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## Ride at Your Own Risk: Bicycling and Government Tort Immunity in Illinois, 43 J. Marshall L. Rev. 293 (2009)

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RIDE AT YOUR OWN RISK:  
BICYCLING AND GOVERNMENT TORT IMMUNITY  
IN ILLINOIS

JOHN OCHOA\*

I. INTRODUCTION

Affixed to the windshield of approximately 1.3 million vehicles registered in Chicago is a city vehicle sticker.<sup>1</sup> In 2008, the sticker featured a person riding a bicycle and the phrase “share the road.”<sup>2</sup> The sticker served as a reminder that bicyclists are also users of the road.<sup>3</sup> Chicago’s Mayor Richard Daley has stated he wishes to turn Chicago into the most “bicycle-friendly” city in the nation.<sup>4</sup> One would think that these are clear indications that the city intends for cyclists to ride their bikes on the street. After all, Chicago’s Vehicle Code specifically prohibits cyclists from riding on the sidewalks.<sup>5</sup>

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1. Press Release, City of Chicago Office of the City Clerk, City Clerk del Valle Announces City Sticker Contest Winner!: 2008-2009 Vehicle Sticker Reflects “Share the Road” Theme (Dec. 5, 2007), *available at* <http://www.chicityclerk.com/office/pressreleases/2007/december/City%20Sticker%20Art%20Contest%20Winner%20120507.pdf> [hereinafter Sticker Contest].

2. See Passenger Automobile Chicago Vehicle Registration Sticker, [http://justyna.typepad.com/photos/uncategorized/2008/07/23/p1220454\\_2.jpg](http://justyna.typepad.com/photos/uncategorized/2008/07/23/p1220454_2.jpg) (last visited Oct. 27, 2009) (containing a photograph of the Chicago vehicle registration sticker).

3. See Sticker Contest, *supra* note 1 (stating that “Chicago high school students, grades 9-12, were invited to submit artwork highlighting the City of Chicago’s efforts to make Chicago’s roads safe and friendly to all including bicyclists, pedestrians and motorists.”). One student’s artwork was selected for use as the design. *Id.*

4. Chicago Streets for Cycling Plan, A Message from the Mayor, <http://www.cityofchicago.org/Transportation/bikemap/> (last visited Feb. 28, 2010). See generally CITY OF CHICAGO MAYOR’S BICYCLE ADVISORY COUNCIL, BIKE 2015 PLAN 2 (2006), *available at* <http://www.bike2015plan.org/pdf/bike2015plan.pdf> (announcing that “[t]he Bike 2015 plan is the City of Chicago’s vision to make bicycling an integral part of daily life in Chicago.”). The plan recommends projects, programs, and policies for the next ten years to “encourage use of this practical, non-polluting and affordable mode of transportation.” *Id.* Included in the report is a plan to create a 500 mile bikeway network, and states that bicyclists’ needs should be considered in the “planning, design, construction and maintenance of all streets. . . . Road hazards such as potholes, broken glass and sewer grates that trap bicycle wheels should be identified on a regular basis and repaired quickly.” *Id.* at 3.

5. CHICAGO, ILL., CODE § 9-52-020(b) (2008). The Code allows an

The word “intent,” however, takes on a different meaning in Illinois when applied to cyclists who are injured by unsafe road conditions. Applying the Local Governmental and Governmental Employees Tort Immunity Act (“Tort Immunity Act”), the Illinois Supreme Court found in *Boub v. Township of Wayne* that unless a city has made an “affirmative manifestation” for cyclists to use roads by way of signage or road markings, cyclists are not intended users of the road, and the municipality is immune from suits for injuries caused by unsafe, defective, or poorly maintained roads.<sup>6</sup> This decision prompted many towns in Illinois to abandon plans to create bicycle paths and lanes, or not begin them at all, lest they open themselves up to liability.<sup>7</sup>

It is surprising that despite Chicago’s trailblazing attitude<sup>8</sup> toward cycling, state lawmakers in Springfield who represented “city districts” opposed House Bill 4907,<sup>9</sup> a bill that would have “fixed” the illogical application of the Tort Immunity Act as to bicyclists.<sup>10</sup> As the law stands today, cyclists in Illinois who ride

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exemption for children under the age of twelve. *Id.*

6. 702 N.E.2d 535, 543 (Ill. 1998) (4-3 decision).

7. See League of Illinois Bicyclists, Some Examples of the Powerful Effects of the *Boub* Disincentive, Since 1998, <http://www.bikelib.org/wp-content/uploads/2009/11/BoubCaseFallout03.pdf> (last visited Sept. 28, 2008) (listing seventeen examples of municipalities in Illinois that have abandoned proposed bike routes and road markings for cyclists after the *Boub* case was decided). These are only the examples that the League of Illinois Bicyclists is aware of because of its personal involvement in the initiatives. *Id.* Some towns, however, have decided to move forward with bicycle lanes. See Ed Barsotti, *On-road Bicycle Routes and Illinois’ Liability Disincentive*, Oct. 16, 2008, available at <http://bikelib.org/wp-content/uploads/2009/11/boubdisincentiveriskexposure.pdf> (listing towns that have installed bicycle lanes since the *Boub* decision). The League of Illinois Bicyclists has been addressing the overstated risks of liability, one town at a time, in order to calm fears over installing bicycle lanes. See *id.* (stating its belief that there has been an overreaction to issue of liability and that they are asking agencies to re-examine their positions against adding safety features).

8. In addition to the efforts noted in note 4 *supra*, Chicago has passed ordinances that further protect cyclists. One ordinance requires that vehicles give cyclists at least three feet of clearance when passing on the left. CHICAGO, ILL., CODE § 9-36-010(c) (2008). Another requires motorists to yield the right of way to cyclists making a left turn. CHICAGO, ILL., CODE § 9-16-020(e) (2008).

9. H.B. 4907, 94th Gen. Assem. (Ill. 2006). The bill would have amended the Illinois Vehicle Code to provide that a person riding a bicycle is an intended and permitted user of any highway in Illinois unless specifically prohibited. *Id.* Furthermore, the bill would have expanded liability of municipalities to road conditions only if that condition failed to meet the standard of care required for a car. *Id.* In other words, under the proposed law, municipalities would probably not be liable for road conditions that are only dangerous to cyclists.

10. See *id.* (attempting to amend the Illinois Vehicle Code so there is no liability for conditions that meet the standard of care for a car); see also *Boub*, 702 N.E.2d at 544 (Heiple, J., dissenting) (noting that the application of the

on roads with no bicycle road markings or signage ride “at their own risk” with respect to road conditions.<sup>11</sup> This statewide policy discourages a healthy,<sup>12</sup> environmentally friendly alternative to driving<sup>13</sup> by creating a disincentive for towns to install bicycle lanes on the road.<sup>14</sup> This disincentive puts cyclists and motorists alike at a greater risk of accident.<sup>15</sup>

As we enter the 21st century, sustainable design will become the mantra for new construction and urban planning projects.<sup>16</sup>

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new law creates illogical results).

11. Local Governmental and Governmental Employees Tort Immunity Act, 745 ILL. COMP. STAT. 10/3-102 (West 2008); *see Boub*, 702 N.E.2d at 543 (interpreting the “permitted and intended” language in the Tort Immunity Act as requiring “affirmative manifestations” of intent in the form of signage or road markings before a town would be liable for an injury to a cyclist caused by an unsafe road condition).

12. WORLD HEALTH ORGANIZATION, A PHYSICALLY ACTIVE DAY THROUGH EVERYDAY TRANSPORT 6, 9-10 (2002), *available at* <http://www.euro.who.int/document/e75662.pdf> [hereinafter W.H.O.]. The report cites studies in Denmark, the Netherlands, and the United Kingdom that have tested the physical effects of cycling on health. *Id.* at 9-10. The studies found that cycling has a “strong protective function” on maintaining health and can have a great positive effect on those who are considered “non-exercisers.” *Id.* at 9. The positive effects include weight loss and lower mortality rates. *Id.* at 7.

13. OFFICE OF MOBILE SOURCES, U.S. ENV'T PROT. AGENCY, AUTOMOBILE EMISSIONS, AN OVERVIEW 1 (1994), *available at* <http://www.epa.gov/otaq/consumer/05-autos.pdf>. The EPA writes, “Emissions from an individual car are generally low . . . . But in numerous cities across the country, the personal automobile is the single greatest polluter, as emissions from millions of vehicles on the road add up. Driving a private car is probably a typical citizen’s most ‘polluting’ daily activity.” *Id.*

14. *See Boub*, 702 N.E.2d at 544 (Heiple, J., dissenting) (stating that *Boub* provides a disincentive to municipalities to build bicycle lanes for fear of liability).

15. William Moritz, *Adult Bicyclists in the United States—Characteristics and Riding Experience in 1996*, (Transp. Research Bd., Pre-Print Copy of paper 98-0009, 1998), *available at* <http://www.bicyclinglife.com/Library/Moritz2.htm>. The sample group in this study were members of the League of American Bicyclists, who are presumably more experienced than the average cyclist. *Id.* The study also found that streets with bike lanes had a significantly lower crash rate than either “major” or “minor” streets. *Id.* *See generally* Ian Hallett et al., Center for Transportation Research, Evaluation of On-Street Bicycle Facilities Added to Existing Roadways 61 (unpublished report, on file at Center for Transportation Research, The Univ. of Texas at Austin) (Aug. 2006) *available at* [http://www.utexas.edu/research/ctr/pdf\\_reports/0\\_5157\\_1.pdf](http://www.utexas.edu/research/ctr/pdf_reports/0_5157_1.pdf) (examining cyclist and motorist behaviors on roads with various types of cycling lanes, including roads without bicycle lanes). The study was done to determine feasibility of retrofitting roads with bike lanes. *Id.* at 1. The study found that when bike lanes were present, motorists were less likely to swerve into the adjacent lane to avoid cyclists. *Id.* at 26.

16. *See generally* Release, Obama Biden, Barack Obama and Joe Biden: New Energy for America (2008), [http://www.barackobama.com/pdf/factsheet\\_energy\\_speech\\_080308.pdf](http://www.barackobama.com/pdf/factsheet_energy_speech_080308.pdf) (last visited Nov. 12, 2008) (discussing future plans

As a former Illinois State Senator, President Barack Obama was a cosponsor of one of the early attempts to remove the bicycle lane disincentive in Illinois.<sup>17</sup> His current energy platform encourages creating sustainable communities, including investments into transportation alternatives such as cycling.<sup>18</sup> It is time for a new path in Illinois.

This Comment begins by taking a glance back at the history of tort immunity and cycling law in Illinois. Next, the Comment briefly examines the policy arguments for and against abolishing government immunity with respect to bicyclists. Then, it analyzes the prior attempts at making cyclists “intended” users of the road and examines the many facets of tort liability. This Comment concludes by proposing a tort immunity scheme that would create an incentive for towns to install bicycle lanes and make Illinois a national leader in promoting cycling and protecting cyclists on the road.

## II. BACKGROUND

### A. Tort Immunity: History and Justifications

The idea that government should be immune from civil liability is firmly rooted in Anglo-American jurisprudence, embodied in the maxim “the King can do no wrong.”<sup>19</sup> It was justified by the notion that no court could have jurisdiction over the sovereign, as this would imply that the courts have authority over a king, who was considered supreme.<sup>20</sup> While government immunity from tort liability was abolished in England in 1890, the theory persisted in the United States.<sup>21</sup> Federal, state, and local governments enjoyed a wide degree of immunity from lawsuits.<sup>22</sup> Change slowly came in the United States, but some remnants of

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to implement green technology and use sustainable methods of design).

17. Illinois General Assembly, *Bill Status of S.B. 275*, 93rd Gen. Assem., <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=275&GAID=3&DocTypeID=SB&LegId=1922&SessionID=3&GA=93> (last visited Nov. 12, 2008).

18. Release, *supra* note 16.

19. Edwin Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924).

20. *See id.* (noting that in the Anglo-Saxon system of law the King could not be sued).

21. *See id.* (explaining that mysterious reasons lie behind the granting of immunity to a king in the United States, but that nevertheless such practice has become the law); *see also* David Decker, *When the King Does Wrong: What Immunity Does Local Government Deserve?*, 86 ILL. B.J. 138, 139 (1998) (stating, “The concept of sovereign immunity . . . remained viable in its entirety well into the 20th century.”).

22. Decker, *supra* note 21 at 139. The States are immune from suit except for when they have given their consent to be sued pursuant to the Eleventh Amendment. *Id.* at 139. The federal government could not be sued for tortious conduct until the passage of the Federal Torts Claim Act in 1946. *Id.* at 139.

this “royal prerogative” still endure. Illinois partially waived its 11th Amendment immunity through the 1945 Court of Claims Act.<sup>23</sup> Currently, municipalities can be sued, with limitations, pursuant to the Illinois Tort Immunity Act.<sup>24</sup>

Modern justifications for governmental tort immunity include the fear of an avalanche of lawsuits as well as preventing the use of tax money for the satisfaction of claims.<sup>25</sup> Former Illinois Governor Jim Edgar, in vetoing a bill that would have imposed liability on municipalities for “willful and wanton” conduct in failure to supervise activities on public property, said that tort immunity is “essential to the effective delivery of government services.”<sup>26</sup> The Illinois Supreme Court has noted, however, that abolition of immunity could increase the safety of the citizenry by forcing municipalities to show more care in the delivery of services.<sup>27</sup>

### B. The Path of Bicycle Law in Illinois

The path of bicycle law in Illinois began in Chicago in 1905, and the cyclist who unintentionally put the wheels in motion was Alfred Molway.<sup>28</sup> When Alfred was a child, he had an accident that required the amputation of one leg below the knee.<sup>29</sup> Not ready to give up on the pleasures of life, he received an artificial leg and became proficient enough with it to ride a bicycle.<sup>30</sup> Unfortunately, the fifteen-year-old Molway suffered another permanent injury, this time to his hip, after he was thrown from his bike.<sup>31</sup> A sinkhole in the road, obscured by new rain, caused his fall.<sup>32</sup>

Molway brought suit against the City of Chicago to recover for

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23. 1945 ILL. LAWS p.660 § 1 (current statute at 705 ILL. COMP. STAT. 505/1 *et seq.* (West 2008)). Through the act, citizens can make claims against the state for breach of contract, violations of state laws and regulations, and claims sounding in tort; however, damages are capped at \$100,000 for all tort-like claims except claims arising from motor vehicle accidents with automobiles owned by the state and driven by state employees. *Id.*

24. 745 ILL. COMP. STAT. 10/3-101 *et seq.* (West 2008).

25. *Molitor v. Kaneland Cmty.* Unit Dist. No. 302, 163 N.E.2d 89, 91 (Ill. 1959). The notions that a waiver of immunity would result in large amounts of lawsuits and drain public funds were rejected by the Court. *Id.* at 95.

26. Decker, *supra* note 21, at 143-44.

27. *Molitor*, 163 N.E.2d at 95. The Court was discussing the care that would be used in the selection of bus drivers should tort immunity with respect to school districts be abolished. *Id.*

28. *See generally* *Molway v. City of Chicago*, 88 N.E. 485 (Ill. 1909).

29. *Id.* at 487.

30. *Id.*

31. *Id.*

32. *Id.* at 487-88. The hole in question was ten to fifteen inches in depth and roughly a foot wide and two feet long. *Id.* Evidence showed that the hole had existed for two to three months prior to the accident. *Id.*

his injuries.<sup>33</sup> A jury found in Molway's favor, and the appellate court affirmed.<sup>34</sup> The Defendant, City of Chicago, appealed and made the argument that a cyclist is not an "ordinary traveler" of the road. The city asserted that it only had a duty to keep the road in a reasonably safe condition for "ordinary travel," which at the time included wagons, carriages, and a new traveler of the roads, automobiles.<sup>35</sup>

The Illinois Supreme Court decided that "ordinary travel" included the use of a street by a bicycle.<sup>36</sup> The justices took guidance from several other jurisdictions that held a bicycle was a "vehicle."<sup>37</sup> The Court held that municipalities must keep roads in a reasonably safe condition for the use of vehicles in general, and cities should take into consideration the likelihood that roads will be used by all vehicles in regular use.<sup>38</sup>

This common-law rule of governmental liability, that a municipality should be liable for the injuries of foreseeable users of roads, would ultimately be superceded by the Illinois Tort Immunity Act in 1965.<sup>39</sup> The relevant section of the current Tort Immunity Act with respect to cyclists on highways reads in pertinent part:

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33. *Id.* at 485.

34. *Id.* at 487.

35. *Id.* at 488. Specifically, the defendant argued the trial court erred in refusing certain jury instructions. *Id.* The exact language offered by the defense was as follows: "If you believe, from the evidence, that the street in question, at the time and place of the alleged accident, was reasonably safe for ordinary travel thereon by persons riding in vehicles, such as wagons, carriages, and other similar vehicles, then you are instructed to find for the defendant . . ." *Id.* This language is interesting to note because it is similar in substance to House Bill 4907. Compare *infra* text accompanying note 66 (laying out text of House Bill 4907), with *Molway*, 88 N.E. at 488 (discussing that towns do not have a duty to keep roads absolutely safe for bicycle travel).

36. *Molway*, 88 N.E. at 489. The Court defined a bicycle as a "vehicle" and pointed out that bicycles were not allowed on sidewalks. *Id.* In support of its holding, they also said that bicycles were bound by the "law of the road." *Id.*

37. *Id.* (citing *Holland v. Bartch*, 22 N.E. 83 (Ind. 1889); *Lee v. City of Port Huron*, 87 N.W. 637 (Mich. 1901); *Thompson v. Dodge*, 60 N.W. 545 (Minn. 1894); *Taylor v. Union Traction Co.*, 40 A. 159 (Pa. 1898)). These cases held that a bicycle is a "vehicle" and has rights equal to other vehicles. *But see* 625 ILL. COMP. STAT. 5/1-217 (2008) (defining "vehicle" as "[e]very device in, upon or by which any person or property is or may be transported or drawn upon a highway . . . except devices moved by human power . . ."). This definition of "vehicle" was used by the *Boub* Court to support the contention that bicycles were not "intended" users of the road. *Boub*, 702 N.E.2d at 540.

38. *Molway*, 88 N.E. at 492.

39. 1965 ILL. LAWS 2983, § 3-106. See generally *Molitor*, 163 N.E.2d at 89 (discussing the history of governmental tort immunity in Illinois, especially as it relates to school districts). The Court abolished the common-law rule for governmental immunity as it applies to school districts. *Id.* at 96.

Except as otherwise provided in this article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people *whom the entity intended and permitted* to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used . . . .<sup>40</sup>

The Act dramatically altered the foreseeability rule set forth in *Molway v. City of Chicago*. Now, instead of municipalities being required to keep roads reasonably safe for all foreseeable users, the municipalities themselves narrowly define what classes of people are “intended and permitted” users of the road.<sup>41</sup> Courts applying this statute have found that municipalities evince intent for certain people to be intended users of a roadway by the existence or absence of road markings and signage.<sup>42</sup>

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40. 745 ILL. COMP. STAT. 10/3-102 (West 2008) (emphasis added). Another section of the Tort Immunity Act applies to cyclists riding on off-road bike paths. This Section reads,

Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local public entity or public employee is guilty of willful and wanton conduct proximately causing such injury.

745 ILL. COMP. STAT. 10/3-106. Notice the standard of care is “willful and wanton” and not the “reasonable care” standard found in 10/3-102. Further, note the language “intended *or* permitted” instead of “intended *and* permitted” in 10/3-102 (emphasis added).

41. 745 ILL. COMP. STAT. 10/3-102 (West 2008). A line of cases following the passage of the Illinois Tort Immunity Act defined the parameters of this Act. These cases involve people injured on Illinois government property, mainly roads and sidewalks, while on foot. See generally Bruce Epperson, *Permitted but Not Intended: Boub v. Township of Wayne, Municipal Tort Immunity in Illinois, and the Right to Local Travel*, 38 J. MARSHALL L. REV. 545 (2004) (analyzing cases and detailing the interpretation of the Local Governmental and Governmental Employees Tort Immunity Act and the subsequent case law). Epperson analyzed whether cyclists could find relief in Illinois under various § 1983 claims. *Id.* at 580-608.

42. See *Deren v. City of Carbondale*, 300 N.E.2d 590, 593 (Ill. App. Ct. 1973) (“A city is only required to maintain the respective portions of its streets in a reasonable safe condition for the purposes to which they are respectively devoted by the intention and sanction of the city.”); see also *Wojdyla v. City of Park Ridge*, 592 N.E.2d 1098, 1102 (Ill. 1992) (“To determine the intended use of the property involved here, we need look no further than the property itself.”); *Locigno v. City of Chicago*, 178 N.E.2d 124, 128 (Ill. App. Ct. 1961) (“A street . . . becomes a through street because it is so designated and appropriate signs are placed.”). But see *DiDomenico v. Romeoville*, 525 N.E.2d 242 (Ill. App. Ct. 1988) (holding that a pedestrian who tripped on a pothole in the street while going to his parked car could state a cause of action despite the fact that the portion of road was not marked for pedestrian use). The court said that “[i]t defies common sense to conclude that such local entities did not contemplate and intend that the operator of the vehicle along with



The next cyclist to come before the Illinois Supreme Court could not rely on the common-law rule of liability in *Molway* but instead had to overcome the statutory rule in the Tort Immunity Act. Jon Boub, an experienced cyclist, was riding a bicycle across a bridge when his tire became stuck between two loose planks of wood.<sup>43</sup> The planks had been loosened earlier by workers who were installing a new bridge deck.<sup>44</sup> No warning signs were posted.<sup>45</sup> Boub was seriously injured<sup>46</sup> and brought a six-count complaint against Township of Wayne, including three counts alleging negligence.<sup>47</sup> This case, known widely throughout the cycling community in Illinois, is *Boub v. Township of Wayne*.<sup>48</sup>

The trial court granted the Township's motion for summary judgment, and the appellate court affirmed.<sup>49</sup> On appeal to the Illinois Supreme Court, Boub raised several arguments in support of his position that he was an intended user of the road. He argued, quite logically, that the Illinois Vehicle Code treats cyclists the same as drivers of vehicles,<sup>50</sup> that DuPage County had

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passengers would use the street area around the parked vehicle for ingress and egress to and from their vehicle." *Id.* at 243.

43. *Id.* at 536.

44. *Id.*

45. *See id.* at 543 (noting plaintiff's argument alleging defendant's failure to post warning signs). Boub raised a new argument on appeal that the defendants could be liable under 745 ILL. COMP. STAT. 10/3-104 (West 2008) for failure to post any warning signs regarding the construction project. *Id.* Because Boub failed to raise this argument in the trial court, it was not considered by the Supreme Court. *Id.*

46. *See Epperson, supra* note 41, at 546 (stating Boub suffered from a concussion, three herniated discs, a fractured hip, crushed pelvic joint, torn ligament in his left foot and a dislocated shoulder). His out-of-pocket medical expenses were almost \$50,000. *Id.*

47. Boub only appealed three counts to the Supreme Court. *Boub*, 702 N.E.2d at 537. *See supra* text accompanying note 46 (discussing forfeiture of count III). Count I alleged negligence under 745 ILL. COMP. STAT. 10/3-102 (West 1996). Count II alleged negligence under 745 ILL. COMP. STAT. 10/3-103 (West 1996), which created a cause of action for implementing an unsafe plan or design that appears from its use that it is not reasonably safe. *Id.* The Court did not consider Count II, as liability under 745 ILL. COMP. STAT. 10/3-103 (West 1996) is dependent on the plaintiff being an "intended" user under 10/2-102. *Id.*; *see also* *Curtis v. County of Cook*, 456 N.E.2d 116, 119 (Ill. 1983) (finding that the Government Tort Immunity Act should be "construed as a whole," and that a finding of no liability under section 10/3-102 necessarily meant no liability under 10/3-103).

48. *Boub*, 702 N.E.2d at 543.

49. *Id.* at 536.

50. *Id.* at 540. Boub cited to 625 ILL. COMP. STAT. 5/11-1502 (West 1996) (current version at 625 ILL. COMP. STAT. 5/11-1502 (West 2008)). *Id.* This Section provides that "every person riding a bicycle upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this code." 625 ILL. COMP. STAT. 5/11-1502 (West 2008).

designated the road as a “through street suitable for biking,”<sup>51</sup> and that cyclists “customarily” used the road for bicycling.<sup>52</sup> Boub also argued that *Molway*, a case that had never been explicitly overruled, should be followed.<sup>53</sup>

The Court, in interpreting the Tort Immunity Act, rejected Boub’s arguments and held that cyclists were not intended users of the road.<sup>54</sup> The Court said that it was the municipality, in this case Wayne Township, that defined who was an intended user of the road.<sup>55</sup> The Court also said this intent is proven by the existence of bicycle road markings or signage—in this case, neither was present.<sup>56</sup>

The case was closely divided (four to three) and contained a strong dissent by Justice Heiple.<sup>57</sup> In his dissent, Justice Heiple accepted the plaintiff’s logic<sup>58</sup> and said the Court’s holding would create a disincentive to install bicycle lanes and routes.<sup>59</sup> He also pointed out the unfairness of the decision, noting that the condition of the bridge could have just as easily injured a motorcyclist who would be able to recover, while a bicyclist would not.<sup>60</sup> Just as Justice Heiple predicted, the decision prompted numerous municipalities to abandon their bicycle lane projects.<sup>61</sup>

The language of the Tort Immunity Act continues to act as a

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51. *Boub*, 702 N.E.2d at 541. There was no indication in the case that DuPage County’s “designation” of the road as suitable for bicycles included signs or road markings on the road itself. *Id.*

52. *Id.*

53. *See id.* (arguing that the appellate court’s decision was inconsistent with *Molway*).

54. *Id.* at 543.

55. *Id.*

56. *Id.* at 539. *But see* *Cole v. City of East Peoria*, 559 N.E.2d 769, 773 (Ill. App. Ct. 1990) (finding that municipality could be liable for injury to a child cyclist who was injured after her bicycle was caught in a sewer grate). Cyclist was riding on a four-foot section of road that was demarcated with a white stripe. *Id.* at 771. No signs or road markings specifically designated the area to be used by cyclists, but the city had known that cyclists “customarily” used the area for cycling. *Id.* at 770.

57. *Boub*, 702 N.E.2d at 543-45. “The majority’s conclusion that bicyclists are not intended users of roads defies common sense, contravenes statutory authority, and frustrates public policy.” *Id.* at 544 (Heiple, J., dissenting).

58. *Id.* at 543-45. Justice Heiple stated that the Illinois Vehicle Code and DuPage County’s designation of the road as a bicycle route support the conclusion that the village intended for cyclists to use the road. *Id.* at 544. He also points out that the State of Illinois has adopted a policy that cyclists should “be given full consideration during the development of highway projects.” *Id.*

59. *Id.* at 544-45.

60. *Id.* at 544.

61. *Supra* text accompanying note 7. In addition to cities abandoning their projects, one county actually removed signage that was already in place; Rock Island County removed all “share bikeway” signs on advice of the city attorney. League of Illinois Bicyclists, *supra* note 7.

roadblock to recovery. In *Latimer v. City of Chicago*, an adult cyclist was injured after riding over uneven city streets.<sup>62</sup> There were no road markings indicating the city intended for the cyclist to ride on that road.<sup>63</sup> The appellate court affirmed the trial court's grant of summary judgment for the city.<sup>64</sup> The appellate court followed the reasoning in *Boub* and was not persuaded by the cyclist's assertions that the Chicago Vehicle Code demonstrated intent for cyclists to use all the city streets.<sup>65</sup> Since *Boub* and the subsequent decisions, several attempts have been made to amend the Illinois Vehicle Code. All attempts thus far have failed.<sup>66</sup>

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62. *Latimer v. City of Chicago*, 752 N.E.2d 1161, 1162 (Ill. App. Ct. 2001).

63. *Id.*

64. *Id.* at 1166.

65. *Id.* at 1164-65. Plaintiff attempted to analogize the city ordinances in Chicago to those in *Brooks v. City of Peoria*, arguing that, taken together, they demonstrated the City of Chicago's intent for cyclists to use the streets. *Id.* at 1165-66 (citing *Brooks v. City of Peoria*, 712 N.E.2d 387 (Ill. App. Ct. 1999)). In *Brooks*, a child cyclist was able to maintain an action for injuries suffered while riding on a broken sidewalk despite the fact that no signs or markings indicated that the child was an "intended" user. *Brooks* 712 N.E.2d 387, 391 (Ill. App. Ct. 1999). The court justified their departure from *Boub* by relying on city ordinances, as well as by essentially saying that allowing defendant, City of Peoria, to enjoy liability for injuries to infant cyclists on defective sidewalks would be unconscionable. *Id.*

The plaintiff in *Latimer* cited to ordinances that defined "streets" as "the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of general traffic circulation," and defines "traffic" as "pedestrians, ridden or herded animals, bicycles, vehicles, and other conveyances . . ." 752 N.E.2d at 1164. (citing CHICAGO, ILL., CODE § 9-4-010 (1997) (current version at CHICAGO, ILL., CODE § 9-4-010 (2008)). Plaintiff also notes that cyclists are prohibited from riding on the sidewalks. *Id.* at 1165 (citing CHICAGO, ILL., CODE § 9-52-020(b) (1990)). The Court countered with an ordinance that says a "roadway" is a portion of public way "intended to be used" for vehicular travel, and emphasizes the "intended" language. *Latimer*, 752 N.E.2d at 1164. (citing CHICAGO, ILL., CODE § 9-4-010). In *Brooks*, the court also found ordinances contrary to their holding, such as a Peoria ordinance defining sidewalk as "intended for the use of pedestrians," but strains to find a way around the language. 712 N.E.2d at 391-92 (Ill. App. Ct. 1999).

66. In addition to House Bill 4907, discussed in note 9 *supra*, there have been other failed attempts to pass similar legislation, including House Bill 2390, 94th Gen. Assem. (Ill. 2005) and Senate Bill 275, 93rd Gen. Assem. (Ill. 2003). The following is the exact language of the amendment to the Illinois Vehicle Code proposed in House Bill 4907:

(b)(1) A person riding a bicycle is an intended and permitted user of any street or highway in Illinois except for a street or highway on which bicycle use has been specifically prohibited by the Department of Transportation or by a local public entity acting in compliance with Section 11-208.

(2) Notwithstanding subdivision (b)(1), no public entity shall be liable under this subsection (b) for the creation of, the existence of, or failure to remedy any condition related to the design, roadway surface, lighting,

### C. Time For a New Path

According to a study by the National Highway Traffic Safety Administration (“NHTSA”), there were an estimated 2.484 billion bicycle trips taken by Americans sixteen and older during the summer months of 2002 alone.<sup>67</sup> About thirteen percent of those cyclists said they felt “threatened” on their last ride.<sup>68</sup> Many cyclists felt that vehicles were driving too close for comfort.<sup>69</sup> About thirty-seven percent of “threatened” cyclists also felt in danger due to uneven walkways or roadways, in other words, dangerous road conditions.<sup>70</sup>

Another study by the NHTSA shows that these cyclists’ fears were warranted.<sup>71</sup> In 2008, 716 cyclists were killed, and another 52,000 were injured in traffic accidents in America.<sup>72</sup> In Illinois, 115 cyclists lost their lives and another 16,676 were injured in traffic accidents between 2004 and 2008.<sup>73</sup> In addition to these numbers, many non-fatal accidents involving cyclists go unreported, meaning the number of those injured is probably much higher.<sup>74</sup> Using “cost of injury” estimates from the Federal

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signage, or pavement markings of any street or highway causing injury to a person riding a bicycle, if that condition meets the standard of care required for a passenger car.

H.B. 4907, 94th Gen. Assem. (Ill. 2006).

67. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., NATIONAL SURVEY OF BICYCLIST AND PEDESTRIAN ATTITUDES AND BEHAVIOR 5 (2008), available at <http://www.scribd.com/doc/4947965/Bicyclist-Attitudes-and-Behaviors-Survey> [hereinafter ATTITUDES & BEHAVIORS]. The study was conducted by the Gallup Organization, and data was collected in 2002. *Id.*

68. *Id.* at 6.

69. *Id.* at 7. When asked why they felt threatened, eighty-eight percent responded that they felt threatened due to motorists. *Id.* The top concern amongst cyclists who felt threatened by motorists was motorists driving too close to the cyclist (forty percent), followed second by the speed of motorists (thirty-two percent). *Id.*

70. *Id.*

71. See generally NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2 (2009), available at <http://www.nrd.nhtsa.dot.gov/Pubs/811172.pdf>.

72. *Id.*

73. *Id.* (adding the number of cyclist fatalities each year from 2004 to 2008 listed in the “fatalities by person” table). Cyclist injury numbers were obtained from the Illinois Department of Transportation, Motor Vehicle Crash Information, <http://www.dot.state.il.us/trafficsafety/crashreports.html> (follow “Illinois Crash Facts and Statistics” links for the years between 2004-2008. Data is included in annual reports) (last visited Mar. 10, 2010).

74. See Jane C. Stutts & William W. Hunter, *Police Reporting of Pedestrians and Bicyclists Treated in Hospital Emergency Rooms*, 1635 TRANSP. RES. REC.: J. OF THE TRANSP. RES. BD. 88 (1998) (noting that bicyclists who were hospitalized or killed were 1.4 times more likely to be reported on the state crash files than were bicyclists receiving emergency room treatment only); see also Richard Brustman, N.Y. Bicycling Coal., *An Analysis of Available Bicycle and Pedestrian Accident*, in IMPROVING BICYCLING AND PEDESTRIAN SAFETY 89 (1999), available at <http://www.nybc.net/programs>

Highway Administration, cyclist deaths in Illinois between 2004 and 2008 cost approximately 333 million dollars, and injuries cost 1.0 billion dollars.<sup>75</sup>

Since 1965, and culminating with the *Boub* decision, cycling law in Illinois has been headed down the wrong path. The next section analyzes how removing the statutory disincentive and installing bicycle lanes will benefit the citizens of Illinois. The costs borne by municipalities from waiving immunity are also considered. The analysis concludes by examining in greater detail the various levels of liability applicable to municipalities.

### III. ANALYSIS

#### A. The Argument for Bicycle Lanes

The preamble of the Illinois Constitution proclaims that the State seeks “to provide for the health, safety, and welfare of the people . . . .”<sup>76</sup> The current state of tort immunity, however, creates a disincentive to create bicycle lanes, which makes the roads more dangerous for cyclists and motorists alike. As a direct effect, abolishing municipal immunity for bicycle accidents due to roadway conditions would give cities an incentive to keep their roads in good repair.<sup>77</sup> Removing the disincentive to create bicycle lanes, however, would have a greater effect on public health and safety.

Bicycle lanes protect both cyclists and motorists from accidents. Cyclists riding on streets with bike lanes have a thirty-eight percent (on major streets) to fifty-six percent (on minor streets) less chance of being involved in an accident than when

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/NYBCManual\_Appendices.pdf (analyzing bicycle and pedestrian accidents in New York State). Among the report’s findings: Bicycle-only accidents are generally not covered by insurers, removing a filing incentive; one-third of bicycle accident hospitalization cases are not in traffic accident databases; and bicycle accidents are less likely to be reported than accidents involving motor vehicles. *Id.*

75. League of American Cyclists, Facts and Figures, [http://www.bikeleague.org/media/facts/#how\\_many](http://www.bikeleague.org/media/facts/#how_many) (last visited Oct. 23, 2008). Cost estimates were from 2000, when the Federal Highway Administration estimated each cyclist death costs an average of \$2.9 million, and each injury costs an average of \$61,375. *Id.* Nationally in 2008, cyclist fatalities cost approximately \$2.1 billion, and cyclist injuries cost \$3.2 billion. *Id.* Also, the accident costs are probably greater because the numbers given only take into account reported accidents, and many accidents are not reported. Stutts & Hunter, *supra* note 74; Brustman, *supra* note 74, at 2-4. The National Highway Traffic Safety Administration estimated that two million people were injured while cycling in the last two years. ATTITUDES & BEHAVIORS, *supra* note 67, at 11.

76. ILL. CONST. pmbl.

77. This logic was used by the Illinois Supreme Court in *Molitor*. 163 N.E.2d at 95.

riding on streets without bike lanes.<sup>78</sup> Numerous other studies have shown that the existence of bike lanes also promotes safer cycling habits and increases rider safety.<sup>79</sup> Additionally, having dedicated bike lanes prevents motorists from “drifting” into other lanes of traffic while attempting to pass cyclists.<sup>80</sup> In this way, bicycle lanes make the roads safer for motorists as well.

Not only will bicycle lanes make citizens safer, they will also make them healthier. According to the Center for Disease Control, over twenty-five percent of the population in Illinois is considered obese.<sup>81</sup> One problem is that automobiles have replaced walking and cycling for all but the shortest trips.<sup>82</sup> One study estimated that medical conditions attributable to obesity cost Illinois 3.4 billion dollars over a two-year period.<sup>83</sup> Cycling provides intrinsic health benefits by lowering blood pressure, spurring weight loss, and decreasing mortality rates.<sup>84</sup>

Riding a bike rather than driving also has the extrinsic benefits of reducing automobile emissions<sup>85</sup> and lessening noise pollution.<sup>86</sup> Studies have shown that more people are willing to eschew their “gas-guzzlers” and use bike lanes when they are

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78. Moritz, *supra* note 15.

79. Cambridge Community Development, Safety Benefits of Bike Lanes, [http://www.cambridgema.gov/~CDD/et/bike/bike\\_safety.html](http://www.cambridgema.gov/~CDD/et/bike/bike_safety.html) (last visited Oct. 23, 2008). Website cites numerous studies that found the existence of bicycle lanes improves cyclist safety. *Id.* But see Paul Schimek, M.I.T. Department of Urban Studies and Planning, *The Dilemmas of Bicycle Planning* (Mar. 2, 1999), <http://www.massbike.org/info/dilemma.htm> (finding that bicycle lanes can sometimes encourage dangerous behavior, such as bikes making left turns from the furthest right lanes, and cars turning right in front of bicycle lanes).

80. Hallett, *supra* note 15, at 61.

81. Centers for Disease Control and Prevention, U.S. Obesity Trends, 1985-2007, <http://www.cdc.gov/obesity/data/trends.html> (last visited Oct. 22, 2008). This data is not being used to suggest there is a causal relationship between obesity rates and lack of bike lanes, but simply to show that there is much room for improvement, and Illinois should consider all avenues to improve the health of its citizens.

82. Jeffrey P. Koplan, MD, MPH, & William H. Dietz, MD, PhD, *Caloric Imbalance and Public Health Policy*, 282 J. AM. MED. ASSOC. 1579, 1579 (1999).

83. Centers for Disease Control and Prevention: Overweight and Obesity, <http://www.cdc.gov/obesity/causes/economics.html> (last visited Oct. 22, 2008).

84. W.H.O., *supra* note 12, at 9-10.

85. See Office of Mobile Sources, *supra* note 13 (noting that, in many cities, the automobile is the greatest air polluter).

86. See Rick Weiss, *Noise Pollution Takes Toll on Health and Happiness*, WASH. POST, Jun. 5, 2007, at HE05 (discussing problems caused by automobiles). The article cites a study by the U.S. Census Bureau that forty percent of Americans whose home has any type of traffic noise characterize the noise as “bothersome,” and one-third find the noise so bothersome that they would want to move. *Id.* The article highlights the negative effect of noise pollution on stress levels. *Id.*

available.<sup>87</sup> In addition, the increase in cyclists on the street makes cyclists safer overall because they make cars and other vehicles more aware of their existence.<sup>88</sup> Also, cyclists of all abilities have said they would like to see more bike facilities in their communities, such as bike lanes.<sup>89</sup> Finally, cycling can also help mitigate high gasoline prices and dependence of fossil fuels.<sup>90</sup> Bike merchants have reported increases in bicycle sales, in part because of high gas prices.<sup>91</sup>

### B. The Argument Against Bicycle Lanes

Bicycle lanes cost money. Installing one mile of bicycle lane costs the municipality approximately \$15,000.<sup>92</sup> This cost may be mitigated with federal funds from the Congestion Mitigation and Air Quality Improvement Program ("CMAQ"), which has authorized 8.6 billion dollars to go towards funding state and local transportation projects.<sup>93</sup> The cities of Chicago and Evanston in Illinois have received funds from this program to install bicycle lanes.<sup>94</sup> The program pays for up to eighty percent of road projects that contribute to cleaner air, such as bike lanes.<sup>95</sup>

In addition to construction costs, there is also the cost of liability. It is unclear how much insurance premiums would increase for municipalities if immunity with respect to cyclists is abrogated. This uncertainty did not prevent municipal lobbyists from resisting the change. In response to House Bill 4907,<sup>96</sup> the

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87. Jim Redden, *Bike Lanes Work, PSU Professor Says*, PORTLAND TRIB., Oct. 16, 2008, available at [http://www.portlandtribune.com/sustainable/story.php?story\\_id=122402296838932000](http://www.portlandtribune.com/sustainable/story.php?story_id=122402296838932000). The study found that cyclists sought out and used bike lanes where they were available; see also Cambridge Community Development, *supra* note 79 (stating that bike lanes encourage biking as a means of transportation).

88. Interview with Randy Neufeld, Healthy Streets Campaign Coordinator, Chicagoland Bicycle Federation in Chicago, Ill. (Oct. 23, 2008) [hereinafter Neufeld Interview]. The Chicagoland Bicycle Federation changed names and is now the Active Transportation Alliance.

89. ATTITUDES & BEHAVIORS, *supra* note 67, at 12.

90. See generally Associated Press, *As Fuel Prices Surge, Bike Business Rolls Along*, May 11, 2008, available at <http://www.msnbc.msn.com/id/24566705/> (discussing the increase in bike sales relating to rising gas prices).

91. *Id.*

92. Telephone Interview of Ed Barsotti, Executive Director, League of Illinois Bicyclists (Oct. 23, 2008) [hereinafter Barsotti Interview]. The cost includes road markings and signs. *Id.* A product called thermoplastic, which is more durable than paint, is used to paint the lines on the road. *Id.*

93. FEDERAL HIGHWAY ADMINISTRATION, THE CONGESTION MITIGATION AND AIR QUALITY (CMAQ) IMPROVEMENT PROGRAM 3, available at <http://www.fhwa.dot.gov/environment/cmaq06gd.pdf> [hereinafter CMAQ].

94. Barsotti Interview, *supra* note 92.

95. *Id.*

96. See *supra* text accompanying note 66 (quoting the text of House Bill 4907).

Illinois Municipal League warned of “dramatic costs” to municipalities if the bill was passed into law.<sup>97</sup> The League said that the bill would require towns to maintain all of their roads for bicyclists’ usage, and that towns would bear all the costs for cyclist injuries caused by unsafe road conditions.<sup>98</sup> The question remains: how bad are road conditions now, and how much would cyclist lawsuits caused by unsafe road conditions really cost?

The City of Chicago maintains a listing of all its settlement and verdict payouts from 2005 to 2009.<sup>99</sup> The city keeps track of payouts from the city coffers for automobile accidents caused by street conditions, manholes, and collisions with fixed and foreign objects. These numbers provide an idea of how bad the roads are now, and what they are costing the city in terms of liability. Although not a perfect comparison, the records provide solid numbers as to how much and how often the largest city in Illinois pays motorists for unsafe road conditions.<sup>100</sup>

Between January 2005 and December 2005, the city made 57 payments totaling approximately \$133,000, or nearly 0.4% of the city’s total payouts for the year.<sup>101</sup> The city paid out 37 times in 2006 totaling \$782,000, roughly 1.6% of all payouts that year.<sup>102</sup> In 2007, 20 payouts were made totaling \$87,000, about 0.2% of all total payouts.<sup>103</sup> In 2008, 51 payouts have been made totaling roughly \$78,000.<sup>104</sup> This accounted for 0.05% of all payouts in 2008.<sup>105</sup> In 2005, 6 payments were made for “bicycle accidents,” but the circumstances surrounding those payments are unclear.<sup>106</sup>

The language of the last legislative effort to alter tort immunity, House Bill 4907,<sup>107</sup> would have only imposed liability on

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97. *Bicycle Legislation Action Alert! House Bill 4907-Expansion of Municipal Liability for Bicyclists*, LEGISLATIVE BULLETIN (Illinois Municipal League, Springfield, Ill.) Feb. 17, 2006, at 2, available at <http://www.iml.org/files/pages/881/LB2006-05.pdf> [hereinafter *Action Alert!*].

98. *Id.* at 3. Bicyclists, unlike drivers of cars, are not required to carry insurance. *Id.* at 2.

99. City of Chicago Department of Law, Settlements & Judgments, <http://egov.cityofchicago.org/city/webportal/portalEntityHomeAction.do?entityName=Law&entityNameEnumValue=26> (follow “Settlements & Judgments” hyperlink) (last visited Oct. 24, 2008) [hereinafter *Settlements & Judgments*].

100. *See generally id.* The costs do not include litigation costs. *Id.* In addition, it is difficult to speculate the injury costs to cyclists as opposed to vehicles, as damage to vehicles is primarily property damage, and not bodily harm.

101. *Id.* The exact amount was \$132,793. *Id.*

102. *Id.* The exact amount was \$781,041. *Id.* One settlement was reached for a “MVA” (Motor Vehicle Accident) caused by street conditions in March 2006, totaling \$550,000. *Id.*

103. *Id.* The exact amount was \$87,213. *Id.*

104. *Id.* The exact amount was \$77,421. *Id.*

105. *Id.*

106. *Id.*

107. H.B. 4907 94th Gen. Assem. (Ill. 2006); *see supra* text accompanying



municipalities for road conditions that would have triggered liability for vehicles.<sup>108</sup> Given that there are over 3,800 miles of roads in Chicago,<sup>109</sup> the statistics suggest that suits for bicyclist injuries caused by road conditions not safe for vehicles would be minimal.<sup>110</sup>

Municipal Lobbyists, however, maintained that whether a road condition was unsafe for a vehicle under House Bill 4907 would have likely been a jury question, thus opening up municipalities to liability for many different road conditions.<sup>111</sup> It is not the fear of the number of cyclist lawsuits that concerns municipalities as much as the fear of the “big one”—a catastrophic injury to a cyclist that would trigger a multi-million dollar lawsuit.<sup>112</sup>

Such an accident occurred in Chicago in 1996 when Donald Hallsten, a law student, was hit by a taxi while riding his bike and paralyzed from the waist down.<sup>113</sup> Hallsten alleged the city was negligent in allowing a canopy to obstruct the view on the roadway.<sup>114</sup> The case settled in 2001, after the *Boub* decision came

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note 66.

108. Illinois General Assembly, Bill Status of HB4907, [http://ilga.gov/search/iga\\_search.asp?scope=leg94](http://ilga.gov/search/iga_search.asp?scope=leg94) (enter “H.B. 4907” into text box labeled “Search 94th General Assembly Bills and Resolutions By Number”) (last visited Feb. 7, 2010).

109. Chicago Department of Transportation, Frequently Asked Questions About Potholes, [http://egov.cityofchicago.org:80/webportal/COCWebPortal/COC\\_EDITORIAL/PotholeFAQ\\_winter0809.pdf](http://egov.cityofchicago.org:80/webportal/COCWebPortal/COC_EDITORIAL/PotholeFAQ_winter0809.pdf) (last visited Apr. 11, 2009).

110. For example, in 2007, there was one payout made to a motorist for unsafe road conditions for every 190 miles of roadway, at an average cost of \$4,300 per claim. Settlements & Judgments, *supra* note 99. There are approximately 138,000 miles of roads in Illinois. Illinois Department of Transportation, <http://www.dot.state.il.us/org1.html> (last visited Oct. 25, 2008). If the data compiled from Chicago were extrapolated for the whole state, there would be 726 roadway claims in Illinois for a total cost of \$3.1 million. It should be kept in mind that there are more vehicles than bicycles using the road, so the number of claims by bicyclists would probably be less.

111. See *Action Alert!*, *supra* note 97, at 2 (asserting that “a court will have to decide whether the conditions of the road meet the standard of care for a passenger car.”); see also Facsimile from Jay Judge, esq., of Judge & James, Ltd. to Ed Dutton, Park District Management Agency et al. (April 2, 2001) (on file with author and the Active Transportation Alliance, formerly the Chicagoland Bicycle Federation) [hereinafter Judge Facsimile] (discussing Senate Bill 1014, a predecessor to House Bill 4907, which contained language similar to House Bill 4907 regarding the standard of care). Fax was sent among representatives of municipal organizations in Illinois and gave an analysis of the bill. *Id.* Judge writes, “Our biggest problem with Senate Bill 1014, as originally written, was that it would have made every bicycle accident case on a street or highway a jury question . . . Most judges would let a jury decide if the condition was “reasonably safe for motor vehicles.” *Id.* at 4.

112. Neufeld Interview, *supra* note 88.

113. Donald Hallsten v. City of Chicago, No. 97-L-1092 (1st Dist. Ill. filed Jan. 29, 1997).

114. Christopher Terry, *Lawyer Pounds the Pavement to Clear a Path for*

down, for \$4.35 million.<sup>115</sup> The city's motion for summary judgment was denied because signs existed on the road designating it as a bicycle route, and consequently Hallsten was an intended user.<sup>116</sup> Thus, serious injuries can occur, and probably will occur in the future.

As previously noted, if immunity is abrogated, municipalities would also incur costs of maintaining roads so they are safe for bicycle travel. The Court in *Boub* spoke of the "enormous cost" of maintaining roads for cyclists should immunity be waived.<sup>117</sup> Certainly, if blanket immunity is abrogated, municipalities may decide it makes economic sense to better maintain roads now than incur liability later.<sup>118</sup> This result would make roads safer for cyclists and prevent damage to vehicles. The Court in *Boub* overstates the "enormous burden" to a certain extent as municipalities would not, nor have they ever, been under a duty to maintain the roads "like the Indianapolis 500 raceway."<sup>119</sup>

### C. Setting a Standard of Care

As previously discussed, all attempts at a legislative "fix" to tort immunity with respect to bicycles have failed.<sup>120</sup> Powerful lobbyist organizations influenced the legislative battle. The Illinois Trial Lawyer's Association ("ITLA") pushed for broad abrogation of municipal immunity, while the Illinois Municipal League, among others, lobbied for retaining as much immunity as possible.<sup>121</sup>

The recent attempts to make cyclists "intended" users of the road have attempted to alter the Illinois Vehicle Code.<sup>122</sup> As

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*Bicyclist*, CHICAGO LAWYER, Oct. 2001, at 36.

115. *Id.*

116. *Id.*

117. See *Boub*, 702 N.E.2d at 543 (quoting *Vaughn v. City of W. Frankfort*, 651 N.E.2d 1115, 1119 (Ill. 1995) that "[t]he costs of making all public streets and roadways safe for unrestricted pedestrian use would be an extreme burden on municipalities with limited resources.").

118. *Molitor*, 163 N.E.2d at 95.

119. Barsotti Interview, *supra* note 92; see also *Molway*, 88 N.E. at 492 (stating that the law does not require roads to be kept absolutely safe for cyclists); *infra* text accompanying note 138 (discussing what road conditions a municipality might be under a duty to correct); *supra* text accompanying note 66 (providing the text of House Bill 4907).

120. See *supra* text accompanying note 66 (detailing history of attempts at legislation to make bicyclists "intended" users of the road).

121. Barsotti Interview, *supra* note 92. Other Municipal organizations included the Park District Management Agency, Township Officials of Illinois Risk Management Agency, Illinois Association of County Engineers, Intergovernmental Risk Management Agency, and the DuPage Mayors & Managers Association. Judge Facsimile, *supra* note 111.

122. See H.B. 2390, 94th Gen. Assem. (Ill. 2005); H.B. 4907, 94th Gen. Assem. (Ill. 2006) (attempting to modify 625 ILL. COMP. STAT. 5/11-1502 (West

indicated by the Illinois Supreme Court's language in *Boub*, however, this move may not have an effect on the liability of municipalities, as the Court held that we look to the local municipality's intent when determining if cyclists are intended users of the road.<sup>123</sup> Thus, altering the Illinois Vehicle Code may not have the desired effect on municipal tort immunity.<sup>124</sup>

Instead, the focus should be on the Tort Immunity Act itself.<sup>125</sup> Amending the current Tort Immunity Act to directly address bicycles would remove the disincentive to create bicycle lanes and ensure that cyclists are protected. One major point of contention is the applicable standard of care that would be applied to cyclists on the road.<sup>126</sup> The ITLA insists on a "reasonable care" standard, while the Municipal League prefers a "willful and wanton" standard.<sup>127</sup>

"Ordinary care" is the standard of care in Section 3-102 of the Tort Immunity Act, which requires municipalities to maintain property in a "reasonably safe condition."<sup>128</sup> Failure to exhibit reasonable care is "characterized chiefly by inadvertence, thoughtlessness, inattention, and the like . . ."<sup>129</sup> Reasonable care, as every first-year law student should know, is the care a "reasonable man" of ordinary prudence would exercise to protect against a foreseeable, unreasonable risk of harm that might result from his conduct.<sup>130</sup>

"Willful and wanton" conduct, on the other hand, requires

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2008) so that bicyclists are considered "intended and permitted" users of the road).

123. See *Boub*, 702 N.E.2d at 541. (stating that "[m]oreover, we reiterate that our inquiry is limited under Section 3-102(a) to determining the intent of the local public entity, Wayne Township in this case. The intent of DuPage County board is not determinative."); see also Epperson, *supra* note 41, at 579 (discussing rationale of *Boub*).

124. See Neufeld Interview, *supra* note 88 (noting that the intent of the municipality is determinative).

125. *Id.*

126. Barsotti Interview, *supra* note 92; see also Letter from Randy Neufeld, Healthy Streets Campaign Coordinator, Chicagoland Bicycle Federation, to Ed Dutton, of the Park District Risk Management Agency (May 12, 2003) (on file with author and the Active Transportation Alliance, formerly the Chicagoland Bicycle Federation) (discussing the difficulty in drafting a standard of care that would satisfy interests for all parties).

127. Facsimile from Jay Judge, esq., of Judge & James, Ltd. to William J. Anderson, of the Northwest Municipal League (Mar. 14, 2001) (on file with author and the Active Transportation Alliance, formerly the Chicagoland Bicycle Federation). The fax offered a proposed amendment to the Tort Immunity Act that set the standard of care for bicycle lanes to a willful and wanton standard. *Id.*

128. 745 ILL. COMP. STAT. 10/3-102 (West 2008).

129. Peoples Gas Light and Coke Co. v. Joel Kennedy Construction Corp., 829 N.E.2d 866, 870 (Ill. App. Ct. 2005).

130. Ziarko v. Soo Line Railroad, 641 N.E.2d 402, 405 (Ill. 1994).

intentional or reckless behavior.<sup>131</sup> The Tort Immunity Act defines willful and wanton conduct as “a course of action which shows actual or deliberate intention to cause harm or which, if not intentional, show an utter indifference to or conscious disregard for the safety of others or their property.”<sup>132</sup> “Willful and wanton” is the standard of care in Section 3-106 of the Tort Immunity Act, and applies to property used for recreational purposes, including dedicated bicycle paths not on roadways.<sup>133</sup> It has been said that for conduct to rise to the level of “willful and wanton,” it should “shock the conscience.”<sup>134</sup> In order to satisfy all constituencies, some balance must be struck between the “reasonable care” and “willful and wanton” standards.

Under the Tort Immunity Act, there is some question as to which standard would apply to bike paths currently installed on roadways.<sup>135</sup> The Illinois Court of Appeals found in *Dinelli v. County of Lake* that the willful and wanton standard applied to a cyclist injured on a bicycle trail while crossing a roadway.<sup>136</sup> But in *Cole v. City of East Peoria*, the appellate court applied a reasonable care standard to a child cyclist who, while riding on a section of road marked and separated from traffic, was injured by a sewer grate.<sup>137</sup> Confusion over the applicable standard is all the more reason to amend the Tort Immunity Act.

During legislative negotiations, Municipal Lobbyists proposed

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131. *Id.* at 405-06; *see also* *Schneiderman v. Interstate Transit Lines, Inc.*, 69 N.E.2d 293, 300 (Ill. 1946) (holding that a “willful or wanton” injury must have been intentional or must have been caused by a “reckless disregard” for other’s safety, such as the failure to use ordinary care to prevent an accident with knowledge of impending danger).

132. 745 ILL. COMP. STAT. 10/1-210 (West 2008).

133. *Id.* 10/3-106.

134. *Oravek v. Cmty. School Dist.* 146, 637 N.E.2d 554, 558 (Ill. App. Ct. 1994). In this case, a child cyclist was injured on a skateboard ramp left on school property by a third party. *Id.* at 555-56. The court found that even if the school had knowledge of the ramp, “it is difficult to imagine even the tenderest of consciences being shocked by defendant’s conduct in the instant case.” *Id.* at 558.

135. *Barsotti*, *supra* note 7 (quoting Feb. 14, 2006, e-mail from Ed Dutton to Ed Barsotti). Dutton says that based on the Court’s holding in *Dinelli*, it is unsettled what standard of care would apply to bicycle lanes installed on roads. *Id.* (citing *Dinelli v. County of Lake*, 691 N.E.2d 394 (Ill. App. Ct. 1998)).

136. *See Dinelli*, 691 N.E.2d at 397 (quoting language of Section 3-106). The court affirmed the trial court’s finding that the Defendant County was not liable under the willful and wanton standard for the design and plan of the part of the roadway where the bike trail crossed the road. *Id.* at 399-400. The Plaintiff unsuccessfully argued that an “ordinary care” standard should apply. *Id.* at 396.

137. *Cole v. City of E. Peoria*, 559 N.E.2d 769, 772-73 (Ill. App. Ct. 1990). This case applied the reasonable care standard in the context of either Section 10/3-102 or Section 10/3-103 of the Tort Immunity Act. *Id.*

that municipalities should be immune from suit for injuries caused by natural accumulations of weather phenomenon, as well as based on the type of roadway material used.<sup>138</sup> A similar provision creating blanket immunity appears in Section 10/3-107 of the Tort Immunity Act, which immunizes local public entities from injuries occurring on hiking, riding, fishing, or hunting trails.<sup>139</sup> Specifying conditions under which a municipality is always immune from suit would reduce litigation costs by creating certainty in the law as well as take certain issues out of the hands of a jury.

In addition, there are other considerations that increase or decrease liability such as notice provisions in the Tort Immunity Act<sup>140</sup> and issues of contributory negligence.<sup>141</sup> The Illinois Tort Immunity Act currently requires either “actual or constructive” notice of road conditions before a municipality would be liable for injuries caused by the condition.<sup>142</sup> The municipality is immune from suit for road conditions if it establishes that the road condition is of such a character, and has existed for so long, that it would not have been discovered “by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger . . . .”<sup>143</sup>

Other states have variations in their notice provisions that

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138. Facsimile from Jay Judge, esq., of Judge & James, Ltd. to William J. Anderson, of the Northwest Municipal League (Mar. 22, 2001) (on file with author and the Active Transportation Alliance, formerly the Chicagoland Bicycle Federation). Amended vehicle code would have made bicyclists assume risks of “normal conditions and operational risks” of streets including, [p]otholes not more than both three inches deep and thirty inches in diameter, irregular surfaces on gravel, dirt, clay, and oil and chip roads, pavement stress cracks, normal accumulations of gravel and debris, gravel and grass shoulders, concrete culverts, guard rails, bridge structures, sewer drain grate slots, expansion joints, sewer covers, speed bumps, ice, snow or water on the road and shoulder surfaces, narrow-width streets and highways, and the like.

*Id.*

139. 745 ILL. COMP. STAT. 10/3-107(b) (West 2008).

140. *Id.* 10/3-102.

141. See generally *Scofield v. Illinois*, 31 Ill. Ct. Cl. 540 (1977) (finding that cyclist was contributorily negligent and barred from recovery for injuries sustained from riding over a “jagged three foot hole” one inch deep because cyclist was distracted by a dog in the front basket of her bike). She testified during deposition that she would have seen the hole from a distance had she been looking. *Id.* at \*1.

142. 745 ILL. COMP. STAT. 10-3/102(a) (West 2008).

143. *Id.* The municipality likewise would not be liable if it maintained an inspection system with due care and did not discover the condition. 745 ILL. COMP. STAT. 10-3/102(2) (West 2008). Municipalities are also deemed to have constructive notice if one of its employees had actual notice of the condition. *Mtengule v. City of Chicago*, 628 N.E.2d 1044, 1048 (Ill. App. Ct. 1993).

would affect liability. New York, for example, requires the municipality to receive actual written notice of road conditions before immunity is waived.<sup>144</sup> This type of notice provision would likely further reduce a town's liability.<sup>145</sup> In California, among other states, the notice requirement is waived if a public employee creates the dangerous condition through negligent or other wrongful conduct.<sup>146</sup>

Even if a government entity has notice of a road defect, liability does not always follow. The Illinois Court of Claims has held that cyclists are under a duty to keep a lookout for roadway defects when riding.<sup>147</sup> When a cyclist rides into a defect so large or obvious that he or she should have seen it, the cyclist will be barred from recovery.<sup>148</sup> A cyclist in Illinois may also be denied recovery if he or she is violating a traffic law or ordinance at the time of injury.<sup>149</sup> Finally, cyclists in some instances are also barred from recovery if they are aware of the dangerous condition of a road generally, yet continue their ride.<sup>150</sup>

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144. N.Y. TOWN LAW § 65-a (McKinney 2003). The statute also contains a constructive notice condition. *Id.*

145. *But see* Neufeld Interview, *supra* note 88 (responding to this "written notice" provision, a group of personal injury attorneys hired a company to document every potentially unsafe road and sidewalk condition and send written notice to the city). This resulted in a large database of road and sidewalk conditions of which the city had written notice and could not raise that defense without regard to whether the condition was significant enough to satisfy constructive notice. *Id.*

146. CAL. GOV'T CODE § 835(a) (West 2008); MISS. CODE ANN. § 11-46-9(v) (West 2008). The Mississippi statute also codifies immunity in cases where a dangerous condition is "obvious to one exercising due care." *Id.*; MO. REV. STAT. § 537.600 (West 2008); N.J. STAT. ANN. § 59:4-2(a) (West 2008).

147. *Hollis v. Illinois*, 35 Ill. Ct. Cl. 86, at \*2 (1981). The Claimant was an experienced cyclist. *Id.* at \*1. The Claimant testified that he took his eyes off of the road for about "10 seconds" and did not see a large pothole in the road. *Id.* at \*2. The Claimant had ridden over that particular road six months earlier, and there is no indication the pothole existed at that time. *Id.* at \*1.

148. *McAbee v. Illinois*, 24 Ill. Ct. Cl. 374, at \*3 (1963). The court held that in a case where the visibility is good, the pavement is dry, and there are no obstructions in claimant's view, the claimant was guilty of contributory negligence in failing to see a pothole two feet in length, six or seven inches deep, and four inches in width. *Id.*

149. *LaPointe v. City of DeKalb*, 424 N.E.2d 1352, 1355 (Ill. App. Ct. 1981).

150. *Kensy v. City of Southampton*, 206 A.D.2d 506, 507 (N.Y. App. Ct. 1994). Cyclist was riding on unpaved shoulder of road that contained loose gravel. *Id.* Testimony established that plaintiff was aware of the gravel, yet continued to ride over it for a quarter of a mile. *Id.* The court held that the plaintiff "assumed the risk" of the condition, and was barred from recovery. *Id.*

#### IV. A NEW PATH

For Illinois to move to the forefront in promoting a safe,<sup>151</sup> healthy,<sup>152</sup> and green alternative to driving, a change must be made in the current statutory scheme to take away the disincentive to create bicycle lanes. An examination of the legal issues involved suggests that a change must be made to the Tort Immunity Act itself, and that the change must involve altering the standard of care. But as prior attempts have shown, it has been extremely difficult to garner the necessary votes to convince municipalities to waive liability and adopt a "reasonable care" standard.<sup>153</sup> We know that the major stumbling blocks to amending the law are the "enormous burdens"<sup>154</sup> of making roads safe as well as the fear of massive liability.<sup>155</sup> The Tort Immunity Act can be amended in a way that will ease the fears of municipalities, while at the same time give towns an incentive to construct bicycle lanes.

##### *A. Fine Tuning Tort Immunity*

Bicycles should be specifically provided for in the Tort Immunity Act.<sup>156</sup> This will supplant the "local intent" test in the

151. Moritz, *supra* note 15; Hallett, *supra* note 15, at 61; Cambridge Community Development, *supra* note 79.

152. W.H.O., *supra* note 12, at 9-10.

153. Neufeld Interview, *supra* note 88; Barsotti Interview, *supra* note 92.

154. See *Boub*, 702 N.E. at 543. (noting that "it is appropriate to consider the potentially enormous costs both of imposing liability for road defects that might injure bicycle riders and of upgrading road conditions to meet special requirements of bicyclists."). See generally, *Action Alert!*, *supra* note 97 (discussing the costs to municipalities to be "dramatic").

155. Neufeld Interview, *supra* note 88.

156. The proposed text would read as follows:

745 ILL. COMP. STAT. 10/3-109 Municipal liability concerning bicyclists use of public roadways:

1. (a) Unless otherwise specified in this Section, a local public entity and its employees have a duty toward a person riding a bicycle to exercise ordinary care to maintain roadways in a reasonably safe condition in a manner which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice as specified in Section 3-102.

(b) A local public entity will not be liable for injuries to cyclists riding on gravel, dirt, clay or "oil and chip" roads that are caused by the inherent condition of the road, or irregularities which are a natural consequence of their particular construction. The burden shall be on the plaintiff to show that an irregularity is not a natural consequence so as to abrogate immunity under this subsection. A local public entity will also not be liable for injury to cyclists caused by normal accumulations of gravel, debris, ice, snow or water on the road and shoulder surfaces.

Act, which looks to the intent of the municipality. A “reasonable care” standard would require the municipalities to maintain roads without bicycle lanes in a reasonably safe condition.<sup>157</sup> It would also only cover bicycles being ridden in a “reasonably foreseeable” way.<sup>158</sup> This level of liability will serve as the baseline. When bicycle lanes are installed, a “willful and wanton” standard would apply; more on this later.

The amended statute would contain several provisions that would shield towns from liability and reduce the costs of continually monitoring and maintaining roads. The modified Tort Immunity Act would specify road conditions where the municipality would be immune from suit.<sup>159</sup> This section would create immunity based on injuries arising out of two general conditions: type of roadway material used and natural accumulations of dirt, gravel, and other weather phenomenon. This would remove uncertainty in the law and assure towns that not all roads must be “perfectly safe” for bicycle travel.

Also, when a cyclist is aware, or should be aware of the condition of a road, but nevertheless chooses to ride on it, he or she assumes the risk of injury and the municipality is immune from suit.<sup>160</sup> In other words, municipalities should be liable only if the road condition is of such a nature that it takes the cyclist by

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(c) A local public entity will not be liable under this Section if they can show that the plaintiff had prior knowledge at the time of the accident regarding the existence of the roadway condition that caused injury, either by showing the plaintiff actually knew of the condition, or that the condition should have been obvious to a person exercising due care based on the size of defect or the frequency that person used roadway in question.

(d) Nothing in this Section limits the local public entity from asserting any defense available under common law.

157. See *supra* text accompanying note 156, Section (a). The notice provision would most likely foreclose suit on minor road conditions discussed in *Molway* such as a “sharp stone, a tack, a bit of glass, or coal in a road . . .” 88 N.E. at 492-93.

158. See *supra* text accompanying note 156, Section 1(a). Cyclists who are riding in a dangerous manner, e.g., riding on handlebars, two riders on a bicycle, “stunt” riding, riding a bike with no breaks, participating in “alley cat races,” in which cyclists race through city streets in unauthorized races, or violating other traffic laws at time of accident (such as riding the wrong way down a one-way street) could not recover.

159. See *supra* text accompanying note 156, Section (b) (certain conditions from this section were adopted from the suggestions of Jay Judge, who represents interests of municipalities, appearing at *supra* text accompanying note 127).

160. See *supra* text accompanying note 156, Section (c) (borrowing language from the Mississippi statute which states that a municipality is immune from suit if the condition would be obvious to one exercising due care. MISS. CODE ANN. § 11-46-9(v) (West 2008)).



surprise. Courts should inquire as to the cyclist's knowledge of the roadway and the appearance of the road condition to the cyclist at the time of injury. This codifies the current Illinois caselaw regarding contributory negligence and cyclists.<sup>161</sup>

If and when bicycle lanes are installed, a "willful and wanton" standard would apply.<sup>162</sup> This would create liability for municipalities only if their actions show intent to cause harm or utter indifference for safety of others.<sup>163</sup> Once bike lanes are installed, this level of liability would shield municipalities from extensive liability.<sup>164</sup> The "willful and wanton" standard should apply to the entire roadway, not just the portion with the bicycle lane.<sup>165</sup>

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161. See *supra* text accompanying note 148 (giving brief description of facts in *McAbee v. State of Illinois*, 24 Ill. Ct. Cl. 374 (1963)); see *supra* text accompanying note 147 (giving brief description of facts in *Hollis v. State of Illinois*, 35 Ill. Ct. Cl. 86 (1981)); see *supra* text accompanying note 141 (giving brief description of facts in *Scofield v. State of Illinois*, 31 Ill. Ct. Cl. 540 (1977)).

162. See *supra* text accompanying note 131 (providing a definition of "willful and wanton").

163. *Id.*

164. See *Dinelli*, 691 N.E.2d at 399 ("A public entity may be found to have engaged in willful and wanton conduct only if it has been informed of a dangerous condition, knew others had been injured because of the condition, or if it intentionally removed a safety device or features from property . . ."). Willful and wanton conduct is involved when the defendant engages in a "course of action" that proximately causes injury to the plaintiff. *Id.*

165. This proposed text would immediately follow part 1.(d) in the proposed section 745 ILL. COMP. STAT. 10/3-109 found at *supra* note 156 and would read:

745 ILL. COMP. STAT. 10/3-109 Municipal liability concerning bicyclists use of public roadways:

2. (a) Unless otherwise specified in this Section, neither a local public entity nor public employee shall be liable to a cyclist injured on a roadway which, at the time accident, contained a bicycle lane, or other road marking indicating a portion of the road to be used for bicyclists, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury.

(b) Nothing in subsection 2(a) shall abrogate any of the specific immunities detailed in subsection 1(b) or 1(c).

(c) If the plaintiff can establish the following: (1) that a roadway containing a bicycle lane or marking was in a dangerous condition at the time of the injury; (2) that the injury directly resulted from the dangerous condition; (3) that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred; and (4) that a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition, then the immunities conferred on local public entities and their employees under subsection 1 shall apply.

Setting the standard of care on roads without bicycle lanes at “reasonable care” and raising the standard of care on roads with bicycle lanes to “willful and wanton” would provide an incentive for the municipalities to install bicycle lanes. Instead of a municipality enjoying immunity unless they act to install bicycle lanes; municipalities, by installing bicycle lanes, would lessen their liability from a “reasonable care” standard to a “willful and wanton” standard. This scheme represents a new approach to municipal tort immunity that seeks to satisfy municipalities and protect bicyclists, while at the same time turning the bike lane disincentive into an incentive.

There would be one small change to the “willful and wanton” standard for roads with bicycle lanes. Similar to other states, if a municipal employee causes a dangerous road condition to exist after upgrading the road for bicycle use, the standard of care would return to “reasonable care” with respect to that condition only.<sup>166</sup> This would follow one of the basic principles of tort law that those engaging in wrongful conduct should be liable for harm suffered by others as a result.<sup>167</sup>

### *B. Paying for the Lanes*

In addition to the Federal CMAQ funds for bicycle lanes, the State of Illinois can play a role to support cycling. Municipalities should foster bicycle lanes by demonstrating to the Illinois Department of Transportation that bike lanes are feasible in their communities.<sup>168</sup> The State will construct bicycle lanes while

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166. See *supra* text accompanying note 165, section 2.(c) (giving exact language, adopted in part from MO. REV. STAT. § 537.600 (West 2008)).

167. DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY FIFTH EDITION 3 (Thompson/West 2005). This section would not cover dangerous conditions caused by “plan or design” of roadways. 745 ILL. COMP. STAT. 10/3-103 (West 2008). This section would apply to the design of bicycle lanes but would not apply to cyclists injured on roadways that are not equipped with bicycle lanes. It would be irresponsible for towns to be immune from suit if they design bicycle lanes that are unsafe. The municipalities can take guidance in the design of bicycle facilities from the AASHTO guidelines. See generally AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS, GUIDE FOR THE DEVELOPMENT OF BICYCLE FACILITIES (1999), available at [http://safety.fhwa.dot.gov/ped\\_bike/docs/b\\_aashtobik.pdf](http://safety.fhwa.dot.gov/ped_bike/docs/b_aashtobik.pdf). The “recreational user” standard of care for off-road bicycle paths would remain. 745 ILL. COMP. STAT. 10/3-106 (2008).

168. See ILLINOIS DEPARTMENT OF TRANSPORTATION, BUREAU OF DESIGN & ENVIRONMENTAL MANUAL 17-1(1) (2002), available at <http://www.dot.state.il.us/desenv/BDE%20Manual/BDE/pdf/chap17.pdf> (describing the factors they consider when making transportation improvements). The manual states that “[b]icycle and pedestrian travel demand in the vicinity of a project is determined early in the project planning phase. When sufficient demand is indicated, the Department will provide the appropriate accommodations. *Id.*

working on new projects, thus bypassing the costs of retrofitting existing roadways. By drawing on funds from both federal and state sources, municipalities can minimize the cost of constructing bicycle lanes while at the same time minimizing their liability exposure under the amended Tort Immunity Act proposed in this Comment.

#### CONCLUSION

In some European countries, bicycles are widely used and have become regular fixtures in the landscape.<sup>169</sup> These countries have implemented road design policies that protect cyclists and promote bicycling.<sup>170</sup> It is possible to create the same type of scheme in Illinois. Removing the statutory disincentive to install bicycle lanes in Illinois would be a move down the right path. It would advance the well being of the citizens of Illinois and level the playing field regarding liability and road conditions. Just around the time Alfred Molway was injured riding his bicycle on the streets of Chicago, the famous author and prognosticator H.G. Wells wrote that “[c]ycle tracks will abound in Utopia . . .”—perhaps he was on to something.<sup>171</sup>

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169. See *What Germany and Holland Can Teach NYC About Bicycle and Pedestrian Safety*, Transportation Alternatives, Fall 2003, at 18, available at <http://www.transalt.org/files/newsroom/magazine/034Fall/18europe.html> (noting that in Germany and Holland, the percentage of cyclists went up while cycling deaths in Germany and pedestrian deaths in Holland declined).

170. *Id.*

171. H.G. WELLS, A MODERN UTOPIA 47 (1904).