liable for injuries due to negligent fire inspection.[38] Governmental entities may also be liable for injuries resulting from police officers' negligent use of motor vehicles.[39]

ANN. §§ 613A.1 to 613A.13 (West Supp. 1991); KAN. STAT. ANN. §§ 75-6101 to 75-6119 (1989); KY. REV. STAT. ANN. § 44.070 to 44.170 (Baldwin 1989); LA. REV. STAT. ANN. §§ 13:5101 to 13:5114 (West 1991 & Supp. 1992); ME. REV. STAT. ANN. tit. 14, §§ 8101 to 8118 (West 1980 & Supp. 1991); MD. CODE ANN. CTS. & JUD. PROC., §§ 5-401 to 5-404 (1989 & Supp. 1991); MASS. ANN. LAWS ch. 258, §§ 1 to 13 (Law. Coop 1980 & Supp. 1991); MICH. COMP. LAWS ANN. §§ 691.1401 to 691.1415 (West 1987 & Supp. 1991); MINN. STAT. ANN. § 3.736 (West 1977 & Supp. 1992); MINN. STAT. ANN. §§ 466.01 to 466.15 (West 1977 & Supp. 1992); MISS. CODE ANN. §§ 11-46-1 to 11-46-21 (Supp. 1991); MO. ANN. STAT. §§ 537.600 to 537.650 (Vernon 1988 & Supp. 1992); MO. ANN. STAT. § 537.675 (Vernon 1988); MO. REV. STAT. ANN. §§ 537.700 to 537.755 (Vernon 1988 & Supp. 1992); MONT. CODE ANN. §§ 2-9-101 to 2-9-805 (1991); NEB. REV. STAT. §§ 13-901 to 13-926 (1987 & Supp. 1991); NEV. REV. STAT. ANN. §§ 41.0305 to 41.039 (Michie 1986 & Supp. 1992); N.H. REV. STAT. ANN. 541-B:1 to 541-B:22 (Supp 1991); N.J. STAT. ANN. 59: 1-1 to 59: 12-3 (West 1982 & Supp. 1991); N.M. STAT. ANN. §§ 41-4-1 to 41-4-29 (Michie 1989 & Supp. 1991); N.Y. CT. CL. ACT §§ 8 to 28 (McKinney 1989 & Supp. 1991); N.C. GEN. STAT. §§ 143.291 to 143.300.1 (1990 & Supp. 1991); N.D. CENT. CODE §§ 32-12-02 to 32-12-04 (1976 & Supp. 1991); N.D. CENT. CODE §§ 32-12.1-01 to 32.12.1-15 (Supp. 1991); OHIO REV. CODE ANN. §§ 2743.01 to 2744.09 (Anderson 1981 & Supp. 1991); OKLA. STAT. ANN. tit. 51 §§ 151 to 172 (West 1988 & Supp. 1992); OR. REV. STAT. §§ 30.260 to 30.300 (1988 & Supp. 1990); 42 PA. CONS. STAT. ANN. §§ 8521 to 8528 (1982 & Supp. 1991); 42 PA. CONS. STAT. ANN. §§ 8541 to 8564 (1982 & Supp. 1991); 1 PA. CONS. STAT. ANN. § 2310 (Purdon Supp. 1991); R.I. GEN. LAWS §§ 9-31-1 to 9-31-13 (1985 & Supp. 1990); S.C. CODE ANN. §§ 15-78-10 to 15-78-190 (Law. Co-op. Supp. 1991); S.D. CODIFIED LAWS ANN. §§ 3-21-1 to 3-21-11 (Supp. 1991); TENN. CODE ANN. §§ 9-8-101 to 9-8-407 (1987 & Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001 to 101.109 (West 1986 & Supp. 1992); TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.001 to 104.008 (West 1986 & Supp. 1992); TEX. CIV. PRAC. & REM. CODE ANN. §§ 107.001 to 107.005 (West Supp. 1992); UTAH CODE ANN. §§ 63-30-1 to 63-30-38 (1989 & Supp. 1991); VT. STAT. ANN. tit. 12, §§ 5601 to 5605 (1973 & Supp. 1989); VA. CODE ANN. §§ 8.01-195.1 to 8.01-195.9 (Michie 1984 & Supp. 1991); VA. CODE ANN. § 8.01-222 (Michie 1984); WASH. REV. CODE ANN. §§ 4.92.005 to 4.92.270 (West 1988 & Supp. 1991); WASH. REV. CODE ANN. §§ 4.96.010 to 4.96.030 (West 1988); W. VA. CODE §§ 14-2-1 to 14-2-29 (1991); W. VA. CODE §§ 29-12A-1 to 29-12A-18 (1986 & Supp. 1991); WIS. STAT. ANN. § 893.80 to 893.82 (West 1983 & Supp. 1991); WYO. STAT. ANN. §§ 1-39-101 to 1-39-120 (1988 & Supp. 1991).

37 Governmental entities are not liable for those actions explicitly excluded by the state's tort claims act. For example, tort claims acts provide immunity for discretionary acts. *See, e.g.*, CAL. GOV'T. CODE § 820.2 (West 1980); ILL. ANN. STAT. ch. 85, para. 2-201 (1987); S.C. CODE ANN. § 15-78-60(5) (Law. Co-op. Supp. 1991).

38 Adams v. State, 555 P.2d 235, 241 (Alaska 1976). However, some jurisdictions have held that the government's statutory duty to inspect business premises for fire hazards is a function for which the government retains immunity. *See* Reid v. Allen, 349 N.W.2d 806 (Mich. 1984).

39 *See, e.g.*, Brummett v. County of Sacramento, 582 P.2d 952 (Cal. 1978); Thain v. City of New York, 313 N.Y.S.2d 484 (N.Y. App. Div. 1970) (city liable for officers' failure to warn other drivers with lights and siren before entering intersection at high speed), *aff'd*, 280 N.E.2d 892 (N.Y. 1972) (although employees immune from liability for negligent acts, county would nonetheless be liable for damages).

Absent the absolute protection of the sovereign immunity doctrine, a government entity may be liable for the tortious acts of its officials. If an officer is acting within the scope of his employment, his actions are considered the actions of his governmental employer, and a cause of action accrues against the government.[40] Thus, those injured as a result of an officer's negligent acts committed within the scope of the officer's employment may seek redress against the government, subject to legislative and judicial limitations on government liability.

1. *Discretionary versus Ministerial Acts*

Although the waiver of governmental immunity has made tort actions based upon police negligence possible, government entities still retain some degree of immunity.[41] For example, every state has retained immunity for government officials acting in their discretionary capacity.[42]

The discretionary-ministerial function distinction[43] provides government immunity for acts of employees involving "discretionary functions or duties."[44] Discretionary functions are those "characterized by a high degree of discretion and judgment involved in

40 David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 55 (1972) (An officer's personal privilege protects him from personal liability if he acts "in good faith and with a reasonable although erroneous belief that his act was authorized. . . ."). The immunity of the officer is equivalent to the immunity of the government; if the officer is acting within the scope of his employment and is liable, the government is liable. Thus, the question is not whether the plaintiff can recover against the officer or the State, but whether the plaintiff can recover at all. See Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209-13 (1963), for a discussion of the immunities of officer and government as "coterminous."

41 Every state uses the discretionary-ministerial distinction and grants immunity to government officials for actions involving choices with respect to policy issues. RESTATEMENT (SECOND) OF TORTS § 895(B) (1965).

42 PROSSER AND KEETON, *supra* note 25, § 131, at 1044. Although discretionary immunity may be formulated such that it describes the "privilege" of the government actor, this immunity is the government's as well as the actor's. Jaffe, *supra* note 40, at 212-13. *See, e.g.*, MASS ANN. LAWS ch. 258, § 10(b) (West 1988) (exempting from liability "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused.")

43 This distinction originated in American case law (Dalehite v. United States, 346 U.S. 15, 36 (1953) ("[w]here there is room for policy judgment and decision there is discretion")), and has been incorporated into many state statutes which abrogate absolute governmental immunity but retain qualified immunity for government officials. PROSSER AND KEETON, *supra* note 25, § 131, at 1046.

44 Discretionary immunity was originally incorporated into statutory law by the Federal Tort Claims Act in 1946, 60 Stat. 842. Currently, provisions of this statute are found at 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411, 2412, 2671, 2672, 2674-80. The Federal Tort Claims Act provides that the government is liable "in the same manner and to the same extent as a private individual under the circumstances," 28 U.S.C. § 2674

weighing alternatives and making choices with respect to public policy and planning."[45] Two rationales underlie this distinction. First, as with the doctrine of sovereign immunity, "certain governmental activities are legislative or executive in nature and any judicial control of those activities, in tort suits or otherwise, would disrupt the balanced separation of powers of the three branches of government."[46] Second, absent this grant of immunity for such actions, government actors would be reluctant to make discretionary decisions and carry out their responsibilities.[47]

Discretionary immunity has been broadly interpreted to include government conduct involving policy judgments.[48] For example, the decision whether or not to replace a major bridge is discretionary because it involves the evaluation of broad policy factors.[49] With regard to police actions, difficult factual choices surrounding the power to arrest are considered discretionary.[50] For example, the officer's decision whether certain behavior or evidence consti-

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(1988), but retains immunity for all governmental conduct that involves.a "discretionary function or duty." *Id.* § 2680(a).

States also have similar statutes which abrogate absolute governmental immunity, but retain the discretionary-ministerial distinction. See, e.g., The Massachusetts Tort Claims Act, which provides that

> [p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances. . . .

MASS. ANN. LAWS ch. 258, § 2 (West 1988). Exempted from such liability, however, is "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a puhlic employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." *Id.* § 10(b). A South Carolina statute exempts from liability "the exercise of discretion or judgment by the government entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." S.C. CODE ANN. § 15-78-60(5) (Law. Co-op. Supp. 1990).

45 Irwin v. Town of Ware, 467 N.E.2d 1292, 1298 (Mass. 1984) (quoting Whitney v. Worcester, 366 N.E.2d 1210, 1216 (Mass. 1977)).

46 PROSSER AND KEETON, *supra* note 25, § 131, at 1039.

47 Ransom v. City of Garden City, 734 P.2d 70, 73 (Idaho 1987).

48 PROSSER AND KEETON, *supra* note 25, at 1039. *But see Whitney*, 366 N.E.2d at 1217. In *Whitney*, the court stated that immunity does not extend to all acts requiring policy judgment because "the performance of all functions involves the exercise of discretion and judgment to some degree." *Id.* at 1217. The court described discretionary acts as those "characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." *Id.* at 1216. Those acts that involve "the carrying out of previously established policies or plans" are not discretionary in nature. *Id.*

49 Julius Rothschild & Co. v. State, 655 P.2d 877 (Haw. 1982).

50 Jaffe, *supra* note 40, at 218-19.

tutes probable cause to search or arrest is protected by discretionary immunity.[51]

On the other hand, if the conduct is ministerial in nature, that is if the act involves implementing established plans and policies, the government is subject to liability for its employees' torts.[52] For example, a fire department's decision to establish a maximum speed limit for fire trucks is discretionary. If the driver of the truck exceeds this limit and causes injury, however, the city is liable because once the limit was established, the employee's function became ministerial.[53] Thus, whether a government act is categorized as ministerial or discretionary determines whether the government is subject to liability.

a. *Discretionary Acts: No Liability*

In the context of negligent failure to arrest drunk drivers, the vagueness of the terms "ministerial" and "discretionary" has led to inconsistent results.[54] Courts focus on different factors to determine whether an act is discretionary, and as a result, come to different conclusions about whether failure to arrest a drunk driver is discretionary or ministerial.

The discretionary immunity doctrine has effectively protected police from liability to injured third parties.[55] Courts which emphasize the need for police officers to use discretion when making any arrest have found that the decision to detain a drunk driver is shielded by discretionary immunity.[56] Similarly, courts which focus on the language of drunk driving statutes that do not mandate detention of drunk drivers also label the officer's act discretionary, and thus immune from liability.[57]

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51 *Id.* However, the officer is not entitled to total immunity in the arrest context; police discretionary immunity does not shield officers from liability for false arrest. *Id.* n.22.

52 *See* Chambers-Castanes v. King County, 669 P.2d 451 (Wash. 1983) (the decision to dispatch an officer to the scene of a crime or to investigate a crime does not involve a basic policy judgment which would render the government immune from suit).

53 Jackson v. Kansas City, 680 P.2d 877 (Kan. 1984).

54 Critics of the discretionary-ministerial function distinction find that the distinction is too easily manipulated. *See* Jaffe, *supra* note 40, at 218:

> The dichotomy between 'ministerial' and 'discretionary' i[s] at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result. One may also believe that it has become a convenient device for extending the area of nonliability without making the reasons explicit.

55 *See* Shore v. Town of Stonington, 444 A.2d 1379 (Conn. 1982); Everton v. Willard, 468 So. 2d 936 (Fla. 1985); Jones v. Maryland-National Capital Park & Planning Comm'n, 571 A.2d 859 (Md. Ct. Spec. App. 1990); Schutte v. Sitton, 729 S.W.2d 208 (Mo. Ct. App. 1987).

56 *See infra* notes 58-65 and accompanying text.

57 *See infra* notes 66-73 and accompanying text.

Because the police must be free to make arrest decisions without fear of liability, some courts have characterized the duty to detain a drunk driver as discretionary, insulating the government from liability for an officer's negligent failure to prevent a drunk driver from driving.[58] In *Everton v. Willard*,[59] a sheriff's deputy stopped an intoxicated driver for a traffic violation. The deputy knew[60] that the driver had been drinking, yet failed to take any measures to prevent him from driving.[61] Minutes later, the driver was involved in an accident, killing one person and seriously injuring another.[62] The families of the injured and deceased brought suit against the driver, the deputy, the sheriff's office, and the county.[63] The trial court dismissed the complaint against all parties except for the driver. The Supreme Court of Florida upheld the dismissal because

> the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit. . . . This discretionary power is considered basic to the police power function of governmental entities and is recognized as critical to a law enforcement officer's ability to carry out his duties.[64]

The court found that, like a judge's decision regarding sentencing or a prosecutor's decision to prosecute, the officer's decision to arrest is discretionary and as a result, the officer is immune from liability.[65]

When a drunk driving statute does not specifically require police officers to arrest or detain drunk drivers, a court may find that the officer's duty is not mandatory. In *Hildenbrand v. Cox*,[66] a police officer investigated a driver who had collided with a flower pot in the town square.[67] Although the driver told the officer that he had drunk a few beers, and the officer noticed beer cans in the driver's

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58 *See Shore*, 444 A.2d 1379 (if the police are held liable for failure to make an arrest, police will be forced to choose between potential liability for false arrest and potential liability for failure to arrest); Fusilier v. Russell 345 So. 2d 543 (La. Ct. App.) (officers are faced with a dilemma between being sued for damages for false arrest, on the one hand, and for damages from failure to arrest on the other), *cert. denied*, 347 So. 2d 261 (La. Ct. App. 1977).

59 468 So. 2d 936 (Fla. 1985).

60 The *Everton* court's opinion states that "[t]he deputy recognized, from his own observations and Willard's admission, that Willard had been drinking to some extent." *Id.* at 937.

61 *Id.* at 937.

62 *Id.*

63 *Id.*

64 *Id.* at 937, 938.

65 *Id.* at 939.

66 369 N.W.2d 411 (Iowa 1985).

67 *Id.* at 412-13.

car,[68] the officer permitted the individual to drive away.[69] Shortly thereafter, the driver was killed in another collision.[70] The driver's estate sued the officer and the city, alleging that the officer was negligent in allowing the driver to continue driving. The court recongized that the driver was intoxicated at the time of the investigation and the subsequent fatal collision, but held that neither the officer nor the city was liable.[71] Because the state statutes regarding drunk driving and public drunkenness state that the officer "may" arrest the individual or take him into custody, the court found that the legislature did not intend to prescribe mandatory conduct.[72] Thus, the officer had no duty to arrest the driver, and by failing to arrest him, the officer had committed no tort.[73]

b. *Ministerial Acts: Liability*

A number of courts have determined that the duty to arrest a drunk driver is not discretionary: police have a mandatory duty to prevent an intoxicated person from driving.[74] That is not to say that the police have an obligation to stop and arrest every individual who may be driving drunk, but once an officer believes or has reason to believe that an individual is intoxicated and intends to drive in that state, the officer has a mandatory duty to prevent that individual from driving. Courts advocating this view usually focus on whether the police department has provided specific guidelines requiring an officer to detain a drunk driver,[75] or whether the drunk driving statute itself authorizes or requires officers to remove drunk drivers from the road.[76]

When the police officer is provided with specific guidelines regarding intoxicated individuals, the court may find that the officer's duty to detain is not discretionary. In *Fudge v. City of Kansas City*,[77] two police officers observed the intoxicated condition of an individual, but failed to prevent the individual from getting into his car and driving away.[78] Shortly thereafter, the individual caused an accident

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68 *Id.* at 414.

69 *Id.*

70 *Id.*

71 *Id.* at 416.

72 *Id.*

73 *Id.*

74 *See* Ransom v. City of Garden City, 743 P.2d 70 (Idaho 1987); Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984); Fudge v. City of Kansas City, 720 P.2d 1093 (Kan. 1986); Bailey v. Town of Forks, 737 P.2d 1257 (Wash. 1987).

75 *See infra* notes 77-82 and accompanying text.

76 *See infra* notes 83-91 and accompanying text.

77 720 P.2d 1093 (Kan. 1986).

78 *Id.* at 1097.

in which a man was killed.[79] The decedent's family brought an action against the drunk driver and Kansas City. At trial, the court found the City and police officers partially liable for the death of the decedent.[80] On appeal, the City and the police claimed that the officers' actions fell within an exception to the liability imposed in the discretionary immunity section of Kansas Tort Claims Act.[81] The court found that the duty to detain a drunk driver was not discretionary and did not fall within this exception because "the City [had] adopted a specific mandatory set of guidelines for police officers to use with regard to handling intoxicated persons. The guidelines left no discretion."[82]

When a state legislature has enacted laws that require or even just authorize an officer to take an intoxicated driver into custody, a court may find that the officer's decision to detain the driver is not discretionary.[83] For example, *Irwin v. Town of Ware*[84] involved an auto accident caused by an intoxicated driver who two officers had pulled over earlier. The officers knew that the driver had been drinking, yet they failed to conduct a sobriety test and permitted the driver to continue driving.[85] Ten minutes later, the intoxicated driver was involved in a collision, killing the intoxicated driver, and the driver and one passenger in the other car.[86] Two other passengers suffered severe injuries.[87] The court held that the officers' decision to detain the drunk driver was not discretionary. Under the Massachusetts Tort Claims Act, like the Kansas Tort Claims Act, the

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79 *Id.*

80 *Id.*

81 *See* KAN. STAT. ANN. § 75-6104(e) (1989) (immunizing the government from liability for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused.").

82 *Fudge*, 720 P.2d at 1100. The General Order which set out the procedures for handling intoxicated individuals provided: " 'An individual, *male* or *female*, who is incapacitated by alcohol or drugs, and because of such condition, is likely to do physical injury to himself or herself or others if allowed to remain at liberty will be taken into protective custody and processed in the following manner . . .' Id. at 1098 (quoting General Order 79-44).

83 *See* Weldy v. Town of Kingston, 514 A.2d 1257 (N.H. 1986) (failure to arrest teenage driver who had alcohol in vehicle created cause of action against officials and town because statute required that police officer "shall arrest" any driver illegally transporting alcohol). *See also* Leake v. Cain, 720 P.2d 152, 163-64 (Colo. 1986) (If an intoxicated person is not driving, the decision by police officer to take that person into custody is discretionary; but "[w]hen a police officer stops a person he knows, or reasonably should know, is driving under the influence, the officer arguably has no discretion but to arrest the suspect.").

84 467 N.E.2d 1292 (Mass. 1984).

85 *Id.* at 1304-05.

86 *Id.*

87 *Id.*

state retains immunity for discretionary acts by public employees.[88] The court concluded, however, that the decision of an officer to detain a driver, whom the officer knows or should know is intoxicated, is not a discretionary act because a discretionary act is " 'characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning.' "[89] According to the court, an officer's decision to remove a drunk driver from the road is not a "policy or planning judgment."[90] The court stated that by enacting a statute authorizing police to arrest drunk drivers, the legislature had already made the policy or planning decision to remove drunk drivers from the road.[91]

B. The Public Duty Doctrine

The other potential source of governmental immunity for negligent failure to detain drnnk drivers is the public duty doctrine. This doctrine provides that because the government owes some unspecified duties to the general public, but not to any individual person, it is immune from liability for torts committed by a public official absent a special duty owed to the injured citizen.[92] The rnle originated as a common-law doctrine in the 19th century[93] and was first recognized by the Supreme Court in *South v. Maryland*.[94] In 1879, the doctrine was described:

> 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 indi-

88 *See supra* note 44 for the relevant provisions of the Massachusetts Tort Claims Act.

89 *Irwin*, 467 N.E.2d at 1298 (quoting Whitney v. City of Worcester, 366 N.E.2d 1210, 1210 (Mass. 1977)).

90 *Id.*

91 *Id.*

92 *See* PROSSER AND KEETON, *supra* note 25, § 131, at 1049 n.81; John Cameron McMillan, Jr., *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505 (1987); Sellers, *supra* note 33, at 322-23; Walker, *supra* note 33, at 675.

93 Leake v. Cain, 720 P.2d 152, 155 n.6 (Colo. 1986). *See* McMillan, *supra* note 92, at 509; Walker, *supra* note 33, at 60 n.60.

94 59 U.S. 396 (1855). In *South*, the plaintiff sued the local sheriff for failing to enforce the laws of the State and protect the plaintiff who had been kidnapped. The plaintiff asserted that the sheriff knew that the plaintiff had been kidnapped and yet did nothing to obtain his release. *Id.* at 398-99. The Supreme Court held that the sheriff's duty to keep the peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only." *Id.* at 403.

vidual wrong, and may support an individual action for damages.[95]

A majority of jurisdictions rely on the public duty doctrine to shield public officers and their government employers from liability for negligent actions.[96] Unlike discretionary act immunity, the doctrine theoretically is not an immunity barring any governmental tort liability. However, in effect, the public duty doctrine does immunize government entities from liability for an individual's injury because government owes a duty to the public in general, and not to individual plaintiffs, as in the case of police and fire protection.[97]

This doctrine has been widely criticized on the ground that it "results in a duty to none where there is a duty to all."[98] A growing number of cases support the expanding view that the doctrine is an "unwarranted judicial invocation of a sovereign immunity supposedly abolished by prior statutory law."[99] As a result, it has been eroded by judicial decisions which have narrowed its scope[100] or rejected it altogether.[101]

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95 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 379 (1879), *quoted in Leake*, 720 P.2d at 155 n.6.

96 McMillan, *supra* note 92, at 512. *See, e.g.*, Lehto v. City of Oxnard, 217 Cal. Rptr. 450 (Cal. Ct. App. 1985); Fisher v. District of Columbia, 498 A.2d 198 (D.C. 1985); Fessler v. R.E.J., Inc., 514 N.E.2d 515 (Ill. App. 1986); Barratt v. Burlingham, 492 A.2d 1219 (R.I. 1985).

97 Sellers, *supra* note 33, at 323 (the public duty doctrine "has been the principle tool to deny relief in negligent [fire] inspection cases").

98 Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1015 (Fla. 1979)(holding that because the public duty doctrine was a function of sovereign immunity, it did not survive the abrogation of sovereign immunity).

99 Sellers, *supra* note 33, at 323-24. In *Commercial Carrier*, 371 So. 2d at 1015, the court held that the public duty doctrine was "a function of municipal sovereign immunity and . . . its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity." The court further stated that the public duty doctrine did not survive the enactment of the state statute abrogating absolute governmental immunity. *Id.* Similarly, in Adams v. State, 555 P.2d 235, 241-42 (Alaska 1976), the court

> consider[ed] that the 'duty to all, duty to no-one doctrine' is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. . . . To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.

100 Courts have narrowed the public duty doctrine by creating the "special relationship" exception discussed *infra* at notes 109-15 and accompanying text.

101 PROSSER AND KEETON, *supra* note 25, § 131, at 1049. The public duty doctrine has been abolished in the following states: Alaska, Arizona, Colorado, Florida, Iowa, New Mexico, Oregon, Wisconsin, and Wyoming. *See* Adams v. State, 555 P.2d 235 (Alaska 1976) ("[T]he 'duty to all, duty to no-one' doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine."); Ryan v. State, 656 P.2d 616 (Ariz. 1982) ("We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery."); Leake v. Cain, 720 P.2d 152 (Colo. 1986) ("In our view, the problems associated with the public duty rule far outweigh the benefits of the

1. *The Public Duty Doctrine: A Tool to Deny Police Liability in Failure to Arrest Cases*

Under the pure form of the public duty doctrine, an officer's duty to arrest is a duty owed to the public in general, and therefore no individual may sue for an officer's failure to perform that duty. In *Schutte v. Sitton*,[102] a police officer knowingly permitted an individual to get into his vehicle and drive in an intoxicated condition.[103] Shortly thereafter, the victim was killed in an accident caused by the intoxicated driver's negligence.[104] Plaintiffs brought a wrongful death action against the city and the police officer.[105] On appeal, the court upheld the trial court's dismissal of the action.[106] The court stated that under Missouri law, "public officers are not liable for injuries or damages sustained by particular individuals resulting from breach by the officers of a duty owed to the general public."[107] The court held that because the officer's duty to prevent the intoxicated individual from driving was a duty owed to the general public, the officer and the city were immune from liability to individual plaintiffs for breaching this duty.[108]

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rule, which are more properly realized by other means."); Commercial Carrier Corp. v. Indian River Co., 371 So. 2d 1010 (Fla. 1979) (holding that the public duty doctrine is dependent on the sovereign immunity doctrine and did not survive Florida's tort claims act); Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979) (holding that "the abrogation of sovereign immunity means the same principles of liability apply to officers and employees of municipalities as to any other tort defendants, except as expressly modified or limited by the provisions of [the Iowa statute imposing liability on municipalities for their employees torts committed while acting within scope of their employment]"); Schear v. Board of County Comm'rs, 687 P.2d 728 (N.M. 1984) ("The Tort Claims Act abolished the 'public duty—special duty' distinction in this jurisdiction."); Brennen v. City of Eugene, 591 P.2d 719 (Or. 1979) ("[A]ny distinction between "public" and "private" duty is precluded by statute of this state."); Coffey v. City of Milwaukee, 247 N.W.2d 132 (Wis. 1976) ("Any duty owed to the public generally is a duty owed to individual members of the public."); DeWald v. State, 719 P.2d 643 (Wyo. 1986) ("The public-duty/special-duty rule was in essence a form of sovereign immunity . . . [which] [t]he legislature has abolished. The public duty only rule, if it ever was recognized in Wyoming, is no longer viable.").

102 729 S.W.2d 208 (Mo. Ct. App. 1987).

103 *Id.* at 209.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 210 (citing Lawhon v. City of Smithville, 715 S.W.2d 300, 302 (Mo. Ct. App. 1986); Cox v. Department of Natural Resources, 699 S.W.2d 443, 449 (Mo. Ct. App. 1985); Jamierson v. Dale, 670 S.W.2d 195, 196 (Mo. Ct. App. 1984)).

108 *Id.* at 211. The Missouri courts do not recognize a "special duty" exception to the public duty doctrine. *Id.* The court beld that under the doctrine of respondeat superior, if the officer is immune from liability, so is his employer. *Id.* Missouri is the only state which uses the public duty doctrine in its pure form without the "special relationship exception." Walker, *supra* note 38, at 680.

2. *The Special Relationship/Special Duty Exception to the Public Duty Doctrine*

Most jurisdictions that continue to use the public duty doctrine have narrowed its scope by creating a "special relationship" or "special duty" exception to the immunity rule.[109] Generally, a special relationship is created when the government singles out an individual or group for special treatment.[110] Courts vary as to which situations create a special relationship.[111] Most commonly, a special relationship exists when a citizen collaborates with the police and is

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109 Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986); McMillan, *supra* note 92, at 330-31; Sellers, *supra* note 33, at 680; Walker, *supra* note 33, at 514. That the "no duty" rule creates harsh results for injured plaintiffs may have played a role in the creation of exceptions to the public duty doctrine. Bailey v. Town of Forks, 737 P.2d 1257, 1260 (1987), *modified*, 753 P.2d 523 (Wash. 1988).

110 Chambers-Castanes v. King County, 669 P.2d 451, 458-59 (Wash. 1983)(finding a special relationship between plaintiffs who had called the police department for help and the police assured them that help was on the way).

In *Bailey*, 737 P.2d 1257, a city police officer had been in contact with an individual who he knew or should have known was intoxicated. *Id.* at 1258. Nevertheless, the officer ordered the individual to leave the area and watched him enter his truck. *Id.* Shortly thereafter, the intoxicated driver caused an accident which resulted in plaintiff Bailey suffering serious injury. *Id.* After finding that police officer's decisions in the field are not "discretionary policymaking decisions" immune from suit, the court analyzed the officer's behavior under the public duty doctrine. *Id.* The court defined four situations which require a special duty to a particular plaintiff:

1. when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons (legislative intent);
2. where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce);
3. when goverumental agents fail to exercise reasonable care after assuming a duty to waru or come to the aid of a particular plaintiff (rescue doctrine); or
4. where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity (a special relationship).

Id. at 1260 (citations omitted). Because the officer had a duty to take intoxicated individuals into custody, the court found that the failure-to-enforce exception was met and traditional tort principles must be applied to determine whether the officer and the town were liable for plaintiff's injuries. *Id.* at 1260-61. The court said, "[w]hen statutes intend to insure the safety of the public highways, a governmental officer's knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer's negligent conduct." *Id.* at 1261 (citations omitted).

111 *See* Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 825-27 (1981). Courts have expanded the special relationship exception, creating five categories of cases where a special relationship may be found:

1. cases in which the plaintiff is harmed as a consequence of his abetting the police, often as an informer or witness;

placed in danger due to this collaboration,[112] or when the police promise to protect an individual.[113]

In addition, courts have recognized special relationships in other situations and their findings depend largely on the specific facts of the case and public policy concerns.[114] For example, when the police are aware of a narrowly defined and identifiable source of danger to the public which a statute or ordinance seeks to prevent, a court may find a special relationship even though the police could not foresee a specific plaintiff.[115] An officer's failure to detain a drunk driver falls within this category of special relationships. Courts are divided, however, on the question of whether a special relationship has been created when a police officer negligently fails to prevent a drunk driver from proceeding.

a. *No Special Relationship/Special Duty Created*

Some courts have found that when an officer negligently fails to arrest an intoxicated driver, no special relationship is created and the public duty doctrine effectively shields the officer from liabil-

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2. cases where the police extend express promises of protection to specific individuals;
3. cases where 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. cases where 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. cases where the police fail to provide protection from a more general threat, such as a "crime wave."

Id. Courts, however, are highly unlikely to find a special relationship in the last two categories. *Id.*

112 *See* Estate of Tanasijevich v. City of Hammond, 383 N.E.2d 1081, 1083 (Ind. 1978) (finding a special relationship when a citizen cooperated with police and his property was later damaged in retaliation); Christy v. City of Baton Rouge, 282 So. 2d 724, 727 (La. Ct. App. 1973) (police owe duty to protect assault victim attacked while aiding police in arrest); Schuster v. City of New York, 154 N.E.2d 534, 537 (N.Y. 1958) (allowing the plaintiff, whose son had given the police information leading to the arrest of a murder suspect, to recover damages).

113 *See* Morgan v. Yuba County, 41 Cal. Rptr. 508 (Cal. Dist. Ct. App. 1964) (failure to give promised warning of the impending release of dangerous person); Silverman v. City of Fort Wayne, 357 N.E.2d 285 (Ind. Ct. App. 1976) (police promise to protect plaintiff's property could create duty of protection).

114 *See* Note, *supra* note 111; Walker, *supra* note 33, at 682-84.

115 *See* Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984), discussed *supra* notes 84-91 and accompanying text, *infra* notes 122-27 and accompanying text; Bailey v. Town of Forks, 737 P.2d 1257 (Wash. 1987), discussed *supra* note 110. *See also* Campbell v. City of Bellevue, 530 P.2d 234 (Wash. 1975) (city ordinance created special duty for city electrical inspector to disconnect hazardous electrical system).

ity.[116] In *Fessler v. R.E.J., Inc.*,[117] after several complaints of reckless driving, a police officer located the vehicle parked in a lot and spoke with the driver.[118] The officer, however, did not perform any sobriety test and allowed the driver to stay with the vehicle.[119] Approximately an hour later, the intoxicated driver's vebicle collided with another vehicle in which both the driver and passenger were killed.[120] Although the court recognized the special duty exception to the public duty doctrine, it found that the exception did not apply in this case because the plaintiffs did not allege that "plaintiffs' decedents were injured while under the direct and immediate control of Sergeant Pickett and the city of Jerseyville."[121] Thus, the court refused to recognize any special relationship exception to the public duty doctrine unless the police had control over the plaintiffs. As a result, the government had no duty to protect those injured due to the officer's negligence.

b. *Special Relationship/Special Duty Created*

Alternatively, some courts have found that a special relationship is created when an officer negligently fails to detain an intoxicated driver.[122] In *Irwin v. Town of Ware*,[123] the court stated that several categories of special relationships, based largely on a uniform set of considerations, exist in the common law.[124] The most

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116 *See* Everton v. Willard, 468 So. 2d 936 (Fla. 1985); Fessler v. R.E.J., Inc., 514 N.E.2d 515 (Ill. App. Ct. 1987); Ashburn v. Anne Arundel County, 510 A.2d 1078 (Md. 1986); Jones v. Maryland-National Capital Park & Planning Comm'n, 571 A.2d 859 (Md. Ct. Spec. App. 1990); Crosby v. Town of Bethlehem, 457 N.Y.S.2d 618 (N.Y. App. Div. 1982); Barratt v. Burlingham, 492 A.2d 1219 (R.I. 1985).

117 514 N.E.2d 515 (Ill. App. Ct. 1987).

118 *Id.* at 517.

119 *Id.*

120 *Id.* at 519.

121 *Id.* According to the court, four elements must be met for the exception to apply:

1. [T]he municipality must be uniquely aware of the particular danger or risk to which the plaintiff is exposed;
2. there must be allegations of specific acts or omissions on the part of the municipality;
3. the specific acts or omissions on the part of the municipal employees must be either affirmative or wilful in nature; and
4. the injury must occur while the *plaintiff is under the direct and immediate control* of employees or agents of the municipality.

Id. (citations omitted). The court focused on the fourth element, which was not met, "assuming the plaintiffs here have alleged facts sufficient to establish the first three requirements of the exception." *Id.*

122 *See* Fudge v. City of Kansas City, 720 P.2d 1093 (Kan. 1986); Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984); Bailey v. Town of Forks, 737 P.2d 1257 (Wash. 1987).

123 467 N.E.2d 1292 (Mass. 1984). For a discussion of the facts involved in *Irwin*, see *supra* notes 84-91 and accompanying text.

124 *Id.* at 1300.

important of these considerations 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 from the failure to do so."[125] The court also placed heavy emphasis on legislative intent to protect a specific class, such as those who a drunk driver may injure.[126] Based on foreseeability and legislative intent, the court concluded that a special relationship exists between an officer who negligently fails to remove a drunk driver from the road and a third party who is injured by the drunk driver.[127]

3. *Abolishment of the Public Duty Doctrine*

A growing number of courts are abolishing the public duty doctrine in all contexts because they have concluded that the doctrine's purposes are better served by traditional tort principles and the protection provided by sovereign immunity statutes.[128]

In the context of failure to arrest drunk driver cases, the Colorado Supreme Court abrogated the public duty doctrine in *Leake v. Cain*.[129] In *Leake*, officers had detained a drunk individual at a party, but later released the individual who was to be driven home by his seventeen year-old brother.[130] The drunk individual later drove the vehicle and struck six persons on the street, killing two of them.[131] In response to the action filed against the driver, the officers, and the city, the court abolished the public duty doctrine in Colorado because it "creates needless confusion in the law and results in uneven and inequitable results in practice."[132] The court stated that the effect of the doctrine was the same as that of sovereign immunity, which had been abrogated in the state.[133] It further stated that the legislature, which had enacted a statute instructing courts to resolve claims against the government without regard to public status, could not have intended to protect the government with a doctrine so similar to sovereign immunity.[134] The court then applied traditional

125 *Id.* (citations omitted).
126 *Id.* at 1303-04.
127 *Id.*
128 Leake v. Cain, 720 P.2d 152, 158 (Colo. 1986). *See* Adams v. State, 555 P.2d 235 (Alaska 1976); Ryan v. State, 656 P.2d 616 (Ariz. 1982); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979); Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979); Schear v. Board of County Comm'rs, 687 P.2d 728 (N.M. 1984); Brennen v. City of Eugene, 591 P.2d 719 (Or. 1979); Coffey v. City of Milwaukee, 247 N.W.2d 132 (Wis. 1976).
129 720 P.2d 152 (Colo. 1986).
130 *Id.* at 154.
131 *Id.*
132 *Id.* at 159.
133 *Id.* at 160.
134 *Id.*

tort principles and statutorily created governmental protections to determine the liability of the officers and the city.[135]

C. Two Doctrines, One Result: Governmental Immunity

In order to insulate the police and their government employers from liability for negligent failure to detain drunk drivers, courts have relied on two doctrines: governmental immunity for discretionary acts and the public duty doctrine. By labelling an officer's decision not to detain a drunk driver as discretionary, courts place this conduct within a category of government conduct which is immune from liability in every state.[136] Similarly, courts may characterize an officer's duty to detain a drunk driver as a public duty which, absent a "special relationship" between the officer and the plaintiff, makes the government immune from liability to any individual.[137] Whether these courts apply the public duty doctrine or the discretionary immunity doctrine, the result is the same: the government is immunized from liability when a police officer's negligent conduct results in the injury or death of a victim.

Neither principle nor policy justifies the invocation of artificial barriers to exonerate the government from liability. Although some courts have rejected these barriers and denied governmental immunity, the following section argues that no courts should shield the government from liability for negligent failure to detain drunk drivers.

II
ANALYSIS

By characterizing the duty to detain a drunk driver as a mandatory duty and by finding a special relationship exception to the public duty doctrine, some courts have not erected artificial barriers to governmental liability for failure to detain drunk drivers.[138] These courts recoguize that shielding the government from liability lacks justification. First, neither discretionary act immunity nor the

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135 The court found that the officer and city were immune under the discretionary function exception to the state tort claims act because the legislature intended for officers to exercise discretion in deciding whether to take into custody an intoxicated individual who had not been driving. Although the court did not resolve the question of whether an officer bas a mandatory duty to arrest a person suspected of drunk driving, the court implied that if the officer was acting under a drunk driving statute like in *Irwin*, the officer's duty would not have been discretionary: "[w]hen a police officer stops a person he knows, or should know, is driving under the influence, the officer arguably has no discretion but to arrest the suspect." *Leake*, 720 P.2d at 163-64.

136 *See supra* notes 54-73 and accompanying text.

137 *See supra* notes 92-121 and accompanying text.

138 *See supra* note 17 (cases rejecting the public duty doctrine and discretionary immunity to create governmental liability for failure to detain drunk drivers).

public duty doctrine protects the government from liability when an officer knows a driver is drunk and fails to deter that driver. Second, policy concerns require that the government be liable in this context. Specifically, the tort goals of compensation and deterrence, and the public policy concerns surrounding the devastating effects of drunk driving require governmental liability in this area. Traditional tort principles are sufficient to protect government interests without denying immunity where warranted. Therefore, no court should deny an injured plaintiff compensation for the government's negligent failure to prevent an intoxicated individual from driving.

A. Neither Discretionary Act Immunity nor the Public Duty Doctrine Protects the Government

1. *Detaining an Intoxicated Driver is Not a Discretionary Act*

By insulating the government from liability for an officer's decision not to detain an apparently intoxicated driver, courts distort the intent of the discretionary act immunity. This immunity only protects the government from liability for its agents' acts that involve weighing alternatives and making policy choices.[139] The decision to detain a driver the officer knows is intoxicated is *not* discretionary.

This is not to say that all decisions made by an officer in the field should be subject to judicial review. Discretion is a necessary element of police law enforcement,[140] and police decisions that require consideration of many facts and policies, such as the decision whether to arrest an individual suspected of burglary or to stop one particular motorist out of many,[141] should not be subject to negligence review.[142] To enforce the law effectively, an officer must exercise discretion to arrest or to choose another alternative as his judgment at the time dictates.[143] It would be unfair to subject these

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139 *See supra* notes 41-53 and accompanying text.

140 KENNETH C. DAVIS, POLICE DISCRETION 140-41 (1975). Davis argues that, although discretion is necessary for law enforcement, excessive and unnecessary discretion must be eliminated and necessary discretion controlled.

141 *See* Everton v. Willard, 468 So. 2d 936, 939 (Fla. 1985) (Ehrlich, J., dissenting)(describing the decision to choose to pull a motorist over as an allocation-of-resources strategy that is a discretionary exercise of police authority).

142 *See* MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 64-78 (1980) (discussing the necessity of discretion in the decision to arrest).

143 Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979) ("operational" activities can involve policy decisions). In making the decision to arrest, an officer has a few moments to consider a variety of goals, such as the classic aims of the criminal law (desert, incapacitation, treatment, and deterence) along with the requisites of practicality, personal utility, and efficiency. GOTTFREDSON & GOTTFREDSON, *supra* note 142, at 66.

difficult decisions to *post hoc* review. Such review could not take into account either the factual situation confronted by an officer or his training and experience. Thus, the valid concerns of fairness and effective law enforcement require that no liability attach to an officer's discretionary acts.

Courts should not, however, insulate local governments from liability for those police actions which do not require discretion. Effective law enforcement does not require that an officer have a choice of actions once he has encountered a driver whom the officer knows is intoxicated. The decision to detain is simple because of the lack of alternatives; the officer must prevent that individual from driving. By enacting drunk driving statutes, the legislature has already made the policy decision to remove drunk drivers from the road.[144] Because the duty to detain a drunk driver is not discretionary, subjecting an officer's negligent disregard of that duty to tort review does not compromise fairness concerns or effective law enforcement.[145]

Opponents of this position argue that imposing liability will decrease the effectiveness of law enforcement because, in order to function properly, the police must not fear tort liability.[146] In most

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144 *See* Irwin v. Town of Ware, 467 N.E.2d 1292, 1299 (Mass. 1984) ("No reasonable basis exists for arguing that a police officer is making a policy or planning judgment in deciding whether to remove from the roadways a driver who he knows is intoxicated. Rather, the policy and planning decision to remove such driver has already been made by the Legislature."); *Everton*, 468 So. 2d at 947 (Shaw, J., dissenting) ("Once an intoxicated driver is apprehended, the obvious intent of the legislature is first to immediately remove the intoxicated driver from the highway where he poses an imminent danger to the public safety. . . .").

145 Because the definition of a discretionary act is vague, courts, such as the Florida Supreme Court in *Everton*, expand the definition to encompass the officer's judgment whether to arrest a drunk driver in order to protect the officer and his goverument employer from liability. However, this distorts the original intent of the discretionary act immunity which was to protect government entities from liability for *policy judgments*. *Everton*, 468 So. 2d at 940 (Ehrlich, J., dissenting).

146 *See* Fessler v. R.E.J., Inc., 514 N.E.2d 515, 522 (Ill. 1987):

> [I]t should be remembered that efficient law enforcement necesarily involves a grant of broad discretion to police officers in determining whether to restrain, detain, or arrest an individual. This discretion is required by the facts that there are often numerous matters deserving of a police officer's attention at the same time, and it is often impractical for police officers to consult with their superiors in order to arrange their priorities.

(citation omitted); *Everton*, 468 So. 2d at 949 (Shaw, J., dissenting) (addressing the argument that "denying immunity for the discretionary acts of police officers will 'chill' the officers in the performance of their duties."); Jones v. Maryland-National Capital Park & Planning Comm'n, 571 A.2d 859, 869 (Md. Ct. Spec. App. 1990):

> When performing the job of a law enforcement officer, the exercise of discretion may call for decisiveness and action in response to crises. A police officer's presently difficult job would be nearly impossible if every act committed in a non-malicious, discretionary manner could become

states, however, the individual police officer is exempted from personal liability unless he has acted, maliciously, wantonly and willfully, or in bad faith.[147] Thus, officers do not have to fear personal liability and are not unduly inhibited by the prospect that their government employers will have to bear the financial responsibility for the officers' negligent acts.[148]

Opponents of government liability also contend that the judiciary should not review officers' decisions made in the field under high pressure circumstances.[149] However, courts already review police behavior to protect the constitutional rights of the accused.[150] Similarly, courts should be able to review an officer's decision to release a drunk driver and should also grant injured plaintiffs the right to seek redress for their injuries.[151]

> the basis of a lawsuit. Were that to occur, we would in effect be placing handcuffs on the officers, not the culprits.

(quoting Boyer v. State, 560 A.2d 48, 50 (Md. 1989) (citations omitted). *See also* George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1179 ("[I]t seems that the courts are troubled chiefly by the danger of bridling the free exercise of judgment by public officials."); Jaffe, *supra* note 40, at 223 ("A second reason [for discretionary immunity] is that if the officer is answerable, he may hesitiate to do what should be done. . . .").

147 In Florida, for example, police officers are exempt from liability unless they act in bad faith, with malicious intent, or with wanton and willful disregard for the rights of others. FLA. STAT. ANN. § 768.28(9)(a) (West 1986 & Supp. 1992). In Arizona, officers are also immune from personal liability for the performance of acts done in good faith without wanton disregard of their statutory duties. ARIZ. REV. STAT. ANN. § 41-621(H) (1992). In Idaho, officers are exempt from personal liability if the challenged act does not involve malice or criminal intent and is within the scope of employment. IDAHO CODE § 6-903(d) (1990 & Supp. 1991). In Massachusetts, the state will provide legal representation for and indemnify police officers for claims against the officer provided the officer acted within the scope of his employment and did not act in a "wilful, wanton or malicious manner." MASS. ANN. LAWS ch. 258, § 9A (Law. Co-op. 1980 & Supp. 1991). *See also* CAL. GOV'T CODE §§ 825-825.6 (West 1980 & Supp. 1992); N.Y. PUB. OFFICERS LAW § 17 (McKinney 1988 & Supp. 1992) (1990 & Supp. 1991); OR. REV. STAT. § 30.285 (1988).

148 Ransom v. City of Garden City, 743 P.2d 70, 73 (Idaho 1987) ("[W]e do not believe police officers in the field will be unduly inhibited by the prospect that the governmental entity might eventually bear the financial responsibility for compensating those who have been injured by the negligent acts of officers").

149 *See id.* (addressing the policy against the court determining the propriety of a decision by a coordinate branch of government); Everton v. Willard, 468 So. 2d 936, 949 (Fla. 1985) (Shaw, J., dissenting) (addressing the argument that "judges and juries, in the later tranquility of the courtroom, cannot be permitted to 'second guess' the decisions of police officers made under the stress and strain of the 'street world' with its conflicting demands and dangers."). *See also* Jaffe, *supra* note 40, at 223 ("The first [basis for the discretionary function exception] is the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by law to exercise discretion."); Note, *supra* note 111, at 832 ("Central to the discretion argument is the contention that courts lack the requisite expertise to review police actions.").

150 *See Everton*, 468 So. 2d at 949 (Shaw, J., dissenting). Courts also review police conduct in tort claims for false arrest and § 1983 claims of misconduct. Note, *supra* note 111, at 832.

151 *Everton*, 468 So. 2d at 949 (Shaw, J., dissenting).

By refusing to label a police officers negligent failure to detain a drunk driver as discretionary, the Kansas Supreme Court in *Fudge* and the Supreme Judicial Court of Massachusetts in *Irwin* properly interpreted the discretionary-ministerial act distinction. Only discretionary acts are protected and the decision to detain an individual an officer knows is intoxicated is by no means discretionary. Thus, the discretionary act doctrine does not protect the government from liability in these circumstances. For courts, such as those in *Everton* and *Hilderbrand*, to label such an act as discretionary is a misinterpretation of the doctrine.

2. *When an Officer Knows a Driver Is Intoxicated a "Special Relationship" Is Created*

Short of abrogating the public duty doctrine,[152] courts should acknowledge that when a police officer knows an individual has or will be driving in an intoxicated condition, a "special relationship" is created. The knowledge of a driver's intoxicated state is the basis of the government's unique ability to prevent harm to third parties. It is this knowledge which creates the special duty to prevent that driver from causing harm to other citizens.[153] In *Irwin*, the court stated that the government's duty to protect is based on foreseeability of harm to citizens arising from government inaction.[154] Because the officer knew, or should have known, that the individual was intoxicated, he should have foreseen the potential injuries to third parties. Thus, he had a duty to prevent that harm. Failure to take preventive measures breaches that duty and, as a result, the government is liable.

When an officer knows of the intoxicated condition of a driver, the officer has a special duty to prevent the harm that might be inflicted upon third parties if the officer fails to act. Therefore, even if the public duty doctrine is retained, courts should apply the special duty exception in these cases.

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152 Ideally, the public duty doctrine should be abolished. *See infra* notes 183-87 and accompanying text.

153 *See* RESTATEMENT (SECOND) OF TORTS, § 302(B) (1964):

> An act or an omission may be negligent if the actor *realizes or should realize* that it involves an unreasonable risk of barm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal (emphasis added).

154 467 N.E.2d 1292, 1301 (Mass. 1984). The court also based the special relationship exception on the legislature's intent to protect citizens from drunk drivers.

B. Policy Concerns

1. *Compensating Victims*

The tort system entitles those who are injured due to the negligence of another to recover their damages at the expense of the wrongdoer.[155] The concern for compensating tort victims has always been a powerful influence in tort law, and[156] the modern trend focuses on this function. Courts have expanded tort liability by providing victims with access to the courts to seek redress. In the private sector, for example, courts have created the tort of negligent infliction of emotional distress to allow plaintiffs to recover when they have no other damages.[157] Courts have also abrogated the defense of contributory negligence which, in the past, prevented plaintiffs who were partially at fault from recovering.[158] Some courts have even expanded the duty of landlords to include protecting tenants from foreseeable criminal acts of third parties.[159] In the public sector, the abrogation of absolute government immunity has significantly expanded government tort liability.[160]

Courts must give those harmed as a result of negligent failure to detain drunk drivers an opportunity to recover from the government. Otherwise, those harmed are forced to bear the cost alone. To deny these victims the opportunity to seek redress for their injuries is inapposite to the modern trend of expanding tort liability in order to compensate victims.

2. *Deterring Harmful Conduct*

Courts are concerned not only with compensating victims but also with deterring harmful conduct in the future.[161] Culpable defendants should be held accountable for their actions in order to deter future negligent behavior. Once police officers know that negligent failure to detain drunk drivers may result in liability, officers will take greater care in preventing drunk individuals from driving. As a result, officer performance in removing drunk drivers from the

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155 *See supra* notes 25-29 and accompanying text.

156 PROSSER AND KEETON, *supra* note 25, § 4, at 20.

157 *See* Thing v. La Chusa, 771 P.2d 814 (Cal. 1989); Dillon v. Legg, 441 P.2d 912 (Cal. 1968); Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990); Ramirez v. Armstrong, 673 P.2d 822 (N.M. 1983).

158 *See* United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Placek v. City of Sterling Heights, 275 N.W.2d 511 (Mich. 1979); Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981).

159 *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); Kwaitkowski v. Superior Trading Co., 176 Cal. Rptr. 494 (Cal. Ct. App. 1981); Scott v. Watson, 359 A.2d 548 (Md. 1976); Trentacost v. Brussel, 412 A.2d 436 (N.J. 1980).

160 *See supra* note 36 and accompanying text. *See also* Note, *supra* note 111, at 822.

161 *See supra* note 26 and accompanying text.

road will be enhanced. Because the police officer is in a unique position to know and prevent individuals from driving drunk, every incentive must he provided in order to encourage officers to get drunk drivers off the road.

Likewise, the possibility of liability will encourage government entities to implement stricter standards in hiring, training, and supervising police officers.[162] Evidence indicates that institutional reforms can significantly affect crime prevention.[163] Greater care by police officers and enhanced governmental supervision of those officers will result in fewer drunk drivers on the road.

Drunk driving causes a devastating number of injuries and deaths every year,[164] and measures that reduce the incidence of drunk driving are necessary to combat this national crisis. Denying governmental immunity for negligently failing to prevent a death or injury as a result of drunk driving is a necessary factor in the nationwide fight against drunk driving.

3. *Economic Considerations*

Those opposed to such liability argue that it will cause economic harm to the government employer by requiring it to pay damage awards to injured parties.[165] Such economic considerations, however, were also relevant to the decision to abolish sovereign immunity—a decision which almost every state has already made, regardless of the possibility of economic burden to the government.[166] State legislatures obviously did not intend for eco-

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162 *See* Bermann, *supra* note 146, at 1195. See also Owen v. City of Independence, 445 U.S. 622, 651 (1980), in which the Supreme Court said that 42 U.S.C. § 1983 (1988), which opened the door for municipal liability for tortious conduct of its employees, "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." The Court further added:

> In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the front line officers are judgment-proof in their individual capacities.

Id. at 652 n.36. *See also* GREGORY H. WILLIAMS, THE LAW AND POLITICS OF POLICE DISCRETION 107-11 (1984) (stating that municipal liability may compel efforts by local governments to monitor police behavior).

163 *See* Note, *supra* note 111, at 833 (describing studies that show that department techniques affect crime prevention).

164 *See supra* notes 1-3 and accompanying text.

165 *See* Irwin v. Town of Ware, 467 N.E.2d at 1304 (Mass. 1984); Bailey v. Town of Forks, 737 P.2d 1257, 1259 (Wash. 1987). *See also* Note, *supra* note 111, at 833.

166 *See Irwin*, 467 N.E.2d at 1304 ("[T]he Legislature, by enacting [the Massachusetts Tort Claims Act], chose to put the public funds at risk.")

nomic considerations to prevent every innocent plaintiff injured through the negligence of a public official from recovering.

Additionally, state legislatures may limit adverse economic effects of state and municipality liability for police negligent failure to detain drunk drivers. First, through the purchase of liability insurance, goverument entities can protect themselves from the financial burden of tort liability.[167] Second, legislatures may statutorily limit the maximum amount of damages awardable so that the government unit will not suffer financial devastation as a result of tort liability.[168]

The application of traditional tort principles in failure to detain drunk drivers cases will also prevent undue financial hardship on the government entity.[169] Thus, the government will not be strictly liable for an officer's failure to arrest a drunk driver. First, there must be a duty which is only created when a police officer stops, detains, or observes an individual, and the officer knows or should know the individual is intoxicated and intends to drive. Under these circumstances, the officer has a duty to detain the individual and perform a sobriety test. Second, the officer must breach that duty. If the results of the sobriety test indicate that the individual is intoxicated, the officer is required to prevent that individual from driving. Under this analysis, injured plaintiffs would be able to recover in cases similar to *Schutte*,[170] *Everton*,[171] and *Fessler*,[172] where the officer knows that the individual is intoxicated and intends to drive in that state but fails to conduct a sobriety test or prevent the individual

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167 Ryan v. State, 656 P.2d 597, 598-99 (Ariz. 1982). Admittedly, some local governments may be financially unable to acquire liability insurance; however, the policies requiring that government entities be subject to review in tort actions are overwhelming. Even a small municipality will be better suited financially to deal with the loss than the individual citizen.

168 *E.g.* R.I. GEN. LAWS § 9-31-3 (Supp. 1990):

> In any tort action against any city or town or any fire district, any damages recovered therein shall not exceed the sum of one hundred thousand dollars ($100,000) provided, however, that in all circumstances in which said city or town or fire district was engaged in proprietary functions in the commission of such tort, the limitation of damages set forth in this section shall apply.

Section 9-31-4 allows the general assembly to waive the limitation. R.I. GEN LAWS § 9-31-4 (Supp. 1990). *See also Irwin*, 467 N.E.2d at 1304 ("The town's argument might be more effective if the Legislature had not imposed a $100,000 limitation.").

169 *See* Leake v. Cain, 720 P.2d 152, 160 (Colo. 1986) (the application of tort principles and the protection of statutory limitations of liability better serve the policies of protecting excessive governmental liability and the prevention of "hindrance of the governing process").

170 729 S.W.2d 208 (Mo. Ct. App. 1987). *See supra* notes 102-08 and accompanying text.

171 468 So. 2d 936 (Fla. 1985). *See supra* notes 59-65 and accompanying text.

172 514 N.E.2d 515 (Ill. App. Ct. 1987). *See supra* notes 117-21 and accompanying text.

from driving. Under a tort analysis, such blatant disregard for the safety of others would result in recovery for those injured.

Under traditional negligence analysis, however, it would be unreasonable to assert that the officer should have known that an individual was intoxicated or that the individual intended to drive, the government would not be liable because no duty has been breached. In *Leake v. Cain*,[173] the court applied traditional tort principles and found that, because the officer had no reason to know that the intoxicated teenager would drive, his failure to detain the teenager did not result in liability for injuries resulting from the individuals subsequent driving.[174] The result in *Leake* indicates that traditional tort principles are sufficient to limit the liability of governmental units to cases where the officer clearly knew of an individual's intoxicated state and intent to drive in that state.

Although concerns regarding the protection of the government's financial stability in the face of tort liability are legitimate, these concerns do not serve to deny compensation to those injured as a result of a police officer's negligence in failing to detain a drunk driver. Interests in compensating the injured and establishing more responsive police policy outweigh the concern for the economic protection of the government.[175]

III

RECOMMENDATIONS TO ENSURE LIABILITY FOR NEGLIGENT FAILURE TO DETAIN DRUNK DRIVERS

A. Statutory Reform Mandating Arrest of Drunk Drivers

Despite the great concern about drunk driving, most statutes do not mandate arrest of drunk drivers.[176] Many of the statutes provide specific procedural guidelines for arresting an intoxicated

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173 720 P.2d 152, 160 (Colo. 1986). *See supra* note 129 and accompanying text.

174 *Leake*, 720 P.2d at 162 (the plaintiff's cause of action failed on conventional tort principles because "the officers had no reason to believe that [the teenager] had been driving under the influence of alcohol or that he intended to do so in the immediate future").

175 *See* Schear v. Board of County Comm'rs, 687 P.2d 728, 733-34 (N.M. 1984) (economic burden on government entities due to abrogation of the public duty doctrine outweighed by the advantage to society of more responsive government agencies).

176 Gregory H. Williams, *Police Discretion: A Comparative Perspective*, 64 IND. L.J. 873, 895 (1989).

driver[177] and specify penalties for driving while intoxicated,[178] but, as written, they imply that police officers have discretion in deciding whether or not to arrest.[179] As a result, courts interpret the loose language of these statutes to mean that the decision to detain a drunk driver is discretionary.[180] To remedy the problem, state statutes must command police to detain or arrest an individual if the officer has probable cause to believe that the individual has been driving while intoxicated. The statute must require mandatory enforcement so that courts will define the duty to arrest or detain as mandatory and allow injured parties to recover for neglect of this duty.[181]

State statutes may also be specifically written to provide for a cause of action against an officer and his employer for failure to enforce certain laws. In Connecticut, if police officers negligently fail to suppress riotous assemblies, the city is liable for all injuries suffered as a result of the officer's negligence.[182] Similarly, state legis-

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177 *Id. See, e.g.*, WIS. STAT. ANN. § 345.24(1) (West 1991):

> Officer's actions after arrest for driving under the influence of intoxicant.
>
> A person arrested under § 346.63(1) or (5) or an ordinance in conformity therewith or § 346.63(2) or (6) or 940.25, or § 940.09 where the offense involved the use of a vehicle, may not be released until 12 hours have elapsed from the time of his or her arrest or unless a chemical test . . . shows that there is 0.04% or less by weight of alcohol in the person's blood or 0.04 grams or less of alcohol in 210 liters of the person's breath, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest.

178 *See, e.g.*, IOWA CODE ANN. § 321J.2(2)(a) (West Supp. 1991) (not mandating arrest, but providing for mandatory two-day jail sentence for conviction of first offense).

179 *See, e.g.*, MD. TRANSP. CODE § 16-205.2(a) (1987 & Supp. 1991) (providing that an officer who has reasonable grounds to believe that an individual is or has been driving or attempting to drive while intoxicated, the officer "may" request that the individual submit to a breath test).

180 *See supra* notes 66-73 and accompanying text.

181 A statute mandating that an officer detain a drunk driver could be written as follows:

> Purpose: To provide mandatory guidelines for police officers regarding drunk drivers; to prevent injuries that may be prevented by effective police action; to provide a cause of action to innocent victims should a police officer negligently fail to prevent an intoxicated individual from driving.
>
> If a police officer observes, stops, or detains an individual whom the officer suspects or should suspect is intoxicated and has been driving or intends to drive a motor vehicle while under the influence of alcohol or drugs, the officer must:
>
> a. detain the individual;
> b. administer a test to discover the alcohol content in the individual's blood;
> c. if the defendant's blood alcohol content is more than .10 percent, or if the individual refuses to submit to the test, the officer must take the individual into protective custody or arrest the individual.

182 Shore v. Town of Stonington, 444 A.2d 1379 (Conn. 1982); *see* CONN. GEN. STAT. ANN. § 7-108 (West 1989):

latures should enact statutes that specifically provide a cause of action for third parties who are injured as a result of a police officer's negligent failure to detain a drunk driver. Such a statute will guarantee that those who deserve compensation will have the opportunity to seek redress in court.

B. Abolishment of the Public Duty Doctrine

Each state should follow lead of the Colorado Supreme Court in *Leake v. Cain*[183] and eight other state courts and abolish the public duty doctrine.[184] States abrogated the doctrine of absolute sovereigu immunity because of the injustice to injured plaintiffs.[185] Courts continue to impose the functional equivalent of sovereigu immunity, however, by using the public duty doctrine to shield the public entity from liability.[186] Like sovereigu immunity, the public duty doctrine shields the government from liability merely because of the status of the wrongdoer; the doctrine protects the goverument from liability when a private individual would be liable.[187]

> CITY OR BOROUGH LIABLE FOR DAMAGE DONE BY MOBS. Each city and borough shall be liable for all injuries to person or property, including injuries causing death, when such injuries are caused by an act of violence of any person or persons while a member of, or acting in concert with, any mob, riotous assembly of persons engaged in disturbing the public peace, if such city or borough, or the police or other proper authorities thereof, bave not exercised reasonable care or diligence in the prevention or suppression of such mob, riotous assembly or assembly engaged in disturbing the public peace.

In *Shore*, the court refused to find the officer or the city responsible for the officer's failure to arrest an intoxicated driver because the statutes regarding drunk driving were not ministerial in nature. *Shore*, 444 A.2d at 1382. The court also stated that if Connecticut bad a statute analogous to § 7-108 which provided a cause of action for negligent failure to detain drunk drivers, the plaintiff may have recovered. *Id.* at 1382-83. However, Connecticut had no such statute and the plaintiff had no cause of action.

183 720 P.2d 152 (Colo. 1986).

184 *See supra* note 101 and accompanying text. Although when the public duty doctrine has been abolished, it bas been done by the judiciary, state legislatures are urged to eliminate this unjust and unfounded doctrine through statute.

185 *See* McAndrew v. Mularchuk, 162 A.2d 820, 830-31 (N.J. 1960):

> It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of government sbould be imposed upon the single individual who suffers the injury, ratber than distributed among the entire community constituting the government, . . . and where it justly belongs.

(citations omitted)

186 *See Leake*, 720 P.2d at 160 ("[T]he effect of [the public duty doctrine] is identical to sovereign immunity").

187 Adams v. State, 555 P.2d 235, 241-42 (Alaska 1976) ("An application of the public duty doctrine here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private

Thus, the public duty doctrine accomplishes the same unjust results as absolute sovereign immunity and, like sovereign immunity, must be abolished.

CONCLUSION

A police officer's duty to prevent an intoxicated individual from driving is mandatory; once an officer knows the individual is intoxicated, he should be required to prevent that individual from driving. Neither the public duty doctrine nor discretionary act immunity should protect the government from liability to injured third parties in this context. Nevertheless, by inappropriately cloaking the inaction as a discretionary function or a duty owed to the public in general rather than to any individual plaintiff, some courts have protected the police and their government employers from liability. As a result, injured plaintiffs are denied the opportunity to seek redress for injuries that an officer could have prevented. Holding police and their government employers liable for negligent failure to detain a drunk driver is justified because to do so effectively compensates the victim, deters negligent police behavior, and encourages effective government policy in preventing drunk driving. All courts should abolish the artificial barriers to government liability and provide those injured by negligent enforcement of drunk driving statutes an opportunity to seek compensation.

Kelly Mahon Tullier

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defendant would have owed such a duty, no 'special relationship' between the parties existed.").