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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)

Bruce Epperson

PERMITTED BUT NOT INTENDED: *BOUB V. TOWNSHIP OF WAYNE*, MUNICIPAL TORT IMMUNITY IN ILLINOIS, AND THE RIGHT TO LOCAL TRAVEL

BRUCE EPPERSON*

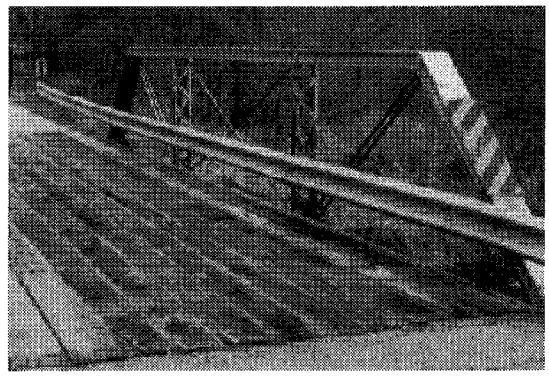
I. INTRODUCTION

A. Background

On September 8, 1992, Jon Boub, an experienced cyclist and triathlete, rode his bicycle through Wayne Township, a semi-rural area in DuPage County on the western fringe of the Chicago metropolitan area.[1] His daily training circuit took him across an old, one-lane bridge on St. Charles Road. The bridge was surfaced with wooden planks, between which asphalt "caulking" had been applied to prevent gaps. Vandals sometimes stole the planks, so the township's road supervisor ordered the installation of a new road surface. Work started that morning, and the caulking had been removed by the end of the day. No signage or barricades were installed when the crew went home, and cars continued to use the bridge without incident throughout the evening. The bridge was at the bottom of a hill; Mr. Boub was traveling between thirty-three and thirty-five miles per hour as he approached it. About halfway across, his front wheel fell into a gap between two

* Associate Attorney, Donna M. Ballman, P.A., 4801 S. University Drive, Suite 3010, Ft. Lauderdale, FL 33328, (954) 815-2972, BruceEpp@aol.com. J.D., Shepard Broad Law Center, Nova Southeastern University; B.S., University of Kansas; M.U.R.P., University of Colorado. The author thanks Jon A. Duncan, Esq. and John Stainthorp, Esq., for their assistance in reviewing earlier drafts of this Article. Both gentlemen participated in the preparation of Jon Boub's appellate briefs, and were able to point out several errors and omissions. A portion of this Article was prepared under the supervision of Michael Masinter of the Shepard Broad Law Center, who permitted the definition of "civil rights law" to be stretched to the limit to accommodate its preparation under the guise of a seminar paper.

1. This introduction is taken from: *Boub v. Township of Wayne*, 684 N.E.2d 1040 (Ill. App. Ct. 1997) [hereinafter Boub I]; Eric Petersen & Gin Kilgore, Illinois Bicycle Advocacy Groups and the Law: Struggling with the *Boub* Decision 5 (2004) (unpublished manuscript, Chicago Area Transportation Study); and HUGH TRAVIS CULLEY, THE IMMORTAL CLASS 256 (2001).



The St. Charles Road bridge

Photo courtesy of Chicagoland Bicycle Federation and the League of Illinois Bicyclists.

planks and he was thrown onto the bridge railing. He suffered a concussion, three herniated discs, a fractured hip, a crushed pelvic joint, a torn ligament in his left foot and a dislocated shoulder. After insurance, Mr. Boub's out-of-pocket medical and rehabilitation expenses totaled almost $50,000.

He filed a complaint in Illinois state court against Wayne Township alleging six counts. Only Counts I and II are considered in this Article. The first count asserted that the township negligently failed to maintain the bridge in a reasonably safe condition for his use as required by title 745, section 10/3-102(a) of the Illinois Compiled Statutes[2] (sections of title 745 of the Illinois Compiled Statutes are hereinafter referred to only by section number), and the second count asserted that the township created an unreasonably dangerous condition as defined by section 10/3-103(a).[3]

The township moved for summary judgment on all six counts, maintaining that, under Illinois law, they owed no duty of care to

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2. This section provides:

> 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. . . .

745 ILL. COMP. STAT. 10/3-102(a) (2002).

3. This section provides:

> A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity. . . .

745 ILL. COMP. STAT. 10/3-103(a).

a bicyclist on the bridge and were absolutely immune from liability. The motion was based on a provision within section 10/3-102(a), which states that a local government is liable only to "permitted and intended" users of its public facilities. The township maintained that while Mr. Boub was a permitted user, he was not an intended user. The trial court granted summary judgment, and Mr. Boub appealed to the state's second district appellate court, which upheld the decision. The Illinois Supreme Court agreed to hear the case on February 4, 1998.[4]

Oral arguments were heard on June 30 and a decision upholding the appellate court was handed down on October 22, 1998.[5] The supreme court issued a four-to-three decision, with Justice Heiple writing a sharp dissent. Although the decision was intricate, it contained four core elements: 1) an "intended" user of a local roadway could only be determined by the most local level of government, as exhibited by "physical manifestations of intent," such as signage and roadway markings; 2) "intention" defined classes of users, not types of use—however, all unintended users were, by definition, engaged in unforeseeable activities; 3) intent was an element in the municipality's duty of care, and was thus a question of law to be determined by the court; and 4) the "enormity of the burden" to the municipality could be considered as a factor in determining if a user was intended or merely permitted.

Shortly after the decision, the Illinois Public Risk Management Association (an insurance cooperative for small governments) informed its policyholders that it would not cover loss on roadways marked for bicycle use. Many townships along the Grand Illinois Trail, a statewide network of bicycle routes, removed signage designating the trail, and the Illinois Department of Natural Resources withdrew from participation in the development of the multi-state Mississippi River Trail.[6] Illinois bicycle advocacy groups twice attempted a legislative circumvention of the *Boub* ruling; both failed in the face of strong opposition by the Illinois Municipal League (who wanted no change from the status quo) and the Illinois Trial Lawyers Association (who sought the total elimination of local immunity).

This Article explores an alternative strategy to judicially confront the local governmental immunity of section 10/3-102 as unconstitutional under either the Illinois or federal constitution, using two existing federal civil rights statutes, 42 U.S.C. § 1983, and 42 U.S.C. § 1985. Section 1983 permits litigation against a government entity that deprives a citizen of rights guaranteed

4. Boub v. Township of Wayne, 690 N.E.2d 1379 (Ill. 1998).

5. Boub v. Township of Wayne, 702 N.E.2d 535 (Ill. 1998) [hereinafter Boub II].

6. Peterson & Kilgore, *supra* note 1, at 8-9.

under the U.S. Constitution,[7] and § 1985 permits private action against any party that conspires to deprive any person or class of persons of equal protection.[8] Two different tactics are evaluated. First, the potential for bringing action based on a deprivation of a right of localized travel is explored. Although the United States Supreme Court has not explicitly enunciated such a right, this Article will argue that Supreme Court dicta and recent federal case law (tacitly supported by the high court) indicate a strong propensity to recognize such a right. Second, the possibility of seeking redress under federal or state equal protection and due process provisions is explored. Equal protection in Illinois is unique. For over a century, equal protection was guaranteed by a state constitution provision prohibiting special legislation.[9] Although Illinois adopted a separate equal protection clause when it rewrote its constitution in 1970, it considered the special legislation protection so important that it retained the provision.[10] As a result, while equal protection challenges in the state are evaluated using criteria identical to that in its federal counterpart,[11] equal protection in Illinois has always had a historical resonance with the citizenry when the legislature confers benefits on less than a statewide basis.[12] Significantly, this includes government immunity.[13]

B. Organization of the Article

This Article is divided into four sections. The first is this introduction. The second explores the legislative and judicial history of local government tort immunity in Illinois from 1898 to

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7. Section 1983 specifically states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (2000).

8. Section 1985 states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages. . . .

42 U.S.C. § 1985(3).

9. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1070 (Ill. 1997).

10. ILL. CONST. art. IV, § 13 (1970).

11. Melbourne Corp. v. City of Chicago, 394 N.E.2d 1291, 1301 (Ill. App. Ct. 1979).

12. *Best*, 689 N.E.2d at 1069.

13. *Id.*

the present. Particular emphasis is placed on a group of cases from 1973 to 1997 that are referred to here as the "pedestrian cases." An examination of the pedestrian cases indicates that the *Boub* case was not a judicial aberration, but a logical extension of precedent. The second section concludes with a detailed look at the *Boub* case and the judicial decisions that later relied on it. The third section discusses the possible existence of a constitutional right of local travel, which has variously been termed "mobility" and "local movement." The concluding section offers a blueprint for applying the federal civil rights statutes to future cases that result from the application of *Boub* and its progeny. The proposed right of local travel is, of course, featured, but the section also evaluates possible alternatives that rely on currently recognized constitutional rights.

C. A Word on Nomenclature

In 1970 the State of Illinois rewrote its constitution and in 1992 reorganized its state statutes. References within the Article, depending on the date of origin, may use either the old or new statutory system. The table below contains the most frequently referenced statutory sections in this Article.

Pre-1992	***Post-1992***	***Subject***	***Notes***
CONSTITUTIONAL PROVISIONS			
Const. Art 4 § 22	Const. Art. 4 § 13	Prohibited special laws	Modified 1970
Const. Art. 4 § 26	Const. Art. 13 § 4	State sovereign immunity	Modified 1970
STATUTORY PROVISIONS			
(Ill. Rev. Stat.) (ILCS)			
ch. 34 § 301.1	none	Recreational tort liability	Unconst. 1964
ch. 85	745 Act 10	Local govt. tort immunity	
ch. 85 § 3-102	745 10/3-102	Care in maintenance	
ch. 85 § 3-103	745 10/3-103	Adoption of plan or design	
ch. 85 § 3-106	745 10/3-106	Propty. used for rec. services	
ch. 85 § 9-103	745 10/9-103	Insurance contracts	
ch. 122 § 29-11	none	School bus insurance	to 745 10/9-103
ch. 122 §§ 821-31	745 25/1-11	Tort liab. of schools	
ch. 122 § 823	753 1/3	Tort liab. of schools	
ch. 122 § 825	750	Tort liab. of schools	

The most frequently referenced statutes in this Article are in

Chapter 745, Act 10, Article III of the Illinois Compiled Statutes.[14] The current name of this section is the Local Governmental and Governmental Employees Tort Immunity Act, but it has been incorporated in Illinois statutes under a number of different names over the years. As a generic label for those sections of Illinois statutes regulating the immunity of local governments from tort liability, I use two older names, the Illinois Tort Liability Act (or "ITLA") and the Tort Immunity Act. I use these to refer to both the pre-1992 Illinois Revised Statutes and the current Illinois Compiled Statutes. Where it is necessary for clarity to use a precise heading name, I have used the one in force at the time a particular case was decided or a legislative act debated.

Finally, for brevity, I shall refer to the two *Boub v. Township of Wayne* cases as *Boub I* (the Illinois Appellate Court, Second District)[15] and *Boub II* (the Illinois Supreme Court).[16] If no distinction is made, the supreme court opinion is implied. All citations to the briefs filed by the parties and friends of the court are for the supreme court case. References by Illinois appellate courts to *Boub* after October, 1998 are almost always to the supreme court case; where a reference is to the earlier appellate court opinion, I have specifically noted it.

II. LOCAL GOVERNMENT TORT IMMUNITY IN ILLINOIS

A. Legislating Local Government Immunity in Illinois, 1959-1965

In 1898, the Illinois Supreme Court created a common law tort immunity for the negligent acts of local governments.[17] The immunity was an extension of the state's immunity contained in Article IV, section 26 of the Illinois Constitution.[18] However, the state supreme court abolished common law local immunity in 1959 in *Molitor v. Kaneland Community Unit District No. 302*.[19] A

14. 745 ILL. COMP. STAT. 10/3-101 to 10/3-110.

15. 684 N.E.2d 1040 (Ill. App. Ct. 1997). The Illinois Constitution provides for only one Appellate Court. The Illinois Appellate Court is divided into five non-autonomous, geographic districts, and the First District (located in Chicago, covering all of Cook County) is further divided into divisions. The author thanks Jon Duncan for this clarification.

16. 702 N.E.2d 535 (Ill. 1998).

17. Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 90-91 (Ill. 1959); Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois*, 61 NW. U. L. REV. 265 (1966) [hereinafter *Illinois Tort Claims Act*].

18. "The state of Illinois shall never be made defendant in any court of law or equity." This provision was deleted in the 1970 constitution and replaced with Article XIII, § 4: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished." ILL. CONST. art. XIII, § 4 (1970).

19. 163 N.E.2d 89.

school bus ran off the road, struck a culvert, and exploded, burning several students. Writing for the majority, Illinois Supreme Court Justice Klingbiel stated that "[t]he whole doctrine of governmental immunity for liability for torts rests upon a rotten foundation"[20] and concluded that "we have not only the power, but the duty, to abolish that immunity."[21]

In July 1959, a month after *Molitor*, the Illinois General Assembly adopted a series of statutes limiting the tort liability of park districts, counties, forest preserves, the Chicago Park District, and school districts.[22] The legislature used two very different strategies. Counties, park districts, forest preserves, and the Chicago Park District received absolute tort immunity for negligence,[23] while the liability of school districts was capped at $10,000 for injury or property damage.[24] Death was not included, defaulting to the wrongful death statutory maximum of $30,000.[25]

The absolute immunity extended to counties and park districts was invalidated in 1964 in *Harvey v. Clyde Park District*.[26] A young boy suffered injuries from a playground slide negligently maintained by a local park district. The trial court dismissed the action due to the district's immunity. The plaintiff appealed, challenging the constitutionality of the 1959 legislation. The supreme court overturned, holding that the 1959 act violated the state constitution's prohibition against local or special laws because some local governments received immunity while others, who were performing identical functions, did not.[27] Pointing to the statute's classification by agency, the court concluded that "in this pattern there is no discernible relationship to the realities of life."[28]

On the other hand, the court was careful to point out that it was not invalidating all legislative differentiation, but only classifications based on the type of agency, not the governmental function performed:

> From this decision it does not follow that no valid classifications for purposes of municipal tort liability are possible. On the contrary it is feasible, and it may be thought desirable, to classify in terms of

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20. *Id.* at 94.

21. *Id.* at 96.

22. 1959 Ill. Laws 782, 1890, 1954, 2020, 2060; *Molitor*, 163 N.E.2d at 104-05 (Davis, J., dissenting); *Illinois Tort Claims Act*, *supra* note 17, at 266 n.7.

23. ILL. REV. STAT. ch. 34 § 301.1 (1959). Excerpted from *Comment: Governmental Immunity in Illinois: The* Molitor *Decision and the Legislative Reaction*, 54 NW. U. L. REV. 588, 598 n.52 (1959) [hereinafter *Governmental Immunity in Ilinois*].

24. ILL. REV. STAT. ch. 122 §§ 821-31 (1959).

25. *Governmental Immunity in Illinois*, *supra* note 23, at 595.

26. 203 N.E.2d 573 (Ill. 1964).

27. *Id.* at 576-77; ILL. CONST. art. IV, § 22 (1870), (now Art. IV, § 13 (1970)); *Illinois Tort Claims Act*, *supra* note 17, at 272.

28. *Harvey*, 203 N.E.2d at 577.

types of municipal function, instead of classifying among different governmental agencies that perform the same function.[29]

The general assembly re-crafted the invalidated 1959 legislation in 1965. The legislature assumed *a priori* total municipal liability and structured a set of immunities classified by government function.[30] The 1965 legislation extending immunity to property used for recreational purposes drew on the *Harvey* decision, and carefully used functional, not organizational, criteria:

> 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 as a park, playground or open area, unless such local entity or public employee is guilty of willful and wanton negligence proximately causing such injury.[31]

The phrase "intended or permitted" qualifies "public property" by making public access to a given facility a precondition of immunity. In addition, the local government must maintain the facility in a manner consistent with ordinary recreational use. In 1972, the Illinois Supreme Court commented that section 3-106 "comes into operation only where liability . . . [is] predicated upon the existence of a condition of public property maintained by it and intended or permitted to be used as a park, playground or open area for recreational purposes."[32] Both the language of the statute and its judicial interpretation point towards the conclusion that "intended or permitted" was meant to relate to places, not people (users) or types of use. The phrase "intended *or* permitted" apparently includes both places specifically prepared for recreational use and those where recreational use is customary or traditional.

A problem with this interpretation is that the grant of immunity closely parallels the common "ordinary reasonable care" standard in tort liability. For example, if a municipality maintains a playground in a manner reasonable given its foreseeable uses, it is meeting its ordinary duty of reasonable care

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29. *Id.*

30. *Illinois Tort Claims Act*, *supra* note 17, at 280.

31. 1965 Ill. Laws 2983, § 3-106 (emphasis added). The statute was amended slightly in 1986, and now 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 entity or public employee is guilty of willful and wanton conduct proximately causing such injury.

745 ILL. COMP. STAT. 10/3-106.

32. Sullivan v. Midlothian Park Dist., 281 N.E.2d 659, 662 (Ill. 1972).

and it qualifies for the state's affirmative defense of immunity. This later caused Illinois courts to blur the distinction between duty—an element of the plaintiff's claim—and immunity—an affirmative defense.

The $10,000 cap on liability granted to school districts in 1959 also contained its own constitutional vulnerability. In *Molitor*, the Illinois Supreme Court noted that the Kaneland School District had taken advantage of a provision in state statutes[33] permitting it to purchase liability insurance for its school bus service.[34] The same statute required any school district purchasing such insurance to waive its immunity to the extent of that coverage.[35] This troubled the court:

> Thus, under this statute, a person injured by an insured school district bus may recover to the extent of such insurance, whereas . . . a person injured by an uninsured school district bus can recover nothing at all. . . . The difficulty with this legislative effort . . . is that it allows each school district *to determine for itself* whether, and to what extent, it will be financially responsible for the wrongs inflicted by it.[36]

The court suggests, in a foreshadowing of the *Harvey* case five years later, that allowing school districts to select their own level of immunity through the purchase of bus insurance made the immunity statute an unconstitutional special law under Article IV, section 22 of the Illinois Constitution.[37] However, because the *Molitor* court chose to focus on the larger question of whether the very concept of immunity was permissible, it failed to draw a firm conclusion on this point.

When the Illinois legislature re-wrote the Illinois Tort Claims Act in 1965 after the *Harvey* decision, the $10,000 liability cap for school districts was retained,[38] but districts were now permitted to purchase any type of liability insurance, not just bus insurance.[39] The requirement to waive immunity was similarly expanded.[40]

The *Molitor* court's concern with the insurance waiver proved prescient. In a 1966 case, *Lorton v. Brown County Community School District No. 1*,[41] the state supreme court held that a six-month pre-notice requirement imposed on any plaintiff seeking a waiver of immunity for the purpose of filing an insurance claim

33. Ill. Rev. Stat. ch. 122, § 29-11(a) (1957) (repealed).
34. 163 N.E.2d at 92.
35. *Id.*
36. *Id.* (emphasis added).
37. Now ILL. CONST. art. IV, § 13 (1970).
38. Ill. Rev. Stat. ch. 122, § 825 (1965).
39. Ill. Rev. Stat. ch. 85, § 9-103 (1965).
40. Ill. Rev. Stat. ch. 85, § 9-103(b) (1965) (repealed 1986).
41. 220 N.E.2d 161 (Ill. 1966).

violated the special law provision of the state constitution.[42] Two years later, the state supreme court invalidated the $10,000 cap as a special law without explaining the basis for its decision beyond references to *Harvey* and *Lorton*.[43] By 1973, the constitutionality of the immunity-insurance waiver was being openly debated,[44] and the General Assembly finally put the issue to rest in 1986 by rewriting the statute to allow insurance carriers to assert all the immunities held by their public sector clients.[45]

Given the concern over maintaining the constitutionality of the 1965 legislation granting immunity to park districts and schools, the "intended or permitted" language within the "property used for recreational purposes" subsection of the Illinois Tort Claims Act was a reasonable legislative response to a judicial problem. Blocked by the special laws provision of the state constitution from specifying particular *types* of governmental entities, the legislature used a permissible *functional* differentiation. *Any* governmental entity that permitted or intended the public to use its grounds or equipment for recreational purposes would fall within the purview of section 3-106.

However, the same language wound up being inserted in the general "care in maintenance" provision (section 3-102(a)) of the Act:

> 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. . . .[46]

Unfortunately, no legislative history exists for section 3-102(a),[47] so it is impossible to determine exactly how the "intended and permitted" language was transferred over from section 3-106. The transferred language was different in four important respects. First, where section 3-106 granted immunity if certain conditions were met, section 3-102(a) specified a duty of care. Second, the phrase "intended *or* permitted" was changed to "intended *and*

42. *Id.* at 162-63; Ill. Rev. Stat. ch. 122, § 823 (1963).

43. Treece v. Shawnee Cmty. Unit Sch. Dist., 233 N.E.2d 549, 554 (Ill. 1968).

44. Commentary: *The Constitutionality of Section 9-103 of the Local Government and Governmental Employees Tort Immunity Act*, 50 CHI.-KENT L. REV. 137, 138-39 (1973).

45. 1996 Public Acts 84-1431; ILL. CONST. art. I, § 2; 745 ILL. COMP. STAT. 10/9-103(c) (2004).

46. Ill. Rev. Stat. ch. 85, § 3-102(a) (1965) (current version at 745 ILL. COMP. STAT. 10/3-102(a)) (emphasis added).

47. Gabriel v. City of Edwardsville, 604 N.E.2d 565, 574 (Ill. App. Ct. 1992) (Chapman, J., dissenting).

permitted." Third, "intended and permitted" was used to modify "people," not "public property." Fourth, "intended and permitted" was followed by the qualifier that the property must be used in a "reasonably foreseeable" manner.

At the time the ITLA was adopted in 1965, commentators assumed that the "duty" language of section 3-102(a) was meant to be read in conjunction with the grant of immunity in section 3-106.[48] However, section 3-106 only applied to recreational facilities, while the language of section 3-102(a) made it applicable to all public facilities. The following section, 3-103, served as a bridge, extending immunity to general-purpose facilities:

> A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property.... The local entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe.[49]

The fit between the sections was far from perfect, and the potential always existed that a non-recreational facility adequately maintained under the section 3-102(a) duty of care might not fall under section 3-103's umbrella of immunity. In 1983, the Illinois Supreme Court dealt with the problem by declaring that section 3-103's duty of care derived from a more basic duty within section 3-102,[50] and that section 3-102(a) was a limit on liability as well as a specification of duty.[51] This closed the seam between sections 3-102 and 3-103, but further muddied the water as to whether the former should be considered an element in the cause of action or an affirmative defense.

The change from "intended or permitted" to "intended and permitted" turned out to be the most insidious alteration, especially when the object of this modifier was shifted from places to people. The qualifier *permitted* by itself is straightforward: permitted people are those with permission to use a facility, presumably those with express permission (licensees) and those whom the municipality has tacitly permitted through assent and custom (invitees).[52] But when permitted is combined with *intended*, the result is a logical muddle. Is intended more restrictive than permitted? Normally, to intend to do something

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48. *Illinois Tort Claims Act*, *supra* note 17, at 286.

49. Ill. Rev. Stat. ch. 83, § 3-103(a) (current version at 745 ILL. COMP. STAT. 10/3-103(a)).

50. Curtis v. County of Cook, 456 N.E.2d 116, 120 (Ill. 1983).

51. *Id.* at 119. "The [ITLA] is in derogation of the common law action against governmental entities and specifies certain limitations on the liabilities of such bodies. One of these limitations appears in section 3-102(a)...." *Id.* (internal citations omitted).

52. See "invitee" and "licensee" in BRYAN A. GARDINER, A DICTIONARY OF MODERN LEGAL USAGE 486, 528 (1995).

evinces more purpose than merely permitting something to happen. But permission to use property is very specific—it is difficult to imagine giving express permission to someone to use a site without intending to do so. The only reasonable interpretation is that *permitted* includes both those with express permission (licensees) and implied permission (invitees), while *intended* excludes invitees, leaving only licensees.

Further exacerbating the problem is the inclusion of "reasonably foreseeable manner" immediately after "intended and permitted." Does "foreseeable" re-open the category of relevant people to include those who are merely permitted? An invitee, after all, usually has implied permission through passive assent or custom, and would reasonably be considered a foreseeable user. The inclusion of both "in a manner" and "at such time" suggests that a municipality has a duty to provide reasonable care to any person engaging in a reasonable activity at a reasonable time. But if the foreseeability language is meant to be confined strictly to uses, not users, then the duty of care extends only to those with explicit permission only so long as they are engaged in a foreseeable activity.

Using the most extreme interpretation of sections 3-102(a) and 3-103 together, a municipality would be immune from liability unless: 1) a location was unreasonably unsafe; *and* 2) the user had express permission to use the location; *and* 3) the user was engaged in a foreseeable activity. This was, in fact, the interpretation that jelled in *Boub II*. Between 1965 and 1998, however, lay a long and contorted legal road.

B. Redefining Government Negligence: Judicial Interpretation of the ITLA

Until 1986, it was settled law that the Tort Immunity Act "essentially continued the common law duties of a municipality with respect to the maintenance of its public ways."[53] The common law in Illinois regarding the standard of due care to be accorded to cyclists was established in a 1909 Illinois Supreme Court case, *Molway v. City of Chicago*.[54] Some local courts had previously ruled that absent a statutory provision, a bicyclist must "take the road as he finds it."[55] While finding that "the law does not require a road shall be absolutely safe for bicycling purposes,"[56] the court added that "public officials are bound to take into consideration the probability that it will be used by all vehicles that are in

53. Risner v. City of Chicago, 502 N.E.2d 357, 359 (Ill. App. Ct. 1986) (quoting Larson v. City of Chicago, 491 N.E.2d 165, 166 (Ill. App. Ct. 1986). *Accord* Santelli v. City of Chicago, 584 N.E.2d 456, 459 (Ill. App. Ct. 1991).

54. 88 N.E. 485, 487 (Ill. 1909).

55. *Id.* at 486.

56. *Id.* at 487.

common use and they must make it reasonably safe and convenient for all such uses."[57]

Despite the heavy reliance the plaintiff and amici in *Boub II* would place on *Molway*, the core of its decision was simply that bicyclists were ordinary users: "Some authorities apparently assume that to make the highways or streets reasonably safe for bicyclists using reasonable care would impose more onerous duties upon municipalities than to keep them in repair for pedestrians or horse-drawn vehicles. We do not think that this conclusion . . . necessarily follows."[58]

As ordinary users, bicyclists were foreseeable and thus were owed a duty of ordinary reasonable care. Overlooked in the pedestrian cases argued almost a century later was the apparently obvious finding that "reasonably safe condition for travel in the ordinary modes"[59] was a practical question, to be determined in each case by the particular circumstances.[60] That is, while the issue of whether a bicyclist was a reasonable user was a question of law, reasonable use by the cyclist and reasonable ordinary care by the municipality were questions of fact to be determined in each case.[61] This would eventually become a critical, but unrecognized, issue. *Molway*'s foreseeability test was made more explicit two years later in *Boender v. City of Harvey*: "The object to be secured is reasonable safety for travel, considering the amount and kind of travel which may fairly be expected upon the particular road or street."[62]

A seemingly unrelated case some fifty years later started to erode the permanence of *Molway*.[63] The City of Chicago was repairing a through street (an arterial) and detoured traffic through two local streets. A local ordinance required the city's traffic engineer to protect the right-of-way of all through streets by placing stop signs facing the intersecting roads. The detour's right-of-way was not so protected, and driver Locigno entered the detour route from a side street without stopping. He was broadsided and his two children were killed.[64] Mr. Locigno sued the city, claiming it had a duty to give the detour the same right-of-way protection as a through street.

The court held that the detour was not a through route because it had not been designated through the installation of

57. *Id.*
58. *Id.* at 486.
59. *Id.* at 487.
60. *Id.*
61. "No rigid rule can be laid down as to defects in highways or streets for which municipalities will be liable or as to the degree of care required by the person injured." *Id.*.
62. 95 N.E. 1084, 1085 (Ill. 1911).
63. Locigno v. City of Chicago, 178 N.E.2d 124 (Ill. App. Ct. 1961).
64. *Id.* at 126.

signage.[65] "A street does not become a through street because it is used as a through street," said the court, "it becomes a through street *because it is so designated and appropriate signs placed.*"[66]

While *Molway* held that the reasonable use of a street could be determined from the circumstances of its actual use, *Locigno* transferred much of this power from roadway users and court fact-finders to the local government. It also extended *Boender's* "localness" criteria down to specific streets and gave municipalities the authority to differentiate between roadways through the use of signage and road markings.

The first test of section 3-102's "intended and permitted" language came in a 1973 case, *Deren v. City of Carbondale*.[67] Mr. Deren, a pedestrian, was struck while walking on the edge of South Wall Street. Although South Wall had no sidewalk, it was used regularly by students walking to a nearby university.[68] Mr. Deren framed the issue as one of foreseeability: "Does a city, possessed of knowledge of regular and heavy pedestrian use . . . have a duty by reason of its knowledge to take reasonable precautions to safeguard such pedestrians from injury by vehicles?"[69]

The appeals court said no, because it was intent, not foreseeability, that mattered: "a city is only required to maintain the respective portions of its streets in reasonably safe condition for the purposes to which they are respectively devoted by the intention and sanction of the city."[70]

But in reaching this conclusion, the court faced formidable interpretive hurdles. The "intended and permitted" language of the ITLA is situated within section 3-102, which deals with a duty of care to maintain facilities. However, in this case, the problem was not maintenance, but a failure to install a vitally needed sidewalk. That situation is addressed in section 3-103, but its language is limited to immunity from liability, not duty of care.

The trial court dismissed Mr. Deren's complaint for failure to state a claim.[71] If the appellate court determined that there was a disputed issue of fact, dismissal would be unwarranted. The determination as to whether the city had a duty of care was an issue of law, but the existence of immunity was a question of fact. The appellate court couldn't rest its decision on section 3-103, because that would mean a remand back to the trial level, but it couldn't base the decision on section 3-102 either, because

65. *Id.* at 128.
66. *Id.* (emphasis added).
67. 300 N.E.2d 590, 592 (Ill. App. Ct. 1973).
68. *Id.* at 591.
69. *Id.*
70. *Id.* at 593.
71. *Id.* at 591.

installation, not maintenance, was the issue.

So the appeals court solved the problem by conflating section 3-102's intent and duty of care language into section 3-103's immunity provisions:

> Long established principles of law fix the rights and liabilities of the parties in a case of this sort . . . the responsibility of public entities has only been extended to those undertakings which they choose or elect to carry out. We are not prepared to create a general duty upon municipalities for the safeguarding of pedestrians. . . .[72]

Thus, intent applied to both the provision of facilities and their maintenance. More importantly, both were questions of duty to be determined by the court. Intent/foreseeability, maintenance/adequate provision, and immunity/duty of care became inseparable issues.

While foreseeability became defined as the reasonable recognition of existing problems that the city had to address to meet its duty of care, intent became a policy decision that the city had the power to make. Duty became tautological: A city had no duty of care if it intended no duty of care. The court apparently recognized what it had done, because it rationalized away the implications of its handiwork by asserting that "a municipality has never been intended under our system as a principal source of social protection."[73]

The court wasn't yet finished with Mr. Deren. Using a blatant misreading of a 1909 Illinois Supreme Court case, *VanCleef v. City of Chicago*,[74] the court in *Deren* came to the remarkably circular conclusion that "the liability of a municipality with respect to its public streets is limited to their use as streets." Applying the language from *Locigno* that a through street is not a through street until it is designated and signed,[75] the *Deren* court shifted the second half of the tautology to assert that the liability of a municipality with respect to its public streets is limited to their use as vehicular ways. Unless designated and signed to the contrary, the streets were for motor vehicles.[76]

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72. *Id.* at 593.

73. *Id.*

74. 88 N.E. 815 (Ill. 1909). The *Deren* court used the following quote, to which I have re-inserted the original following sentence, in italics:

> Undoubtedly, under ordinary circumstances it is the duty of a city to see that its streets are reasonably safe for the uses for which streets are intended. *The liability of the city is, of course, not confined to travelers, but extends to a person stopping on the street to converse with another, or stopping to see a procession pass, or using the street for convenience or pleasure.*

Id. at 817 (emphasis added).

75. 178 N.E.2d at 128.

76. *Deren*, 300 N.E.2d at 593. The validity of this assertion was challenged two years later, on federal constitutional grounds, in *Bykofsky v. Borough of*

In a lengthy dissent, Justice Moran identified and rebutted each point: 1) the majority's opinion was predicated on a naked assertion that streets were built solely for vehicular traffic; 2) the issue of intent should not be subordinated to a question of duty, but was a separate fact-based determination; and 3) intent was not the same as foreseeability, and the two should not be confused.[77] Justice Moran also implied that a use could be so foreseeable that it would override intent:

> The control of the streets of cities was not put into their [municipalities'] hands for the purpose that they might plan or order that the streets should be made dangerous or unsafe for the public to travel thereon. . . . Such action would be substantially the same as planning and creating a public nuisance.[78]

Many of these issues were addressed by the state supreme court in 1983 in *Curtis v. County of Cook*,[79] a drag-racing case. The plaintiff was a passenger injured when her car went off the road and hit a traffic sign.[80] Looking to the "intended and permitted" clause in section 3-102, the court decided that "the language evinces a legislative intent to extend a duty of care only to those persons by whom the local government intended the property to be used,"[81] and that "the existence of a duty must be determined by the courts as a matter of law."[82] Because Ms. Curtis was not an intended user, one of the elements in the cause of action (duty) was not met.[83] The holding in *Curtis* would have two significant impacts on the pedestrian cases and in *Boub II*.

First, intent firmly became an element of duty, and a question of law for the court to determine. Second, intent defined *categories of users*, not *types of use*. A particular user could be acting responsibly, exercising more than ordinary care, and still not be an intended user. On the other hand, intention was subsumed within a municipality's duty of care and was pulled out of the affirmative defense of immunity. Or it could be situated in both. At best, this meant that a municipality could assert immunity without having

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Middletown, 401 F. Supp. 1242, 1254 (M.D. Penn. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976): "One may be on the streets even though he is there merely for exercise, recreation, walking, standing, talking, socializing, or any other purpose that does not interfere with other persons' rights." *Bykofsky* is discussed in greater detail in the following section of this Article.

77. *Deren*, 300 N.E.2d at 595 (Moran, J., dissenting).

78. *Id.* at 595 (Moran, J., dissenting) (quoting Gould v. Topeka, 4 P. 822, 826-27 (Kan. 1884)).

79. 456 N.E.2d at 116.

80. *Id.* at 118.

81. *Id.* at 120.

82. *Id.* at 119.

83. *Id.* at 120. "As a passenger in a speed-clocking automobile, Deborah Curtis cannot be said to fall *within the class of motorists* by whom the defendant's highways were intended to be used." *Id.* (emphasis added).

to admit it had a duty of care. Alternatively, it could get two bites at the apple, once in determining duty—a question of law—and again in asserting immunity—an issue of fact. At worst, it meant that a municipality could define its own duty of care by creating categories of intended users, treating all unintended users as unforeseeable, regardless of whether they should be reasonably anticipated or whether their use adhered to regulations and standards of conduct.

These ambiguities cascaded down through the Illinois court system. For example, *Risner v. City of Chicago*,[84] decided three years later, would become a seminal ITLA case. Plaintiff Howard Risner exited an eastbound Chicago Transit bus on Adams Street and walked across the street in mid-block. Adams was a one-way westbound street, but busses were allowed to travel in the opposite direction. Mr. Risner failed to look in the proper direction and was struck by a westbound car.[85]

The *Risner* court did try to clarify one issue: that immunity under the ITLA is a question of duty—an issue of law. It was not entirely successful, concluding that while issues of foreseeability and breach are questions of fact and duty is a matter of law,[86] immunity is synonymous with the existence of duty.[87]

The appeals court held that the city had no duty to Mr. Risner, but explained its holding in three diametrically opposed sentences:

> Here, however, plaintiff was not an intended or permitted user of defendant's street, using it in a manner it was reasonably foreseeable it would be used; the street is for *use* by vehicular traffic—not pedestrians, except where defendant has provided crosswalks or the like. In addition, although plaintiff argues that *foreseeability is the measure of liability* in determining the reasonable care to be exercised by the municipality, that *foreseeability*, pursuant to the language of the [ITLA], pertains to *use* of the municipality's property, by permitted and intended users, not to *foreseeable users* as plaintiff argues, "*in a manner* in which and at such times as *it was reasonably foreseeable it would be used.*" Here, as mentioned above, Adams street is for the use of vehicular traffic, and jaywalkers are not intended or permitted users and not, therefore, users making use of the street in a foreseeable manner.[88]

These sentences are so self-deconstructing that one has to wonder if the obscuration was deliberate. Start with the first

84. 502 N.E.2d 357 (Ill. App. Ct. 1986).

85. *Id.* at 358.

86. *Id.* at 359.

87. *Id.* "A municipality is not an insurer of the safety of pedestrians against all accidents occurring on its property; its *duty/liability is governed by the [ITLA].*" *Id.* (emphasis added).

88. *Id.* at 359-60.

sentence. The placement of the comma between "street" and "using," without a functional connective, leaves the reader unable to tell if the court thought Mr. Risner was an unintended user using the street in a foreseeable manner, or an unintended user using the street in an unforeseeable manner. The second sentence, prior to the second comma, makes clear that the plaintiff was arguing that foreseeability should determine liability. After the comma, the sentence continues with "*that* foreseeability," presumably both the foreseeability that the plaintiff refers to and the "reasonably foreseeable" language in section 3-102. This dual reference is supported by the "pursuant to the language of the [ITLA]" phrase. Thus, the remainder of the second sentence apparently concludes with the determination that "permitted and intended" refers to categories of people, and "foreseeable" refers to the manner of use by those people. The second sentence is followed by a *see also* citation to *Curtis*, further supporting this interpretation.

But if one accepts this interpretation, the third sentence becomes contradictory. The second sentence concludes that "intended" classifies users, and "foreseeable" categorizes manner of use. But the third sentence then asserts that unintended users are inherently unforeseeable, regardless of their actual conduct, simply because they are unintended. Furthermore, because the existence of duty is a matter of law, and the existence of duty is determined by intent, intent is an issue of law. But if foreseeability (an issue of fact) is a separate cross-cutting categorization from intention, a determination of status as intended or unintended still requires the fact-finder to decide if the use was foreseeable or unforeseeable. The distinction is not trivial, for the issue of fact (foreseeability) is an element of the complaint, while the issue of law (intention) is limited to the application of the affirmative defense of immunity.

The *Risner* court's ambiguity permitted it to reduce the case to a single issue of law by subsuming foreseeability under intent. In effect, the court determined that all unintended users are unforeseeable users, thereby converting classes of people into classes of acts, and making both a single issue of law. The only determinative element remaining was whether a defendant could convince the court that a user was unintended, and could argue this twice: as a failure to state a cause of action (because no duty existed) or in summary judgment as a lack of dispute as to a material issue (because the plaintiff belonged to a category of users from which the municipality was immune).

Not every district of the Illinois appeals court elected to follow the first district. The Third District came to a very different

conclusion in a 1988 case, *Di Domenico v. Romeoville*.[89] Mr. Di Domenico was legally parked in the street parallel to the curb. When he walked out into the road to enter his car, he tripped over a pothole and was injured. The trial court dismissed for failure to state a cause of action.[90] The appeals court overturned, holding that because the village permitted curbside parking, it must have recognized the need to walk in the street to access parked cars.[91] "It defies common sense," stated the court, "to conclude that such local entities did not contemplate and intend" that drivers "would use the street area around parked cars for ingress and egress."[92] The court rejected the village's appeal to *Deren* and *Risner*, deciding that "they provide factual situations quite dissimilar to that presented in the case being considered."[93]

Notice the court's use of the phrase "contemplate and intend." The Third District apparently rejected the earlier attempts to create a dichotomy of intention and foreseeability and sent a brief, but unambiguous, statement that it intended to rely on foreseeability, a question of fact, to assess the prima facie validity of a cause of action.[94]

The Illinois Supreme Court did little to clarify the matter when it heard another pedestrian case, *Marshall v. City of Centralia*,[95] in 1991, three years after *Di Domenico*. A child walking on a sidewalk within the right-of-way of a parkway left the sidewalk to avoid a mud puddle and fell into an open manhole.[96] The court made no meaningful distinction between "duty of care" and "limitation on liability," treating them interchangeably. The court clearly stated that duty of care is a question of law to be determined by the court,[97] and determining intent is a part of this analysis.[98] But it decided that "intent, being a mental state, can rarely be discerned from direct proof and must ordinarily be inferred from the facts."[99] The court concluded that intent was a question of law that must be determined by the facts!

The court also obscured the distinction between intended users and intended uses, as well as the closely linked question of

89. 525 N.E.2d 242 (Ill. App. Ct. 1988).
90. *Id.* at 242-43.
91. *Id.* at 243.
92. *Id.*
93. *Id.* at 244.
94. Because the question at bar was the failure to state a valid claim, immunity was never an issue.
95. 570 N.E.2d 315 (Ill. 1991).
96. *Id.* at 317.
97. *Id.* at 319.
98. "Whether the defendant owed the plaintiff a duty requires this court to refer to the language of section 3-102(a) . . . and determine whether the parkway was for the intended use of the plaintiff." *Id.*
99. *Id.*

whether intent is the same as foreseeability. In the analysis of whether intent was an issue of law or fact, the court framed the issue as a determination of "whether the parkway was for the intended *use of the plaintiff*,"[100] and concluded that "the defendant had a duty to exercise ordinary care to maintain the parkway in a reasonably safe condition *for the benefit of the plaintiff*."[101]

Continuing on, however, the court held that cities cannot maintain unreasonable conditions "at places where people may reasonably be expected to go," and that municipalities "must take into account the natural inclination of children to run about in play and the perverse insistence of adults to cut corners and cross streets and grass plats instead of following precisely the beaten or provided path."[102]

As examples, the court cited a wide variety of reasonable parkway activities: "to enter a car that is parked at the curb; to retrieve mail from a mailbox; to reach a neighbor's house across the street; to board a bus; to stand so that others can pass you on the sidewalk; to cut the lawn . . . and to rake the leaves."[103] The thread that combined these disparate activities was that they were "commonly associated" with the facility through historic use.[104] The state supreme court never clarified whether this "historically used" test defined users, as suggested by its analogy with the traditional invitee definition, or uses, a measure of foreseeability, as the addition of "commonly associated" to the test suggests.

A few months after *Marshall*, the Illinois Appellate Court, First District, heard *Santelli v. City of Chicago*.[105] Mr. Santelli and his passenger were killed when their car lost control in a newly rebuilt curve in a roadway. The plaintiff estate asserted that section 11-304 of the Illinois Motor Vehicle Code required cities to post traffic control devices that "conform to the State Manual and Specifications and [are] justified by traffic warrants stated in the Manual."[106] The appeals court upheld dismissal under section 3-104 of the Tort Immunity Act, which immunized local governments from failure to provide traffic control devices.[107] Although the case did not concern section 3-102(a), it did establish the precedent that the immunity of the Tort Immunity Act included the breach of a duty specifically imposed by the state itself.[108]

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100. *Id.*
101. *Id.* (emphasis added).
102. *Id.*
103. *Id.*
104. *Id.*
105. 584 N.E.2d 456 (Ill. App. Ct. 1991).
106. *Id.* at 460. *See also* Ill. Rev. Stat. ch. 95 1/2, § 11-304 (1987).
107. Ill. Rev. Stat. ch. 85, § 3-104 (1987).
108. *Santelli*, 584 N.E.2d at 460-61.

The Illinois Supreme Court revisited the pedestrian issue a year after *Marshall*. Eugene Wojdyla was killed at night walking across a six-lane highway that separated his employer's business and the firm's parking lot. The street lighting was poor and the nearest crosswalks were a half-mile in each direction.[109]

The court veered sharply away from *Marshall*, back to *Curtis* and *Deren*, but like most retreats, *Wojdyla* was messy and chaotic. *Marshall*, the court claimed, was distinguishable because the location of the earlier incident, a parkway, created a "situation of conflicting purposes on municipal property."[110] There, the pedestrian was an intended user "because his use of the parkway was a customary one." On the other hand, "[h]ere, the purpose of the highway is clearly for the use of automobiles"[111] because "[t]he lines in the street and the signs by the road are intended for use by vehicular traffic." This was the "designated, signed and marked" test from *Locigno*, but combined with a *Marshall*-like "customary usage" test.

But the syllogism of "customary use, therefore intended user" appeared to give new life to *Molway*, the 1909 bicycle case. This interpretation contradicted the supreme court's own recent holding in *Curtis* that intention designated users (not uses), which threatened to broaden the *Di Domenici* "intention by implication" argument, and imperil the usefulness of *Deren*. The court started with *Molway*, which it killed with kindness. The court asserted that its "historical perspective still holds true"[112] because "the developer of modern highways now creates the design for the benefit of automobiles and other vehicles, and rarely for pedestrians."[113] Although "[i]n the most primitive state of society the conception of a highway was merely a foot-path," given the "growth of civilization" the purpose of roads had evolved "until today our urban highways are devoted to a variety of uses not known in former times and [was] never dreamed of."[114] The conclusion that followed this analysis in *Molway* was conveniently forgotten: "To hold that the standard of safety required of public authorities as to streets and highways for all methods of travel should be the safety required for a horse drawn carriage, *or of any other particular vehicle*, would not accord with wise public policy."[115]

The irony in this holding became apparent in *Boub II* when the supreme court emphasized that the categorization of users into

109. Wojdyla v. City of Park Ridge, 592 N.E.2d 1098, 1099-1100 (Ill. 1992).
110. *Id.* at 1101.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. 88 N.E. at 486 (emphasis added).

"permitted" and "intended and permitted" was an immunity/duty of care issue, not a question of transportation policy. The *Boub II* court claimed that there was no contradiction created by the State of Illinois promoting bicycle use at the same time that Wayne Township was denying they were intended users; the former was state transportation policy, the later was state immunity policy.[116] The holding in *Wojdyla* that "customary use" had to yield to the destiny of the automobile was an undisguised public policy decision, and veered perilously close to judicial legislating.

The *Wojdyla* court had more of a problem when it next turned to *Di Domenico*. There, the pedestrian was walking to his parallel-parked car, but was still in the roadway. The city argued that parking lanes and travel lanes were not the same, and Mr. Di Domenico countered that such fine-grained spatial distinctions were useless, and that it was the user's purpose that mattered.[117] The *Wojdyla* court sharply disagreed:

> Were we to measure the duty of care by the intent of individuals traveling over these various properties, we would effectively negate section 3-102(a), . . . for no longer would the intended use by the municipality be controlling. Instead, the intent of any particular individual would determine whether the municipality owed a duty of care.[118]

This is the earliest clear articulation of the "localization" doctrine that was hinted at in *Santelli*: the intent of the local government controls, and is more important than the intent of the user or the intent of higher levels of government. This left one glaring gap in the finding: if the difference of only a few feet could determine the local government intent, how was one to know if he or she was intended? To resolve this, the supreme court again reached back to *Locigno*, although it never cited the case:

> To determine the intended use of property involved here, we need look no further than the property itself. The roads are paved, marked and regulated by traffic signs and signals. . . . Parking lanes are set out according to painted blocks on the pavement, signs or meters. . . . Pedestrian walkways are designated by painted crosswalks by design, and by intersections by custom. These are the

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116. 702 N.E.2d at 540. "Under . . . the Tort Immunity Act, it is the intent of the local public entity that controls; accordingly, the intent of another public body, whether it is the state, a county, or other local entity, should be irrelevant." *Id.*

117. *Wojdyla*, 592 N.E.2d at 1102.

> Plaintiff asserts the location of the decedent at the time of his injury is irrelevant to our inquiry of whether the defendants owed a duty of care, and the key factor to be considered is the purpose in which he was engaged, in this case the approach to his legally parked car.

Id. In both *Di Domenico* and *Wojdyla* the injured party was walking to a car parked at the edge of the roadway.

118. *Id.*

indications of intended use.[119]

This became the second half of the localization doctrine: intended users are to be designated by signs or markings or other physical objects—what the court would later call "clear manifestations of intent."[120] Foreseeability was again subordinated to intent. Mr. Wojdyla's estate asked the court "to mandate that whenever a municipality erects streetlights, it must provide adequate lighting for all who may foreseeably use the street."[121] The court refused to consider the merits of the argument, stating that "since we have determined the decedent was not an intended user, this argument must fail."[122] This was the clearest statement yet by the supreme court that a permitted, but not intended, user could never be acting in a foreseeable manner.

Less than a year later, the Illinois Appellate Court heard yet another pedestrian case. The outcome was a straightforward application of *Wojdyla*. But in a dissent over twice as long as the majority opinion, Justice Chapman reviewed virtually the entire history of section 3-102 litigation starting with *Curtis* in 1983.[123] He focused on two issues: the conflation of duty of care and immunity, and the confusion between intent and foreseeability. Justice Chapman cautioned his colleagues that "the duty question should not be based on whether the plaintiff is getting out of a lawfully parked car, or crossing a street within a crosswalk, or any other exception or limitation."[124] The duty imposed under common law to provide facilities that are in reasonably safe condition should be retained, he argued, and the recent tendency to distinguish very finely between types of property should be abandoned.[125] Location and physical characteristics should be left to a fact-specific evaluation of the breach of duty. After all, he asked, could anyone argue that a city "would not have a duty to . . . do something about a 10-foot wide pit filled with crocodiles, whether that pit was in a sidewalk, on the parkway beside the sidewalk, or in the middle of a street?"[126] The answer would soon surprise him.

Justice Chapman then asked why section 3-102(a) provided for both "intended" and "reasonably foreseeable" users. He conjectured that the "logical purpose" of the apparently duplicative language "would have been to differentiate between the common

119. *Id.* at 1102-03.
120. Sisk v. Williamson County, 657 N.E.2d 903, 907 (Ill. 1995).
121. *Wojdyla*, 592 N.E.2d at 1103.
122. *Id.* at 1103-04.
123. *Gabriel*, 604 N.E.2d at 568-75 (Chapman, J., dissenting).
124. *Id.* at 573 (Chapman, J., dissenting).
125. *Id.* at 573-74 (Chapman, J., dissenting).
126. *Id.* at 573 (Chapman, J., dissenting).

law classes of licensees, invitees, and trespassers which were still recognized at the time of the passage of the Act."[127] Some places, such as streets and parks, are open to all, while others, such as parking garages and offices, are only open to certain people. Section 3-102(a) asked two separate questions: 1) is this person intended and permitted; and 2) was this person acting in a reasonably foreseeable manner? Justice Chapman pointed to *Risner*, the Chicago bus passenger case, as the place where this "logical" construction started to break down:

> Who were the "people" in *Risner*? Presumably, he was a citizen of Chicago. Did the city intend him to jaywalk? No. Did it permit jaywalking? No. But does either of the latter two questions have anything to do with whether a citizen of Chicago is "intended and permitted to use the property," the public streets of the city? No.[128]

Perhaps realizing that his argument would not become a best-seller, Justice Chapman ended his dissent with the puckish comment that the majority reached a conclusion that "while it may have been permitted, was not . . . intended by the legislature."[129]

The Illinois Supreme Court refined *Wojdyla* a year later in *Curatola v. Village of Niles*.[130] The facts were similar to *Di Domenico*: a truck driver legally parked at curbside was injured when he stepped into a pothole. The Illinois Third District Appellate Court affirmed summary judgment for the village, concluding that *Wojdyla* invalidated *Di Dominico*.[131] The supreme court overturned, reconciling the two cases by restricting *Di Domenico* into insignificance. The court started with the now-familiar principle that the streets are "for use by vehicular traffic—not pedestrians, except under certain limited circumstances."[132] The court found only one qualifying circumstance, *Di Domenico*, which it labeled a "narrow exception."[133] However, the *Curatola* court acknowledged the legitimacy of *Di Domenico*'s holding that on-street parking implies that pedestrians are intended roadway users because the parking "mandates or requires pedestrians' usage of the immediate street."[134] The court then grafted on *Locigno*'s "designation and signage" test, as applied in *Wojdyla*. The combined test required that an injured pedestrian must establish that: 1) his or her use of the roadway was "mandated by or immediately proximate to" on-street parking; and 2) that the parking have "clear indications

127. *Id.* at 574 (Chapman, J., dissenting).
128. *Id.* at 576-77 (Chapman, J., dissenting).
129. *Id.* at 575 (Chapman, J., dissenting).
130. 608 N.E.2d 882 (Ill. 1993).
131. *Id.* at 882-83.
132. *Id.* at 886.
133. *Id.* at 888.
134. *Id.* at 887.

regarding the property's intended use."[135]

The importance of *Curatola*, however, lay in its dicta. The City of Chicago had filed an amicus curiae brief conceding that the type of roadway pedestrians found in *Risner*, *Di Domenico*, and *Wojdyla* were foreseeable.[136] However, because of "the enormity of that burden" on cities posed by these uses, the City of Chicago asked the court to use liability exposure as the benchmark for establishing local intent.[137] If a given category of user had the potential to generate significant liability, that fact alone should be dispositive in determining that he or she was not an intended user.[138]

The court was almost apologetic in its denial of the request. To soften the blow, it offered Chicago two concessions: it would do what it could to keep *Di Domenico*-type exceptions narrow, and it would permit "factual issues" relating to the existence of a duty of care to be put before juries "upon proper instruction."[139] However, the Chicago "burdensome, therefore unintended" formula would not go quietly into the night. It returned three years later in *Vaughn v. City of West Frankfort*,[140] another jaywalking case, this time involving a pedestrian who crossed the street in mid-block because the sidewalk ended on her side of the street. *Di Domenico*'s "necessary, therefore intended" exception took another hit when the court found that "it was not impossible for plaintiff to reach her destination without stepping into the street. . . ."[141] "Necessary" was now replaced with "not impossible." The court also rejected the appellate court's contention that the costs of guarding against Ms. Vaughn's injury was not an undue burden on West Frankfort. Pointing to the ITLA's "clear policy" to protect municipalities from liability, the supreme court concluded that "the costs of making all public streets and roadways reasonably safe for unrestricted pedestrian use would be an extreme burden," and "decline[d] the invitation to impose liability on the City. . . ."[142] The Chicago formula was working its way into Illinois common law.

The Supreme Court of Illinois heard one final pedestrian case before *Boub II*, *Sisk v. Williamson County*.[143] The plaintiff was driving at night down a quiet rural road when his car struck a cement bridge abutment obscured by high weeds. When he

135. *Id.*
136. *Id.* at 885.
137. *Id.*
138. *Id.*
139. *Id.* at 888.
140. 651 N.E.2d 1115 (Ill. 1995).
141. *Id.* at 1118.
142. *Id.* at 1119.
143. 657 N.E.2d 903 (Ill. 1995).

walked around the car to check for damage, the same weeds hid the edge of the road and he fell into the creek beneath.[144]

The appellate court found that the county had a duty of care to the plaintiff because the lack of sidewalks on a rural road make it impossible to walk anywhere but the road, and that the pedestrian use of quiet rural roads was "traditional and customary."[145] Moreover, the Illinois Vehicle Code contained specific instructions that a pedestrian on a highway without a sidewalk or shoulder should walk on the left edge of the road. Such regulation, reasoned the appellate court, was a legislative direction that rural pedestrians at the edge of the road were foreseeable.[146]

The supreme court overturned. Invoking *Deren* and *Locigno*, the court rejected the entire appellate court's "traditional and customary" reasoning and even its own "impossibility" doctrine. Falling back on *Wojdyla*'s "intent must be inferred from the circumstances" principle, the court found that only physical "manifestations of intent," such as "signs, meters and pavement markings" were sufficient to establish intent.[147] Although pedestrians on rural roads may be foreseeable, and sometimes even inevitable, neither foreseeability nor necessity manifested intent.[148]

Moreover, only the intent of the local government mattered, as "the Illinois legislature has established a clear public policy to immunize government from the financial burden of preventing injuries which occur as a result of unintended uses of roadways."[149] Although other state statutes, such as the vehicle code, may regulate permitted uses, the legislative intent embodied in the Tort Liability Act alone controlled intended uses. The "localization" doctrine of *Locigno* and *Deren*, and the Chicago "intent as determined by risk" formula came together in *Sisk*. The default rule was that streets are for motor vehicles. While the state and regional governments could determine who was a permitted user, only the most local unit of government could decide who was intended. Such intent must be expressed in physical manifestations, such as signage or roadway markings. Intent defined classes of users, not uses, and was a threshold determination in deciding both the issue of duty and the affirmative defense of immunity—any unintended user was per se

144. *Id.* at 904.
145. *Id.* at 906.
146. *Id.* at 905-06.
147. *Id.* at 907.
148. *Id.* "Although it may become necessary at times for pedestrians to walk on county roads, such use is not a manifestation of the *local municipality's* intent." *Id.* (emphasis added).
149. *Id.* at 908.

unforeseeable, regardless of the propriety of his or her use. Because foreseeability went to the establishment of duty, it was a question of law to be decided by the court, usually upon a motion for summary judgment.

C. *The* Boub *Case*

Jon Boub's complaint contained six counts, three alleging negligence and three alleging wanton and willful misconduct. Wayne Township moved for summary judgment, which was granted by the trial court. Mr. Boub appealed only the three negligence counts.[150] In addition to an alleged failure to properly maintain the bridge in accordance with section 3-102(a), the plaintiff also maintained that the township failed to obtain prior approval for the improvement project under section 3-103,[151] and that the township failed to properly post warning signs at a road construction site as per section 3-104.[152]

Both sides agreed that the central issue was whether a cyclist is an intended user of the roadway.[153] Noting that "we are not aware of any case that has definitively determined whether bicyclists are intended users of the streets,"[154] the appellate court turned to the three pedestrian cases, *Wojdyla*, *Vaughn*, and *Sisk*.[155] Adopting the admonishment in *Wojdyla* that "a court should look to the property itself to determine its intended use,"[156] the court determined that its task was to "look for manifestations in or on the subject property signifying that defendants intended that the road . . . be used by bicyclists."[157] The court concluded that "our review of the record did not reveal anything, based on the property itself, that manifested an intent by defendants that bicyclists use the subject road and bridge."[158]

In their amici brief to the state supreme court, the League of Illinois Bicyclists and the Chicagoland Bicycle Federation countered that the state vehicle code, the Illinois Department of Transportation planning and design manuals, and the DuPage County transportation plans evinced a policy to regard cyclists as intended users of the roadway.[159] In addition, the friends of the court argued that *Molway*, the 1909 case, was still relevant

150. *Boub I*, 684 N.E.2d at 1042.
151. *Id.* at 1046-47.
152. *Id.* at 1047.
153. *Id.* at 1042-43.
154. *Id.* at 1044.
155. *Id.*
156. *Id.* at 1045.
157. *Id.*
158. *Id.* at 1046.
159. Brief of Amici Curiae League of Illinois Bicyclists at 28-29, Boub v. Township of Wayne, 702 N.E.2d 535 (Ill. 1998) (No. 84246), *available at* 1998 WL 34114740.

because it established a common law doctrine uniquely targeted at cyclists, one that had never been supplanted.[160] Mr. Boub had previously raised this argument before the appeals court, which rejected it, holding that such plans apply equally to both permitted and intended users, so "the fact that such rules have been established sheds no light on the issue before us."[161] Similarly, the appellate court also concluded that the supreme court's decisions in *Wojdyla* and *Sisk* to "discard as outmoded" *Molway* applied equally to all roadway users except motor vehicles.[162]

Mr. Boub's briefs had to address a significant statute of limitations issue, and thus the amici brief contained many of the details of Mr. Boub's case-in-chief. Both reiterated the argument that Mr. Boub was both an intended and permitted user because it was the policy of the State of Illinois and DuPage County to actively promote bicycling and improve conditions for bicyclists.[163] In addition, Mr. Boub asserted that the trial court's literal interpretation of *Wojdyla*, *Vaughn*, and *Sisk* that "a court should look to the property itself to determine its intended use,"[164] led the trial court to an unintended situation where it was countermanding state statute and administrative policy.[165] This was the result of analogizing pedestrian use to cycling, which "fails to consider the particular and distinct facts" differentiating the two.[166] In addition, the amici curiae argued that bicycle use was "customary and traditional," a clear reference to *Molway* and the muddled *Wojdyla* holding.[167]

Given the state's judicial history of conflating foreseeability (uses) and intent (users), this argument could have been used to drive a wedge in Wayne Township's main argument that intention was a form of permission local governments could extend or withdraw from classes of users at its discretion.[168] Instead, Mr. Boub's counsel made the tactical error of admitting that both sides

160. *Id.* at 33.

161. *Boub I*, 684 N.E.2d at 1046.

162. *Id.* at 1045.

163. Supplemental Brief of Appellant at 9, *Boub II* (No. 84246), *available at* 1998 WL 34181974.

164. *Boub I*, 684 N.E.2d at 1045.

165. Supplemental Brief of Appellant at 11, *Boub II* (No. 84246) *available at* 1998 WL 34181974. "Possibly the appellate court believed that when *Sisk*, *Vaughn*, and *Wojdyla* required courts to look to the property itself, it required them to ignore state statutes." *Id.*

166. *Id.* at 5.

167. Brief of Amici Curiae League of Illinois Bicyclists at 29-30, *Boub II* (No. 84246), *available at* 1998 WL 34114740.

168. Brief of Defendants-Appellees Township of Wayne at 36, *Boub II* (No. 84246), *available at* 1998 WL 34181975. "[W]hile . . . bicyclists may be permitted users of the road—i.e., they are not affirmatively prohibited from using the roadway—a local public entity's responsibility/duty . . . is limited only to intended and permitted users (namely, vehicular traffic)." *Id.*

agreed that "there is a distinction between a mere permitted user and a user who is intended and permitted."[169] Instead, counsel should have argued that intent was a form of foreseeability, and that it applied to both users and uses. Similarly, while plaintiff's counsel and the amici argued that *Marshall* held that intent was a question of fact, they failed to connect this argument to the larger issue of whether all unintentional users were, by definition, unforeseeable, or whether the categories were cross-cutting, with state and regional agencies determining which uses were foreseeable, and local governments deciding which users were intended.

The main thrust of both the plaintiff and amici briefs was a fear that applying the pedestrian cases to bicycles would create "a perverse system of disincentives"[170] that would prevent local governments from "providing any such [safety] accommodations in the future for fear that doing so will cause them to incur additional tort liability,"[171] and in fact would "motivate some municipalities to remove existing public safety accommodations."[172] Because cyclists traveled much greater distances than pedestrians, the localization doctrine threatened to overwhelm state and regional efforts to accommodate and improve safety for cyclists.

Wayne Township, on the other hand, addressed the issues of localization and foreseeability head-on.[173] The township acknowledged that cyclists were foreseeable and permitted users. Despite this, the township asserted that "the duty of care to maintain property in a reasonably safe condition by such persons extends only to those areas which are specifically marked and designated by the local public entity."[174] While the state vehicle code may extend rights and require vehicle-like duties from cyclists, this established only that they were, at best, permitted users.[175] In addition, the responsibility for determining who is an intended user should be controlled exclusively by the municipality "and not, as plaintiff and the amicus curiae assert, the intent of the plaintiff or the legislature or some other entity."[176] Moreover, the township asserted, this exclusive localization "makes good sense,"[177] because "in this era of tax caps and dwindling

169. Reply Brief of Appellant at 8, *Boub II* (No. 84246), *available at* 1998 WL 34181977 (internal quotations omitted).

170. Brief of Amici Curiae League of Illinois Bicyclists at 36-37, *Boub II* (No. 84246), *available at* 1998 WL 34114740.

171. *Id.*

172. *Id.* at 37.

173. Brief of Defendants-Appellees Township of Wayne at 16, *Boub II* (No. 84246), *available at* 1998 WL 34181975.

174. *Id.*

175. *Id.* at 41.

176. *Id.* at 20.

177. *Id.* at 31.

government budgets, it would be patently unfair to permit the intent of some other person or entity—a user, a planning commission, some agency of the state or federal government, etc.—to define the scope and extent of a local public entity's duty of care."[178] The township did not cite either the *Curatola* amicus brief (Chicago's "enormity of the burden" proposal) or its incorporation into *Vaughn* or *Sisk*, probably to avoid the appearance of advocating a blatantly self-serving public policy argument.

In his reply brief, Mr. Boub addressed the "enormity of the burden" issue, but countered weakly with a "bicycles are different" argument.[179] This was almost certainly the plaintiff's most significant strategic error, and resulted from a pre-existing mindset by cycling advocates and bicycle clubs, who had argued for decades that they should be treated as roadway vehicles, not accessory users.[180] Although this doctrine may have been useful in advocating transportation policy, it was a weak argument when applied to the duty of care and immunity under the ITLA because it addressed highway engineering, not local government liability, which the pedestrian cases had established were distinct issues.

The supreme court also framed the central issue as determining whether bicyclists were intended users.[181] Although acknowledging that "bicyclists, unlike pedestrians, are guided by some of the same signs and pavement markings that motorists observe,"[182] the supreme court nevertheless concluded that *Sisk*'s "physical manifestations of intent" test was appropriate.[183] A local government had liability under the ITLA only if the local road was signed and marked for bicycle use.[184] The court extended the localization doctrine to hold that the intent of another public entity, "whether it is the state, a county, or other local entity,"[185]

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178. *Id.*.

179. Reply Brief of Appellant at 6, *Boub II* (No. 84246), *available at* 1998 WL 34181977.

> [T]he matter before this Court does not seek to address joggers, horseback riders, or other potential foreseeable users of the road, only bicyclists. It is bicyclists who have the historic use of the roads . . . it is bicyclists who are more compatible with traversing roads with vehicles than they are traversing sidewalks with pedestrians; it is bicyclists who can and do exist side-by-side with vehicle traffic on the roads.

Id.

180. The history of this doctrine is well-established, but often polemical on both sides. For a brief summary of the debate, see Bruce Epperson, Sara J. Hendricks, and Mitchell York, *Estimation of Bicycle Transportation Demand From Limited Data*, *in* COMPENDIUM OF TECHNICAL PAPERS: 65TH ANNUAL MEETING OF THE INSTITUTE OF TRANSPORTATION ENGINEERS 436-39 (1995).

181. *Boub II*, 702 N.E.2d at 537.

182. *Id.* at 539.

183. *Id.*

184. *Id.*

185. *Id.* at 540.

was irrelevant. While customary and historical use could be used as a factor in determining intent, it was not dispositive.[186] To some degree, the plaintiff prevailed—the court concluded that some non-physical factors could be indicative of intent.[187] However, only local factors could be considered.[188] Finally, the supreme court further legitimized the *Vaughn/Sisk* doctrine that it is appropriate to consider the "enormity of the burden," but that it must be just one of many factors to be weighed.[189]

Bicycle advocates were flabbergasted by the *Boub II* decision. Unfamiliar with the recent pedestrian cases, most assumed the ruling was an indictment of cycling. In a vociferous dissent, Justice Heiple pointed to the "absurd and dangerous"[190] discontinuity created between highway and liability policy. At the same time the state was striving to incorporate bicycle use into roadway design and use, local governments could effectively eliminate all responsibility by removing existing physical manifestations of intent and blocking the installation of new ones. Justice Heiple, probably referring to *Best v. Taylor Machine Works*,[191] a case decided by the supreme court less than a year before *Boub II*, complained that had Mr. Boub been on a motorcycle when he fell, he could have recovered and that "[t]here is no rational basis for this distinction."[192] The clue was unmistakable: the court in *Best* had found a 1997 state tort limitation act violated the Illinois Constitution because it failed rational basis scrutiny. The *Best* court determined that the Act created "arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis."[193]

D. After Boub: *Localization, Foreseeability and Enormity of the Burden*

The various districts of the Illinois Appellate Court have since struggled with almost every aspect of *Boub II*. In *Brooks v. City of Peoria*, a child riding a bicycle on the sidewalk fell into a drainage ditch.[194] The city, citing *Boub II*, maintained that its duty of care

186. *Id.* at 541.

187. Brooks v. City of Peoria, 712 N.E.2d 387, 390 (Ill. App. Ct. 1999); Diefendorf v. City of Peoria, 720 N.E.2d 655, 659-60 (Ill. App. Ct. 1999).

188. "As the Boub court established, the intent expressed by the local entity is controlling." *Brooks*, 712 N.E.2d at 392. "Under the Act, it is the intent of the local public entity that controls, and we, therefore [can] look to the code to determine the intended users of Peoria's sidewalks." *Diefendorf*, 720 N.E.2d at 658.

189. *Boub II*, 702 N.E.2d at 543.

190. *Id.* (Heiple, J., dissenting).

191. 689 N.E.2d 1057 (Ill. 1997).

192. *Boub II*, 702 N.E.2d at 544 (Heiple, J., dissenting).

193. 689 N.E.2d at 1070.

194. 712 N.E.2d at 388.

in the maintenance of sidewalks was limited to their use by pedestrians, and that "[b]icyclists are free to continue to use the sidewalks if they wish," but that they do so "at their own peril and risk."[195] The appellate court called the city's contention "offensive,"[196] and held that it was "inconsistent with the city's obligation of reasonable care for all foreseeable users."[197] The return of foreseeability as an alternative to (and not a subordinate subclass of) intention placed *Brooks* at odds with *Boub II*. However, the court noted that while the city's line of argument "may be valid in a case involving an adult bicyclist,"[198] "[c]ommon sense would indicate . . . that the nature of a sidewalk includes use by children."[199] It appeared that the Third District was prepared to carve out special exceptions to *Boub II* for some identified groups. Justice Kohler, in a special concurrence, stated this explicitly: "public policy considerations compel us to conclude that Peoria owes a duty to its young bicyclists."[200]

However, this was a position that came very close to violating the state supreme court's holding regarding unconstitutional special laws in *Molitor*, *Harvey*, and *Best*. To cover this exposed flank, the appellate court held that "the circumstances of this case require a different interpretation of [who is an] intended user."[201] The different circumstances? The enormity of the burden! While *Boub II* concerned highway use with its potential "costs of upgrading road conditions to meet the special needs of cyclists,"[202] sidewalks were different "because the city would not have to expend additional amounts of resources to upgrade sidewalk conditions."[203] Enormity of the burden promised to be the great leveler that alleviated all problems of disparate treatment.

Two other 1999 cases reached diametrically opposed positions on the question of whether local ordinances were dispositive in determining intent. The First District concluded that "if a person violates a municipal ordinance, that person is not an intended user of the property,"[204] while the Fifth District held that "though the plaintiff may have violated state statutes . . . plaintiff's breach of the provision in this case does not destroy the city's duty."[205] The

195. *Id.* at 391.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 390.
200. *Id.* at 393.
201. *Id.* at 392.
202. *Id.*
203. *Id.*
204. Montano v. City of Chicago, 720 N.E.2d 628, 633 (Ill. App. Ct. 1999), *appeal denied*, 729 N.E.2d 498 (Ill. 2000).
205. Sullivan v. City of Hillsboro, 707 N.E.2d 1273, 1276 (Ill. App. Ct. 1999), *appeal denied*, 714 N.E.2d 533 (Ill. 1999).

Fifth District took pains to "point this out to emphasize the distinction between an unintended and prohibited use of property and an allegedly negligent plaintiff."[206] A plaintiff acting legally and responsibly could be unintended, yet an illegal or negligent user could still be an intended user, provided that trespass was not the offense.

A few months after *Brooks*, the Third District considered the application of *Boub II* to an adult sidewalk cyclist.[207] Justice Koehler, who had written the special concurrence in *Brooks*, authored the majority opinion. In an apparent dismissal of the rationale underlying *Brooks*, Justice Koehler opened with a return to the language of *Vaughn* that "foreseeability, pursuant to the [ITLA] pertains to use of the municipality's property by permitted and intended users, not to foreseeable users."[208] Failing to find physical manifestations on the Peoria sidewalk system that would indicate bicycle use,[209] the court turned to local bicycle regulations, which it also found unhelpful.[210] Finally, Justice Koehler turned to city codes dealing with parades and bicycle licenses to determine "that some bicyclists, in some circumstances, may be intended users of Peoria's sidewalks. We do not conclude, however, that this language does not indicate that all bicyclists are intended users. . . ."[211] The court never addressed how an intended sidewalk bicyclist could be distinguished from an unintended one,[212] and in a dissent, Justice Breslin complained that the court was trying to make categories of users function as a measure of foreseeability.[213] "Most courts interpreting the Act have seized upon the 'intended and permitted' language," complained Justice Breslin, "while few have acknowledged that portion of the Act which speaks of 'reasonably foreseeable' usage. The majority makes the same mistake."[214] As a litmus test for intention, Justice Breslin advocated Chicago's "enormity of the burden" test.[215] "*Boub* relied on the huge financial burden that would be faced by municipalities if bicyclists were held to be intended users," noted Justice Breslin, adding that "such concerns are simply not raised by the case at

206. *Id.* at 1277.
207. *Diefendorf*, 720 N.E.2d at 655.
208. *Id.* at 658.
209. *Id.* at 659.
210. *Id.* at 658.
211. *Id.* at 659.
212. Justice Koehler apparently believed, in keeping with his *Brooks* concurrence, that it was appropriate to use a dichotomy of adult and infant cyclists—a vague test he ascribed to "public policy"— to establish intent. *Id.* at 660.
213. *Id.*
214. *Id.* at 661.
215. *Id.*

bar."[216]

The final severing of any remaining nexus between foreseeability and intent occurred in a 2001 case, *Latimer v. Chicago Park District*.[217] The facts were a mirror image of *Brooks*. Ms. Latimer fell while riding in the street from a cracked and uneven pavement surface.[218] She asserted that because the City of Chicago prohibited adult cyclists from using the sidewalk, she was an intended user of the city streets.[219] The court disagreed, holding that simply because a user was prohibited in one place, she was not intended in another, even if it was the only plausible alternative: "Consider, for example, a municipality that has banned smoking in its government buildings. Although the municipality might permit smoking in the outdoor areas surrounding those buildings, it would be absurd to conclude that the municipality *intended* for people to smoke in such areas."[220]

Some cyclists have since seized on the smoking analogy to assert that Illinois courts view adult bicycle use as sociopathic as smoking. Although understandable, the charge oversimplifies Illinois municipal tort law. "Intention" has nothing to do with foreseeability, legality, or most government policies. The concept of an "intended" user is grounded completely within section 10/2-102(a), and is a method of categorization totally unrelated to traditional common law precepts of "innocence" or "reasonableness." With the possible exception of motor vehicles, a local government has absolute freedom to differentiate between otherwise normal, typical, foreseeable users engaging in normal, typical, foreseeable activities as "intended and permitted" users and "not intended, but permitted" users.[221] There are only two ways that a user (other than a motor vehicle user) can become an "intended" user of a roadway: 1) local physical manifestations of assent; or 2) Illinois general law *within the Illinois Tort Liability Act*.[222]

Likewise, the rational basis on which such categorization can be made is unrelated to the character of the user or her use—it is grounded entirely in the rational reduction of risk exposure. This point cannot be overemphasized. The rational basis test that any cyclist must address in a *Boub*-type case is not "does the classification of a non-intended user have a rational relation to highway policy?" or even, "does the classification have a rational relation to risk allocation?" *The standard that will be applied is*

216. *Id.*
217. 752 N.E.2d 1161 (Ill. App. Ct. 2001).
218. *Id.* at 1162.
219. *Id.* at 1165.
220. *Id.* at 1164.
221. *Id.* at 1165.
222. *Id.* at 1164-66.

"does the classification have a rational relation to reducing local government expenditures on otherwise legally meritorious tort claims?"

Latimer was an awkwardly reasoned case because the court failed to correctly analogize it to *Sisk*. In *Vaughn*, the supreme court had reduced the *Di Domenico's* "necessary, therefore intended" exception to "not otherwise possible, therefore intended."[223] In *Sisk*, the supreme court ruled it out entirely: "Although it may become necessary at times for pedestrians to walk on county roads, such use is not a manifestation of the local municipality's intent. . . ."[224] *Latimer* was simply the next step: simply because the municipality denies the use of all available alternatives, that does not mean the remaining permitted use is intended. As the *Latimer* court put it:

> Plaintiff is essentially posing the question: If I cannot ride on the sidewalk, where does the city expect me to ride? The city has a codified answer: You are prohibited from riding on the sidewalk, and further, you are permitted to ride where we have not prohibited riding. But is our *intent* that when riding a bicycle, you use [only] marked bicycle lanes. . . .[225]

E. Conclusions

Although the shifting judicial history of the ITLA, especially after 1990, makes it difficult to draw any definitive conclusions, some trends do appear.

1. Localization

The Illinois Supreme Court has clearly determined that, except for the use of motor vehicles on roadways, the most localized level of government has the right to determine intent. Although the early cases in this area, such as *Locigno* and *Deren*, placed primacy on signage and roadway markings, the post-*Boub II* cases appear to signal a willingness to draw on a wider variety of information: physical improvements, codes and ordinances, plans, and policies. All, however, must be issued at the most localized level of government. As the supreme court stated in *Boub II*: "it is the intent of the local public entity that controls; accordingly, the intent of another public body, whether it is the state, a county, or other local entity, should be irrelevant."[226]

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223. 651 N.E.2d at 1118. "It was not impossible for plaintiff to reach her destination without stepping into the street. . . ." *Id.*

224. 657 N.E.2d at 907.

225. 752 N.E.2d at 1165 (internal citations omitted).

226. 702 N.E.2d at 540.

2. Foreseeability and Intent

The relationship between foreseeability and intent under the ITLA continues to be ambiguous. *Diefendorf* strikes a forceful tone: "'*Foreseeability*, pursuant to the language of the Act . . . pertains to the *use* of the municipality's property by permitted and intended users, *not to foreseeable users*. . . .'"[227] The supreme court, however, has been very reluctant to address the issue in a straightforward manner, probably for two reasons. First, appellate Justice Chapman's incisive dissent in 1992's *Gabriel* so clearly delineated the issue that it would be almost impossible to address it without grappling with his reasoning. Moreover, the City of Chicago's enormity of the burden test—which requires *a priori* that any unintended user be deemed unforeseeable—appears to have sobered the supreme court since it was proposed in *Curatola*. The refusal of the supreme court to hear any cases after *Boub II* that have attempted—with spectacular failure—to sort out users that are careful, negligent, adult, or infant and that were engaged in acts that are legal, illegal, predictable, or remarkable indicates their disinclination to deal with the subject. The supreme court's mantra appears to be "locally designated, with physical manifestations of intent."

3. Enormity of the Burden

In *Curatola*, the supreme court distanced itself from the City of Chicago proposal, and even went so far as to back down from its previous position that intent is always a matter of law, opening the door to the possibility of allowing the jury to consider facts in determining intent.[228] The cases after *Curatola*, including *Sisk* and *Boub II*, seem to suggest that the supreme court is satisfied with its localization doctrine, which assumes that roads are solely for motor vehicles in the absence of signage and road markings. Enormity of the burden appears to be primarily a justification for localization, a factor local governments may consider when they decide whether to place signs and markings. Only the third district has applied the test in *Brooks* and *Diefendorf* to justify disparate treatment of sidewalks and streets. However, the first district's analogy of cyclists to smokers, although never since applied, threatens to reinvigorate the issue.

III. Is There a Constitutional Right of Intrastate Travel?

Title 42, § 1983 of the United States Code provides that:

227. 720 N.E.2d at 658.

228. 608 N.E.2d at 888. "In cases where factual issues are presented concerning whether a particular plaintiff is owed this duty [to maintain the street area around parking], such issues may be determined by the jury upon proper instruction." *Id.*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .[229]

Thus, § 1983 only applies where a violation of the federal Constitution occurs. What then is the constitutional right that the Illinois Tort Liability Act violates? This section will argue that it may violate an implied right of localized travel. This is not the right of interstate migration that has been recognized in several U.S. Supreme Court cases,[230] but a "right to travel locally through public spaces and roadways."[231] Although not directly addressed by the Supreme Court, a sufficient body of federal law exists to plausibly maintain that there is such a right. Reviewing the body of applicable case law, one federal circuit court found that seven different clauses or combination of clauses within the Constitution have been asserted as the source of a right to local travel.[232] Arguably the most appropriate source for an intrastate right is the due process clause of the Fourteenth Amendment.[233]

Simply identifying a new and unique constitutional right is, of course, inadequate to invalidate the ITLA or any judicial interpretation of it. However, there are grounds for believing that it may be a useful tool. The Supreme Court, in *Owen v. City of Independence*,[234] determined that local governments do not have immunity from § 1983 suits for constitutional infringements.[235] In *Canton v. Harris*,[236] it said that local government policies that are themselves constitutional, but have a causal connection to an

229. 42 U.S.C. § 1983.

230. Edwards v. California, 314 U.S. 160 (1941) (holding state prohibition on immigration of "indigent persons" violates the Commerce Clause); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding a one year state residency requirement to qualify for welfare benefits violates equal protection clause of Fourteenth Amendment and due process provisions of Fifth Amendment); Mem'l Hosp. v. Maricopa County, 415 U.S. 250 (1974) (one year state residency requirement as precondition to receiving subsidized non-emergency medical care amounts to "invidious discrimination"); Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (residency as precondition to state bar license is unconstitutional); Saenz v. Roe, 526 U.S. 489 (1999) (preferential treatment to long-term state residents for Aid to Families with Dependent Children violates the Privileges and Immunities Clause of the Fourteenth Amendment).

231. Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002).

232. Lutz v. City of York, 899 F.2d 255, 260-61 (3d Cir. 1990).

233. *Id.* at 267.

234. 445 U.S. 622 (1980).

235. *Id.* at 657.

236. 489 U.S. 378 (1989).

unconstitutional deprivation, may ultimately be held unconstitutional.[237] This application will be explored in the next section of this Article.

A vast body of law exists regarding the constitutional right of travel between states,[238] but a much smaller number of cases deal with intrastate travel.[239] Unfortunately, both bodies of literature deal with constitutional issues far removed from the question of transport mobility. In one of the most recent right to travel cases, *Saenz v. Roe*,[240] Justice Stevens described the traditional meaning of the phrase "right to travel":

> The right to travel discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[241]

Saenz borrowed a two-part test taken from an earlier migration case, *Shapiro v. Thompson*.[242] A state regulation must pass strict scrutiny analysis if: 1) it restricts migration; and 2) the travel is undertaken for the purpose of securing a basic life necessity.[243] When the Supreme Court turned to an analysis of local travel in *Memorial Hospital v. Maricopa County*,[244] it applied the same test to a state residency requirement that restricted the access of recent immigrants into a county to subsidized medical care, even if they emigrated from another county within the same state.[245] Although Justice Marshall's majority opinion disclaimed specific applicability of the decision to intrastate travel,[246] footnote nine strongly suggested that the second prong of the *Shapiro* test was more determinative than the source of the immigration contained in the first prong.[247]

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237. *Id.* at 396.

238. *See generally* Leonard B. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956).

239. *See* Andrew C. Porter, *Toward A Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820 (1992).

240. 526 U.S. 489 (1999).

241. *Id.* at 500.

242. 394 U.S. 618, 629 (1969) (holding a one-year residency was required before being eligible for welfare benefits).

243. Porter, *supra* note 239, at 828-29.

244. 415 U.S. 250 (1974).

245. *Id.* at 263–64.

246. *Id.* at 255-56. "Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court [because one of the appellants migrated from another state]." *Id.* at 256.

247. *Id.* at 256 n.9.

It would seem inconsistent to argue that the residence requirement

In a 1971 case, *Bell v. Burson*,[248] concerning the obligation for due process prior to the revocation of a Georgia driver's license, the Court inferred that local mobility was itself a "basic life necessity":

> Once [drivers'] licenses are issued, as in the petitioner's case, their continued possession may become essential in the pursuit of a livelihood. . . . In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."[249]

Notice that the *Bell* court expanded the second prong of the *Shapiro* test. A Georgia driver's license is an entitlement if it *may* become "essential in the pursuit of a livelihood"; it is not required that the state resident actually prove that her license is *presently necessary* to make a living. It is a reasonable inference that if local travel *may* be necessary to secure basic life necessity, it is a protected entitlement.[250]

In a few cases the Supreme Court has directly, if lightly, addressed the concept of a right to mobility. In the *Passenger Cases*, Chief Justice Taney noted that "[w]e are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own states*."[251] The Court also tangentially addressed the use of local roads in *United States v. Guest*.[252] Six individuals were indicted for violating a federal statute by conspiring to deprive people of African descent from the free use of private and public facilities. They were indicted by a grand jury on five counts, of which the third and fourth counts alleged a conspiracy to:

> should be construed to bar longtime Arizona residents, even if unconstitutional as applied to persons migrating into Maricopa County from outside the State. Surely, longtime residents of neighboring counties have more ties with Maricopa County and equity in its public programs, as through past payment of state taxes, than do migrants from distant States.

Id.

248. 402 U.S. 535 (1971).

249. *Id.* at 539 (internal citations omitted).

250. Part III of this Article will address the issue of whether localized travel is an entitlement "by virtue of the fact that [it has] been initially recognized and protected by state law." Paul v. Davis, 424 U.S. 693, 710 (1976).

251. Smith v. Turner, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) (emphasis added). The *Passenger Cases* concerned New York and Massachusetts immigration taxes. The taxes were declared unconstitutional; Chief Justice Taney dissented. *Id.* at 463-64 (Taney, C.J., dissenting).

252. 383 U.S. 745, 757 (1965).

> [I]ntimidate Negro citizens of the United States in the free exercise and enjoyment of:
>
> . . .
>
> [3] The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia.
>
> . . .
>
> [4] The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.[253]

A federal district court dismissed all five counts of the indictment, maintaining that none involved rights of national citizenship.[254] The Supreme Court reversed on both counts three and four. While the Court determined that the conspiracy violated the right of travel, it carefully pointed out that the third count, regarding the local use of streets, was not included in this analysis, but was covered in a separate evaluation based on the Equal Protection Clause of the Fourteenth Amendment.[255] The Court thus equated free access to streets and roadways for local travel with the use of any other vital public facility.

The most direct treatment of the right to localized travel by the Supreme Court was in *Papachristou v. City of Jacksonville*,[256] where the Court struck down a local vagrancy ordinance that, among other acts, made it illegal to be a "common night walker" or to be caught "wandering or strolling around from place to place without any lawful purpose or object."[257] Justice Douglas observed:

> The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent. "Nightwalking" is one. [The State of] Florida construes the ordinance not to make criminal one night's wandering, only the habitual wanderer or, as the ordinance describes it, "common night walkers." We know, however, from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result. . . . If I choose to take up an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight.[258]

Although Justice Douglas made clear his fondness for

253. *Id.* at 757 & n.13.
254. *Id.* at 747-48.
255. *Id.* at 755-57 & n.13.
256. 405 U.S. 156 (1972).
257. *Id.* at 158 n.1.
258. *Id.* at 164 n.6 (internal citations omitted).

nocturnal perambulation, he was less forthcoming about exactly which constitutional right protected it, noting only that the Jacksonville ordinance was void for vagueness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden,"[259] and that "it encourages arbitrary and erratic arrests and convictions."[260]

Three years later, a federal district court was more helpful when presented with a similar ordinance in Middletown, Pennsylvania that imposed a nocturnal juvenile curfew.[261] The Middletown ordinance was carefully crafted to carve out an exception for any minor passing through the town on interstate travel.[262] The district court was therefore obligated to consider the curfew strictly on its adverse impact to Mr. Bykofsky's right of intrastate travel, if such a thing existed. The court determined that it did:

> The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are basic values "implicit in the concept of ordered liberty" protected by the due process clause of the fourteenth amendment. One may be on the streets even though he is there for merely for exercise, recreation, walking, standing, talking, socializing, or any other purpose that does not interfere with other persons' rights.[263]

The district court noted, however, that Mr. Bykofsky was a minor, and as such did not enjoy the full fundamental rights of substantive due process appropriate for an adult.[264] The court therefore applied an interest-balancing-means test weighing the town's interests against the minor's right of freedom of movement and the use of public streets.[265] In this context, the court determined that the curfew "does not unconstitutionally impinge on the minor's right to travel."[266]

The decision was affirmed by the Third Circuit,[267] and Mr. Bykofsky appealed on a writ of certiorari to the Supreme Court. It was denied,[268] but Justice Marshall dissented:

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259. *Id.* at 162.
260. *Id.*
261. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1245 (M.D. Penn. 1975).
262. *Id.* at 1247.
263. *Id.* at 1254. The similarity of the district court's language here to that in *Molway v. City of Chicago*, 88 N.E. 485, 490-93 (Ill. 1909), and the much-abused *VanCleef v. City of Chicago*, 88 N.E. 815, 816-17 (Ill. 1909), should be noted. Although the Illinois state cases may be down, they are not yet out.
264. *Bykofsky*, 401 F. Supp. at 1255.
265. *Id.*
266. *Id.* at 1262.
267. Bykofsky v. Borough of Middletown, 535 F.2d 1245 (3d Cir. 1976).
268. Bykofsky v. Borough of Middletown, 429 U.S. 964 (1976).

> The freedom to leave one's house and move about at will is "of the very essence of a scheme of ordered liberty," and hence is protected against state intrusions by the Due Process Clause of the Fourteenth Amendment. To justify a law that significantly intrudes on this freedom, therefore, a State must demonstrate that the law is "narrowly drawn" to further a "compelling state interest."[269]

After *Bykofsky*, it appeared that courts were willing to recognize some kind of right to local travel. There seemed to be a rough consensus that this right probably originated somewhere other than either of the two privileges and immunities clauses in the Constitution, and that it should be scrutinized using a standard more rigorous than ordinary rational basis, but less exacting than strict scrutiny.

The most complete analysis came fourteen years later, and it arose in a case occurring only a few miles from Middletown. In 1988, the City of York, Pennsylvania enacted a cruising ordinance that prohibited driving more than twice past a designated traffic control point within any two-hour period between 7:00 p.m. and 3:30 a.m.[270] David Lutz, an automobile equipment dealer specializing in hot-rod parts, filed suit in federal court seeking an injunction against the law, asserting that it was overbroad and violated his right to travel.[271] The case eventually wound up in the Third Circuit, where Judge Becker, noting that the question of whether a right of intrastate travel exists posed a threshold issue,[272] elected to undertake a complete review of the problem.

Judge Becker identified seven different constitutional provisions that Supreme Court Justices had, at various times, suggested were the source of a right of travel,[273] including the two Privileges and Immunities Clauses, the two Due Process Clauses, the Commerce Clause, the Equal Protection Clause, and "a conception of national citizenship said to be implicit in 'the structure of the Constitution itself.'"[274] Noting that each provision served very different purposes and thus "could have dramatically different scope and coverage depending on the constitutional provision from which it is derived,"[275] Judge Becker ruled that "the Court recently has provided precious little guidance on which of them presently give rise to a right to travel, and the respective scopes of each."[276]

The Third Circuit decided that the right of localized travel

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269. *Id.* at 964-65 (Marshall, J., dissenting).
270. *Lutz*, 899 F.2d at 257.
271. Steven N. Gofman, *Car Cruising: One Generation's Innocent Fun Becomes The Next Generation's Crime*, 41 BRANDEIS L.J. 1, 12-13 (2002).
272. *Lutz*, 899 F.2d at 259.
273. *Id.* at 260-61.
274. *Id.*
275. *Id.* at 261.
276. *Id.*

originated from substantive due process and that "the right to move freely about one's neighborhood or town . . . is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"[277]

Over a decade later, the Sixth Circuit concurred:[278]

> The right to travel locally through public spaces and roadways—perhaps more than any other right secured by substantive due process—is an everyday right, a right we depend on to carry out our daily life activities. . . . Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys.[279]

Having determined the threshold issue, Judge Becker then turned to the standard of review to be applied. Although fundamental rights emanating from substantive due process have traditionally been evaluated using a strict scrutiny standard, the Sixth Circuit argued that localized travel was more analogous to free speech:

> The right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases. . . . Unlimited access to public fora or roadways would result not in maximizing individuals' opportunity to engage in protected activity, but chaos. . . . Therefore, in order to set out a workable jurisprudence for the newly recognized due process right of localized movement on the public roadways, we find it appropriate to borrow from the well-settled, highly analogous rules the Court has developed in the free speech context.[280]

As Judge Becker's line of reasoning indicates, the analogy between free speech and freedom of mobility results less from any inherent constitutional similarities than from the practical requirements of fair administration and adjudication. Towards this end, the Third Circuit determined that time, place, and manner restrictions on localized travel should be upheld if they are "narrowly tailored to meet significant city objectives."[281] Interestingly, the *Lutz* court failed to incorporate the other major requirement of the free speech time, place, and manner doctrine—that ample alternative channels for communication must be left open.[282]

Three cases in rapid succession applied the time, place, and

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277. *Id.* at 268.
278. *Johnson*, 310 F.3d at 495.
279. *Id.* at 498.
280. *Lutz*, 899 F.2d at 269-70.
281. *Id.* at 270. The Third Circuit held that the York cruising ordinance did meet the required standard.
282. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293-94 (1984); Gofman, *supra* note 271 at 31 n.79.

manner analogy used in *Lutz*. In *Scheunemann v. City of West Bend*,[283] the Wisconsin Court of Appeals applied the *Lutz* standard to an anti-cruising ordinance almost verbatim, but added that restrictions to local travel must be "not one which merely promotes a self-serving interest of government at the expense of the constitutional right of the people to freedom of movement."[284]

A year later, a Minnesota state appeals court adopted the *Scheunemann* variant of the test in *State v. Stallman*.[285] The Minnesota court identified a provision within the earlier West Bend ordinance that allowed a driver to explain the lawful purpose of her trip in the field as a valid defense.[286] Without such a provision, the Anoka ordinance was arbitrary and discriminatory enforcement was inevitable:

> It is clear from the Anoka Police Department's statement of the problem that this ordinance is aimed at an "undesirable" class of people. . . . [I]n Anoka, if a member of the "undesirable" class states a legitimate business or personal reason to the officer, they will still be given a citation to discourage them from coming to Anoka again.[287]

In 1995, the California Supreme Court upheld a municipal ordinance prohibiting camping or the storage of camping equipment in any public place.[288] The court acknowledged that "the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole."[289] However, the California court concluded that such a right could be violated only when a direct restriction of travel occurs.[290] Ordinances that place an indirect or incidental burden on intramunicipal travel require only a rational and legitimate public purpose.[291] The court did not specify the level of analysis to be applied to direct travel restrictions. In an earlier case, *In re White*, the state supreme court found that parole conditions imposed on a convicted prostitute, prohibiting her from entering certain sections of Fresno, were a direct burden on her right of intramunicipal travel, but declined to apply a review standard, declaring that "[t]here is no exact formula for the determination of reasonableness. Each

283. 507 N.W.2d 163 (Wis. Ct. App. 1993).
284. *Id.* at 167.
285. 519 N.W.2d 903, 907-09 (Minn. Ct. App. 1994).
286. *Id.* at 907.
287. *Id.* at 908-09. The similarity of "undesirable" to "unintended"—especially in the context of the City of Chicago's "enormity of the burden" test—should not be overlooked.
288. Tobe v. City of Santa Ana, 892 P.2d 1145, 1169 (Cal. 1995).
289. *Id.* at 1163 (citing *In re* White, 158 Cal. Rptr. 562, 567 (Cal. Ct. App. 1979)).
290. *Tobe*, 892 P.2d at 1163.
291. *Id.* at 1163-64.

case must be decided on its own facts and circumstances."[292] In a lengthy dissent, Associate Justice Mosk argued for both the application of *Lutz*,[293] and its time, place and manner test.[294]

Most recently, the Sixth Circuit heard an appeal to a case quite similar to *In re White*. The plaintiffs in *Johnson v. City of Cincinnati* were two convicted drug offenders prohibited by a City ordinance from entering the "Over the Rhine" neighborhood adjacent to downtown Cincinnati.[295] In this case, it was the city that relied on *Lutz*, asserting that its ordinance was a reasonable time, place, and manner restriction.[296] The court rejected the suggestion, determining that "broadly prohibiting individuals to access [an] entire neighborhood" required the application of strict scrutiny analysis.[297] The Sixth Circuit favorably reviewed the Third Circuit's analysis in *Lutz*, and noted that "we do not foreclose the possibility of applying intermediate scrutiny to a less severe regulation of localized travel,"[298] but argued that "unlike a 'time' or 'manner' regulation, a 'place' regulation is more difficult to transfer from the First Amendment context to the localized travel context."[299]

In a dissent,[300] Judge Gilman maintained that the U. S. Supreme Court determined in the 1993 case *Bray v. Alexandria Women's Health Clinic*[301] that there was no right of intrastate travel, citing a passage from Justice Scalia's plurality opinion:

> [T]he only "actual barriers to . . . movement" that would have resulted from petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other states, unless it is applied *discriminatorily* against them.[302]

The plain reading of the passage appears to refute Judge Gilman's assertion. Justice Scalia was arguing that the protestors, who were prohibiting all women from entering the health center, were not interfering with interstate travel. His comments were not directed at the issue of whether there is such a

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292. *In re White*, 158 Cal. Rptr. at 566.
293. *Tobe*, 892 P.2d at 1181.
294. *Id.* at 1183.
295. *Johnson*, 310 F.3d at 487–89.
296. *Id.* at 502.
297. *Id.*
298. *Id.*
299. *Id.* at 502 n.7. The court stated that "a narrow 'place' restriction might be more appropriately analyzed under intermediate scrutiny." *Id.*
300. *Id.* at 508.
301. 506 U.S. 263 (1993).
302. *Id.* at 277.

thing as the right of intrastate travel, which neither side asserted.

However, the emphasis that Justice Scalia placed on the word "discriminatorily" suggests that he may have been thinking in terms of intrastate travel. Judge Gilman (and Justice Kennedy in his dissent) appears to assume that the emphasized "discriminatorily" refers to discrimination between inter- and intrastate travelers.[303] But the plaintiffs in *Bray* claimed they were discriminated against because they were women, or, alternatively, pregnant women.[304] If this is the discrimination referred to, then Justice Scalia appears to be suggesting that if the travel of "any person or class of persons"—the categories protected by 28 U.S.C § 1985—is discriminatorily interfered with, a federal violation has occurred regardless of whether that travel was interstate or intrastate. This interesting possibility is examined in greater depth in the next section of this Article.

The Supreme Court denied certiorari in *Johnson* in June 2003.[305] To date, it remains the latest word on the issue, and suggests that there is some nascent right of intrastate travel, regardless of whether it is labeled access, mobility, or localized or intramunicipal travel.

IV. APPLYING CIVIL RIGHTS TO *BOUB*: SOVEREIGN IMMUNITY, NEGLIGENCE, AND DUE PROCESS

Even assuming that there is a constitutionally protected right of local travel, the search for a legal mechanism to disable the "permitted and intended" provision of the Illinois Tort Immunity Act is far from assured. A maze of issues, including the sovereign immunity of states, the role of scienter in determining whether a deprivation is unconstitutional, and the importance of post-deprivation procedure in creating a deprivation, clouds the application of any federal civil rights statute, and calls into question what constitutional claim is best applied.

A. The Illinois Tort Law as a Deprivation of the Right of Local Travel

In general, the Eleventh Amendment provides states with immunity in federal court from suit for damages under 42 U.S.C § 1983 absent a clear congressional mandate to the contrary.[306] Such immunity, however, does not apply to state courts, who are bound by the Constitution's Supremacy Clause to extend

303. *Id.* at 336-38. "The implausibility of the Court's readings . . . is matched by its conclusion that a burden on interstate travel is permissible as long as an equal burden is imposed on local travelers." *Id.* at 337.

304. *Id.* at 266-69.

305. 539 U.S. 915 (2003).

306. Quern v. Jordan, 440 U.S. 332, 339-40 (1978). This prohibition does not apply to strictly injunctive relief. *Id.* at 338.

jurisdiction to suits under § 1983 for the redress of constitutional rights violations.[307] While this includes all arms of the state government, such as school districts,[308] it does not include municipalities, which the Supreme Court determined, in *Owen v. City of Independence*,[309] are liable for their constitutional violations in both federal and state court.[310] The *Owen* Court summarized the issue in this way:

> Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.[311]

Further complicating the issue is the uncertainty as to exactly which municipal actions are implicated. In a 1981 case, *Parratt v. Taylor*,[312] the Supreme Court stated that "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights."[313] Only five years later, however, the Court, in two concurrent cases, *Daniels v. Williams*[314] and *Davidson v. Cannon*,[315] determined that "[u]pon reflection we . . . overrule *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment."[316] However, Footnote three in *Daniels* noted that "something less than intentional conduct, such as recklessness or 'gross negligence'" may suffice to support a § 1983 suit.[317]

The ITLA does define "willful and wanton" conduct in section 1-210 as that which "shows an actual or deliberate intention to cause harm," or that "shows an utter indifference to or conscious disregard for the safety of others or their property."[318] However, the section limits applicability of the definition "to any case" where a wanton and willful standard is contained within a defined immunity.[319] Neither section 3-102 (maintenance) nor section 3-

307. Howlett v. Rose, 496 U.S. 356, 380 (1990).
308. *Id.* at 377.
309. 445 U.S. 622, 647-48 (1979).
310. *Id. See also* Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 691 n.54 (1978).
311. 445 U.S. at 648 n.30 (internal citations omitted).
312. 451 U.S. 527 (1981).
313. *Id.* at 534.
314. 474 U.S. 327 (1986).
315. 474 U.S. 344 (1986).
316. *Daniels*, 474 U.S. at 330-31.
317. *Davidson*, 474 U.S. at 334 n.3.
318. 745 ILL. COMP. STAT. 10/1-210.
319. *Id.*

103 (design) explicitly state a wanton and willful standard, and the issue remained unresolved for many years as to whether statutory silence implied 1) a common law duty of care, in which willful and wanton conduct would not be shielded, or 2) no duty of care at all, in which case wanton and willful conduct would not be actionable.

The issue was decided by the Illinois Supreme Court in 1997 in *In re Chicago Flood Litigation*.[320] The court determined that where the legislature omitted a limit to the immunity provided in each individual section of the ITLA, it intended to immunize both negligent and wanton and willful misconduct.[321]

Therefore, 42 U.S.C. § 1983 could create a cause of action where none would otherwise exist. Assume two possible scenarios, using the *Boub* case as an example. In the first scenario, Illinois courts determine that a right of localized travel exists, and that Mr. Boub may have suffered a constitutional deprivation when the township failed to exercise the ordinary reasonable care necessary to accommodate his roadway use. In this situation, Mr. Boub could sue for the constitutional violation, as the ITLA does not bar actions for constitutional deprivations.[322] It is less certain if action on the underlying negligence action would still be blocked—Illinois courts have made it clear that one can sue for equitable relief on the underlying tort that creates a constitutional deprivation, but there is no corresponding case on point for legal remedies.[323]

If the constitutional right has yet to be established, the situation is more complex. Provided that Wayne Township's actions were merely negligent, Mr. Boub could not sue on the underlying tort (due to the ITLA), or on the constitutional deprivation (due to the culpability requirement imposed by *Daniels* and *Davidson*). If Wayne Township's actions were wanton and willful, the ITLA would still block suit, but footnote three in *Daniels* suggests that Mr. Boub could then bring action under § 1983. Moreover, the dividing line between mere negligence and wanton or willful conduct under § 1983 is not nearly as bright as *Daniels* and *Davidson* suggest.

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320. 680 N.E.2d 265 (Ill. 1997).

321. *Id.* at 273. Previous drafts of this Article came to an opposite conclusion, and John Stainthorp, Esq. kindly pointed out both the error and the correct citation, which the author very much appreciates. It should be noted that section 3-106, the section of the ITLA concerning immunity for recreational facilities, which I hypothesized in Section II of this Article was the likely source for the language in ITLA section 103-102, does contain a wanton and willful conduct limitation. *See* Birlingame v. Chi. Park Dist., 689 N.E.2d 234, 236 (Ill. App. Ct. 2001).

322. People *ex. rel.* Birkett v. City of Chicago, 758 N.E.2d 25, 30 (Ill. App. Ct. 2001).

323. *Id.* at 32.

A 1989 case, *Canton v. Harris*,[324] drew a sharp distinction between municipal *acts* and municipal *policies*. Mrs. Harris was arrested by the Canton Police Department and brought to the police station. Despite exhibiting signs of mental incoherence and physical illness, no medical attention was summoned. As a result, Mrs. Harris later required extensive hospitalization and outpatient care. Instead of suing the city for its negligence, she sued the city under § 1983, alleging that the city had a policy of providing inadequate training to its police staff, resulting in a lack of proper medical attention.[325]

The *Canton* court made two significant findings. First, a municipal policy need not be unconstitutional by itself if its application creates a constitutional deprivation.[326] Second, a policy can create municipal liability under § 1983 "only where its policies are the 'moving force [behind] the constitutional violation.'"[327] Although this would initially appear to be a straightforward causality requirement, it is not. The Court held that "[o]nly where a municipality's failure . . . in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."[328] Furthermore, it must be this "indifference," not the policy itself, that creates the action that violates the Constitution.[329] However, "indifference" is used in *Canton* in more than one way. One interpretation of indifference is a policy that leaves municipal employees unable to "respond properly to the usual and recurring situations with which they must deal."[330] This interpretation focuses on the actions of front-line employees. But another section of the opinion suggests that it is the actions of the policymakers themselves that matter: "But it may happen that in light of the duties assigned to specific officers or employees . . . the inadequacy [is] so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."[331]

In either situation (a policy creates actions by front-line personnel that are deliberately indifferent, or the decision itself was created with deliberate indifference by policymakers) the situation encroaches into the forbidden territory of footnote three in *Daniels*, and makes the policymaking entity fair game for a

324. 489 U.S. 378 (1989).
325. *Id.* at 381-82.
326. *Id.* at 386-87.
327. *Id.* at 389.
328. *Id.*
329. *Id.* at 391.
330. *Id.*
331. *Id.* at 390.

§ 1983 suit. In this regard, the reliance that the Illinois Supreme Court placed on localization in defining an intended user in *Boub II* is vital. By giving local governments the final say in determining who is an intended user through the installation of crosswalks, bike lanes, signage and other roadway markings,[332] the state court's interpretation of the ITLA creates exactly the type of "deliberate indifference" that was the subject of *Canton*. This is particularly true if the Chicago "enormity of the burden" test is used, as the deliberate indifference becomes inversely proportional to need for attention.

Even if the proximate action is a mere "garden variety tort," a specific act of negligent maintenance could rise to the level of *Canton*'s "deliberate indifference" if it results either from a local government policy decision that creates indifference by front-line municipal workers or the decision itself is tantamount to deliberate indifference by decision makers. This was the conclusion of the Illinois Appellate Court, First District, in 2000, who heard a municipal tort immunity claim resulting from an allegedly negligently maintained airport.[333] The municipality claimed that the alleged defect (an old drainage swale that was dangerously placed) resulted from a discretionary decision not to pay for relocation, and thus section 3-102 did not apply and there was no duty of care.[334]

The court disagreed, holding that "[e]very failure to maintain property could be described as an exercise of discretion. . . . The legislature could not have intended such a result; otherwise it would not have codified the common law duty to maintain property under section 3-102. . . ."[335] Perpetuating a hazardous condition does not become a discretionary act simply because it acquires the patina of time. It is, instead, a decision to not provide appropriate maintenance that removes section 3-102 immunity—it functions identically to *Canton*'s "deliberately indifferent" ministerial actions.

In *Anderson*, the airport swale case, the intended user status of the crashed aircraft was never in doubt. However, in a situation where one's user status under section 3-102 is in question, *Canton* could provide the safeguard that would prevent the ITLA tail from wagging the dog: a policy decision not to provide maintenance,

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332. *Boub II*, 702 N.E. 2d at 540. "As we have noted, under . . . the Tort Immunity Act it is the intent of the local public entity that controls; accordingly, the intent of another public body, whether it is the state, a county, or other local entity, should be irrelevant." *Id.*

333. Anderson v. Alberto-Culver USA, Inc., 740 N.E.2d 819 (Ill. App. Ct. 2000).

334. 745 ILL. COMP. STAT. 10/2-201. Section 10/2-201 of the ITLA immunizes all local policy decisions, even those abusively exercised.

335. *Anderson*, 740 N.E.2d at 829.

followed by the decision to exclude as intended users those groups placed at highest risk by the omitted maintenance, with the enormity of the burden test proving the justifying link between the creation of the risk and the exclusion. In such a scenario, *Canton* would provide the link between the local government action and the constitutional deprivation (deliberate indifference), while *Anderson* would prevent the maintenance decision from being immunized as a discretionary decision. Thus, a right of localized travel would create a separate cause of action. The constitutional violation would not be the result of the tort itself, but would flow from a policy of deliberate indifference created by extending ordinary reasonable care in maintenance only to intended users, and not all reasonably foreseeable users.

Admittedly, the logic is less than straightforward. The argument starts with the assumption that there is a maintenance failure of some type. The underlying tort action is negligence, and the overlying constitutional suit asserts violation of the right to localized travel. Section 3-102 blocks the cause of action on the tort, and *Daniels* and *Davidson* block the claim on the constitutional issue. The *Canton* deliberate indifference test allows the plaintiff to circumvent *Daniels* and *Davidson* by turning an ongoing garden variety negligence tort into an entrenched municipal policy of deprivation, while the Illinois case, *Anderson*, prevents the defendant from arguing that this shift from municipal act to municipal policy on the constitutional argument requires a parallel shift from ministerial act to discretionary act on the tort issue. While the Supreme Court has determined that municipal acts may accrete into policies for the purpose of evaluating constitutional deprivations, the Illinois Supreme Court has concluded the opposite for determining ministerial negligence.

In summary, assuming that a right of local travel could be established as a constitutional right, *Owen* and *Canton* provide the means of bringing a § 1983 suit against a municipality, even if the deprivation results from the negligent acts of a governmental unit. *Owen* permits § 1983 suits against municipalities in federal court, and *Howlett* prevents state immunity statutes from blocking such suits in state courts. Although *Daniels* and *Davidson* initially appear to prevent the type of simple negligence found in *Boub II* from forming the basis of a § 1983 action, *Canton* appears to supply a way to circumvent this hurdle by establishing that the tort emanated from a policy that either: 1) resulted from policymaking indifference; or 2) resulted in indifference by front-line employees or agents.

B. What if There Isn't a Right of Local Travel? Falling back on Due Process and Equal Protection

In addition to the issue of whether there is such a thing as a

negligent deprivation of constitutional rights, the *Parratt* court inquired into the question of due process. Here, the focus shifts from local travel as a constitutional right requiring protection to the more established ground of protecting procedural due process rights. Noting that "[t]he Fourteenth Amendment protects only against deprivations 'without due process of law,'"[336] Justice Rehnquist argued that in the case of a negligent deprivation, it was impossible to provide a pre-deprivation process because the time, place and nature of the deprivation could not be known.[337] In such a situation, a post-deprivation process "of some kind"[338] is adequate to meet the requirements of the Fourteenth Amendment.[339]

Three years after *Parratt v. Taylor*, the Supreme Court, in *Hudson v Palmer*,[340] expanded the acceptability of post-deprivation process to include intentional deprivations:

> We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned. . . . For intentional, as for as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.[341]

Both *Parratt* and *Hudson* concerned property rights. Clearly, the restriction on local travel (or the heightened risk of loss) imposed on permitted but not intended road users in Illinois involves a liberty or life interest as well as property interests. In a concurrence to *Parratt*, Justice Blackmun argued that the acceptability of post-deprivation due process was limited only to property interests, and that life or liberty interests required pre-deprivation due process: "I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process."[342]

While Justice Rehnquist was not prepared to go as far as Justice Blackmun in arguing that life and liberty interests must receive pre-deprivation due process, he clearly argued that life and liberty interests recognized by a state must receive either pre- or post-deprivation due process:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property"

336. *Parratt*, 451 U.S. at 537.
337. *Id.* at 541.
338. Matthews v. Eldridge, 424 U.S. 319, 333 (1976).
339. *Parratt*, 451 U.S. at 541.
340. 468 U.S. 517 (1983).
341. *Id.* at 533.
342. *Parratt*, 451 U.S. at 545.

> as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.[343]

Justice Rehnquist supported this argument using a state-issued driver's license as an example of such a "recognized and protected" right. The analogy, taken from *Bell v Burson*,[344] is particularly applicable because the entitlement it deals with concerns local travel. The *Bell* court concluded that a driver's license was a state entitlement even if its use to secure a basic life necessity was merely possible, not certain.[345] Moreover, as the Illinois Supreme Court noted in *Boub II*, in *Molway v. City of Chicago*, it once recognized that bicyclists were part of the general traffic of the roads, and therefore had the right to expect reasonably safe and convenient ways.[346] Even though the court dismissed *Molway* as no longer relevant, at one time in its history, the Illinois Supreme Court did require a duty of care towards cyclist-road users, therefore creating a constitutional status "initially recognized and protected by state law," under the specifications provided in *Paul*. The Illinois Supreme Court has the power to withdraw this recognition from cyclists, but *Matthews*, *Hudson*, *Paul* and *Bell* require "some kind of process" directly addressing the removal of an initially recognized and protected interest. Clearly, under either an expansive or narrow interpretation of what comprises a liberty interest, and under either an expansive or narrow interpretation of what process is due, the removal of a state-recognized liberty interest must receive *at a minimum* a post-deprivation hearing of some type.

The Illinois Tort Law appears to violate this condition by proscribing redress for all permitted but not intended users of public facilities who suffer injury or property loss because of negligent maintenance by municipality. However, as Justice Stevens pointed out in his concurrence in *Daniels* and *Davidson*:

> Davidson puts the question whether a state policy of noncompensability for certain types of harm, in which state action

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343. Paul v. Davis, 424 U.S. 693, 710-11 (1975).

344. 402 U.S. 535 (1971).

345. *Id.* at 539.

346. 88 N.E. at 486.

> A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation shall be used. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age.

Id.

> may play a role, renders a state procedure constitutionally defective. In my judgment, a state policy that defeats recovery does not, in itself, carry that consequence. Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long *as there is no fundamental unfairness in their operation.*[347]

Stevens specifically listed sovereign immunity as one "aspect of a State's tort regime" that could be used as a permissible limitation on recovery,[348] but cautioned that "[t]he fact that an immunity statute does not give rise to a procedural due process claim does not, of course, mean that a State's doctrine of sovereign immunity can protect conduct that violates a federal constitutional guarantee."[349]

Such a violation may be grounded in the Constitution's Equal Protection Clause. In a 1981 Supreme Court case, *Logan v. Zimmerman Brush Co.*,[350] the Court evaluated the constitutionality of an Illinois statute terminating a claimant's cause of action for violating a statute of limitations, even when the delay resulted from a state agency's failure to process the application in a timely manner.[351] Although the majority opinion held the statute unconstitutional on due process grounds, a plurality chose to add an equal protection analysis to the decision.

Writing for this plurality, Justice Blackmun admitted that "Logan's equal protection claim is an unconventional one. The [Act] . . . establishes no explicit classifications and does not expressly distinguish between claimants. . . ."[352] Nevertheless, Blackmun found that "the Illinois statute runs afoul of the lowest level of permissible equal protection scrutiny [i.e., rational basis]."[353] The determining factor was that the state statute failed to classify claims on any standard of merit:

> Here, of course the [statute] may operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process. While it may be true that "[n]o bright line divides the merely foolish from the arbitrary law," I have no doubt that [the statute] is patently irrational in light of its stated purposes. . . . It is true, of course, that [the statute] serves to expedite the resolution of certain claims . . . and in that sense it furthers the purpose of terminating disputes expeditiously. But it is not enough, under the Equal Protection Clause, to say that the legislature sought to terminate certain claims and succeeded in doing so, for that is "a

347. *Daniels*, 474 U.S. at 342 (emphasis added). Justice Stevens used one concurrence, in *Daniels*, to address both that case and *Davidson*.
348. *Id.*
349. *Id.* at 343 n.20.
350. 455 U.S. 422 (1981).
351. *Id.* at 424.
352. *Id.* at 438.
353. *Id.* at 439.

> mere tautological recognition of the fact that [the legislature] did what it intended to do."[354]

While the plaintiff and amici curiae briefs in *Boub II* argued that bicyclists were intended users of the road, none of them directly addressed the process by which bicyclists became intended users. The brief submitted by Wayne Township, on the other hand, directly confronted the issue:

> [P]laintiff references various provisions of the Illinois Vehicle Code, various guidelines of the Illinois Department of Transportation, and the "Rules of the Road for Bicycles" distributed by the Secretary of State.... This, of course, is beside the point. For purposes of determining the scope of a local public entity's duty to maintain its own property ... it is the local public entity's intent which controls, not the intent of any particular individual or of some other entity.[355]

This position was adopted almost verbatim by the *Boub II* court.[356] As discussed in Section II of this Article, this interpretation has increasingly come into conflict with state and federal transportation policy, state traffic ordinances, and even local codes. As the *Latimer* court made clear, just because a traffic regulation forces a cyclist to operate in the road does not imply that the use of the street is intended, and that a municipality has a duty of care.[357] Intent must be either delineated with signage and marking or included in the state tort immunity act itself. As shown by *Santelli*, a municipality does not have a duty of care even if specified in the state vehicle code.[358]

Although the plaintiffs in *Boub II* chose not to respond to this argument,[359] it is plausible to argue that by allowing municipalities

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354. *Id.* at 440-41.

355. Brief for Appellee at 22, *Boub II* (No. 84246), *available at* 1998 WL 34114737.

356. 702 N.E.2d at 538 (Heiple, J., dissenting).

357. 752 N.E.2d at 1165. This is the infamous "cycling equals smoking" section.

358. 584 N.E.2d at 460. A recent Illinois appeals court case, *Anderson v. Alberto-Culver USA, Inc.*, 740 N.E.2d 819 (Ill. App. Ct. 2000), casts some doubt on this. A regional airport failed to maintain smooth runway run-off areas, exacerbating the severity of an airplane crash. Such run-off areas were specified in a Federal Aviation Administration (FAA) Advisory Circular. The court concluded that "accepting federal state and funding mandated municipal defendants' compliance with the Advisory Circular surface safety standards and established their duty of reasonable care." *Anderson*, 740 N.E.2d at 828. Federal highway trust funds, passed through the state's department of transportation, usually trickle down to even the most local level of government. The 1997 trust fund legislation (due to be replaced in 2004) contains multimodal advisory compatibility standards. Thus, *Anderson* may obviate *Santelli*.

359. Brief for Appellant at 7, *Boub II* (No. 84246), *available at* 1998 WL 34181977. "Plaintiff acknowledges that the intent of the local entity must be examined...." *Id.*

to separate intended and permitted users from intended but not permitted users, Illinois creates just the type of "non-classification classifications," justified only by tautology, that Justice Blackmun warned of. The "enormity of the burden" test, which holds that fiscal liability is the primary criterion for determining who is an intended user, clearly veers the ITLA towards Justice Blackmun's abyss of tautological classifications. Under this argument, Mr. Boub would not represent the class of bicyclists, but the class of permitted but not intended travelers.

There is reason to believe that the Illinois Supreme Court may be sympathetic to this position. A 1997 case, *Best v. Taylor Machine Works*,[360] concerned a worker injured when a defective forklift truck failed. An Illinois act, Act 89-7, limited compensatory damages for non-economic injuries to $500,000.[361] In addition to damages, the injured worker at trial received declaratory and injunctive relief that the Act violated several provisions of the Illinois Constitution, including the Article IV, section 13 prohibition against special legislation.[362]

The Illinois Supreme Court used two bases for its analysis. First, special legislation challenges should generally be evaluated using the same standards as an equal protection challenge.[363] While the special legislation prohibition was included in the Illinois Constitution in 1870, a separate equal protection provision was only incorporated in 1970.[364] Thus, for most of its life, the special legislation clause provision functioned as Illinois' equal protection clause.[365] Because of its unique history, Illinois courts generally still use the same standards to adjudicate special legislation and equal protection challenges.[366] Second, the court determined that because Act 89-7 did not involve a fundamental right or involve a suspect class, rational basis scrutiny must be used.[367] The court found that Act 89-7 did not even meet this level of scrutiny. Citing the decision rendered by the trial court, it stated that the Act "constitutes special legislation because it eliminates fairness and impartiality in the awarding of compensatory damages, thereby bestowing on certain tortfeasers a

360. 689 N.E.2d 1057 (Ill. 1997).
361. *Id.* at 1063.
362. *Id.* at 1068-69.
363. *Id.* at 1070-71. *See also Melbourne*, 394 N.E.2d at 1300.
364. *Best*, 689 N.E.2d at 1070.
365. *Id.* at 1070-71. "Delegates to the 1870 constitutional convention criticized special legislation because, instead of establishing and enforcing general principals applicable to every class of citizens, special legislation enriched particular classes of individuals at the expense of others." *Id.* at 1070 (citing STATE OF ILLINOIS, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 578 (1870).
366. *Best*, 689 N.E.2d at 1070-71.
367. *Id.* at 1071.

disproportionate, undeserved benefit of escaping liability. . . ."[368]

Although *Best* was an Illinois state case interpreting the state constitution, and *Logan* was a United States Supreme Court case interpreting the federal Constitution, the two cases are close analogs, and *Best* can arguably be used to extend the edicts of *Logan*.[369] The capacity of a court to consider closely linked federal and state constitutional rights together was supported by the Supreme Court in yet another Illinois-based case, *Central Union Telephone Co. v. Edwardsville*,[370] in which the majority concluded that: "It is not, however, a forced or strained interpretation to hold that 'cases . . . in which the validity of a statute or construction of the Constitution is involved' include validity under, or construction of, both [federal and state] constitutions."[371] Similarly, Illinois appellate courts use the same analysis in assessing equal protection claims under both the federal and state constitutions,[372] and have had no qualms in accepting cases from trial courts who have failed to specify which constitution gave rise to their equal protection holdings.[373]

The Illinois Supreme Court's 1997 language in *Best* is eerily similar to that contained in *Molitor*, the 1959 school bus crash case in which the court rejected the state's blanket immunity for school districts. The following passage is from *Molitor*: "The difficulty

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368. *Id.* at 1068-69.

369. Even if this assertion is rejected, a comparison of *Logan* and *Best* is warranted. Most likely, any action seeking a judicial overturn of *Boub* would contain a supplemental claim based solely on a state constitutional challenge, and the discussion would be useful in this context. In addition, it should be recalled that in *Monroe v. Pape*, the court explicitly stated that § 1983 may be used in circumstances where a remedy to an invidious law is inadequate in theory or practice, as well as to challenge the unacceptable law itself. 365 U.S. 167, 174-76 (1961). Thus, an unconstitutional state law that provided no remedies for its invidious nature could form the basis of a § 1983 claim, even if the state law itself was upheld by the state's supreme court. Finally, it should be noted that in revising the Illinois Constitution in 1970, the legislative commentary to Art. XIII, § 4 of the constitution, empowering the legislature to grant local government immunity, specifically cautions that any grant of immunity is "subject to the provisions of the United States Constitution." *Melbourne*, 394 N.E.2d at 1301.

370. 269 U.S. 190 (1925).

371. *Id.* at 195. Illinois had a statute that required appeals of "Constitutional" issues to go directly to the state supreme court. Failure to do so constituted a waiver of the constitutional issues. Because the statute did not specify whether only state constitution issues were intended, or whether federal constitutional issues were included as well, the Supreme Court was asked to determine if it made a difference. The Court said that it didn't. *Id.* at 194-95.

372. People v. Reed, 591 N.E.2d 455, 457 (Ill. 1992).

373. Garcia v. City of Chicago, 608 N.E.2d 239, 241 (Ill. App. Ct. 1992). It should be noted that *Garcia* upheld the (Illinois) constitutionality of a City of Chicago ordinance that allowed children under twelve to ride bicycles on the sidewalk, but prohibited those over the age limit. *Id.* at 242-43.

with this legislative effort to curtail the judicial doctrine is that it allows each school district to determine for itself whether, and to what extent, it will be financially responsible for the wrongs inflicted by it."[374] And this is from *Best*, almost forty years later:

> This court has consistently held that the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis.... The ban on special legislation originally arose ... in response to the ... abuse of the legislative process by granting special charters for various economic entities.[375]

Best describes a history in which the State of Illinois prohibited its legislature from passing laws to arbitrarily benefit the interests of one group—one "economic entity"—over another. *Molitor*, and its judicial descendents, *Harvey*,[376] *Lorton*[377] and *Sullivan*,[378] extend this principle to governmental agencies. The Illinois court's objection in *Best* was twofold: first, by statutorily allowing some entities to self-segregate themselves into discrete classifications with different degrees of liability, the state violated the special legislation provision of the state constitution. Second, such legislation is an improper delegation of judicial power to the legislature. *Molitor* and *Best* also established the principle that the Illinois Constitution's special legislation clause is, by history and application, so inexorably intertwined with concepts of equal protection that the two are inseparable, and that any legislation that permits local government self-segregation violates that provision.[379]

Generally, disparities between persons do not create an equal protection claim.[380] The *Boub II* court concluded that the most localized level of government is the only one entitled to make the ultimate determination as to who is an "intended and permitted" user,[381] a finding that, at first glance, does not initially appear to violate the general rule. However, in a recent case, *Bush v.*

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374. 163 N.E.2d at 92.
375. 689 N.E.2d at 1069-71.
376. 203 N.E.2d at 576-77.
377. 220 N.E.2d at 163.
378. 281 N.E.2d at 662-63.
379. *Melbourne*, 394 N.E.2d at 1300. "Whether a particular legislative enactment violates this special legislation provision is a matter decided upon standards very similar to those involved in equal protection analysis." *Id.*
380. McGowan v. Maryland, 366 U.S. 420, 427 (1961). "[T]he Equal Protection Clause relates to equality between persons as such, rather than between areas and ... territorial uniformity is not a constitutional prerequisite." *Id.*
381. 702 N.E.2d at 541. "We iterate 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 the DuPage County board is not determinative." *Id.*

Gore,[382] the Supreme Court found that a judicially-ordered recount of votes in the 2000 presidential election violated the equal protection clause because not every county was ordered to recount, and in those counties that were so ordered, the recount procedure was not uniform from county to county. The issue, like *Boub II*, was one of determining intent:

> Florida's basic command for the count of legally cast votes is to "consider the intent of the voter." This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.... The search for intent can be confined by specific rules designed to ensure uniform treatment.[383]

It could be argued that the Court's holding in *Bush* was limited to election procedures—among the most fundamental of rights. However, the Court's own summary of the issue suggests that, under some circumstances, it points to a broader need for geo-political uniformity:

> The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. *When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.*[384]

Because the Illinois special legislation clause "contains an express grant of power to the judiciary,"[385] a decision by its supreme court governing its applicability appears to function very much like a judicial remedy, giving rise to the admonition in *Bush* that such solutions must contain the "rudimentary requirements of equal treatment."

One final point needs to be addressed, dealing with another federal civil rights statute, 42 U.S.C. § 1985, a successor to section 2 of the Civil Rights Act of 1871.[386] Section 1985 prohibits those who "conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of

382. 531 U.S. 98 (2000).

383. *Id.* at 530.

384. *Id.* at 532 (emphasis added).

385. *Best*, 689 N.E.2d at 1070. This grant is unique: "the prohibition against special legislation is the 'one provision in the legislative articles that specifically limits the lawmaking power of the General Assembly.'" *Id.* at 1069.

386. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 266 (1993).

the laws. . . ."[387]

The expansive possibilities in the phrase "any person or class of persons" became the subject of much speculation after *Griffin v. Breckenridge*,[388] a 1971 Supreme Court case in which Justice Stewart cautioned that "[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, *or perhaps otherwise class-based*, invidiously discriminatory animus behind the conspirator's action."[389]

Previously, this Article discussed a theoretical right of localized travel in the context of a 1993 Supreme Court case, *Bray v. Alexandria Women's Health Clinic*. There, Justice Souter's majority opinion suggested that: 1) if such class-based animus were applied to all travelers, both intrastate and interstate alike, and 2) as a result, some interstate travelers were adversely affected, then a conspiracy to interfere with a federally protected right (interstate travel) could be established.[390] In his dissent, Justice Stevens appeared to assume that the class that defined the animus was comprised of out-of-state travelers.[391] But Justice Souter, noting that the abortion protesters at the heart of the case were only interfering with women in the last few feet before the door of the clinic, said that "[s]uch a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them."[392]

This sentence, "even if it is applied intentionally against travelers from other States" indicates discrimination between in-state and out-of-state clients; the italicized *discriminatorily* must refer to some other vector of discrimination for the sentence to have any meaning. Using the *Bray* example, if the protesters singled out interstate travelers for harassment, letting Virginia travelers into the clinic without opposition, this would meet the conditions Justice Souter stated when he wrote "even if it is applied intentionally against travelers from other States." Here the restriction (harassment) is applied intentionally against travelers coming from out of state. But if the protesters harassed only pregnant women, regardless of where they traveled from, this would meet the description "applied *discriminatorily* against them." There would be a difference between harassing all

387. 42 U.S.C. § 1983(c).
388. 403 U.S. 88 (1971).
389. *Id.* at 102 (emphasis added).
390. *Bray*, 506 U.S. at 277.
391. "[T]he Court assumes that even an intentional restriction on out-of-state travel is permissible if it imposes an equal burden on intrastate travel." *Id.* at 333.
392. *Id.* at 277.

pregnant women and all out-of-state people. If all pregnant women were harassed, all pregnant women who traveled from outside the state would be harassed, but if all people who traveled from out-of-state were harassed, pregnant women from within Virginia would not be harassed. To have meaning, the phrase "even if it is applied intentionally against travelers from other States" must include the class of all interstate travelers, while the phrase "applied *discriminatorily* against them" must include the class of all pregnant women. Therefore, to discriminate on the basis of travel origin *or* on the basis of some other classification would entail a conspiracy to violate civil rights.

The obvious extension of this argument is that bicyclists should be considered an "otherwise class-based" group. However, because bicyclists are not a protected category in either the federal or state constitutions, any discriminatory classification need only pass rational-basis scrutiny, and given the narrow confines of this grouping, finding a corresponding legitimate public interest would be virtually trivial. This was the conclusion the Illinois Appellate Court reached in *Garcia v. City of Chicago*,[393] upholding the (state) constitutionality of a Chicago ordinance permitting children under twelve to ride bicycles on the sidewalk, but prohibiting older riders: "a party . . . must prove 'by clear and affirmative evidence' that the ordinance constitutes arbitrary, capricious and unreasonable municipal action."[394] But the state supreme court's standard for determining rational basis under the state equal protection clause, as articulated in *Best*, is far more inclusive: "we must determine whether the classifications created [by legislation] are based upon reasonable differences in kind or situation, and whether the basis for the classifications is sufficiently related to the evil. . . ."[395] The 1995 Illinois Tort Reform Act was invalidated because it was unrelated to the means of addressing the perceived problem,[396] not because it was vague or arbitrary.

Returning to Justice Souter's opinion, if the applicable categories addressed by the ITLA are "permitted road users" and

393. 608 N.E.2d 239 (Ill. App. Ct. 1992).

394. *Id.* at 242. There is a wide body of literature supporting the position that there is no right to travel by a particular means. State v. Scheffel, 514 P.2d 1052 (Wash. 1973) (holding a revocation of driver's license for repeated traffic convictions was not unconstitutional); Kansas v. Risjord, 819 P.2d 638 (Kan. 1991) (holding regulation of horse drawn or horseback transport on roadways does not violate Fourteenth Amendment); Mountain States Legal Found. v. Espy, 833 F. Supp. 808 (D. Idaho 1993) (road closure that removes most convenient, but not only, means of access to home does not violate right to travel); Am. Motorcyclist Ass'n v. Park Comm'n of Brockton, 575 N.E.2d 754 (Mass. App. 1991) (park prohibition of motorcycles does not violate freedom of assembly).

395. 689 N.E.2d at 1071.

396. *Id.* at 1073.

"permitted and intended road users," meeting the demands of equal protection becomes far less problematic. If, for all road users other than motor vehicles, it is solely the wishes of the local government that determines if a given subclass of users will be considered permitted and intended, then the duty of care (or, more precisely, the waiving of immunity) will vary from municipality to municipality. However, motor vehicles will be intended users regardless of where they go because local government intent is irrelevant—statewide intent was created judicially in *Deren* and *Wojdyla*.

Wayne Township's brief in *Boub II* asserted that such a differentiation existed under Illinois law: "In short, while pedestrians, joggers, horseback riders, and bicyclists may be permitted users of the road—i.e., they are not affirmatively prohibited from using the roadway—a local public entity's responsibility/duty for maintaining the road in a reasonably safe condition is limited only to intended and permitted users."[397]

And Illinois courts, in the wake of *Boub II*, appear to be reaching a consensus that no statewide action (other than altering the ITLA itself) can make a class of users intended: "[I]n the wake of the *Boub* decision, it is unlikely that a bicyclist will ever be held to be an intended user of a municipal street or roadway unless that roadway has been specifically marked or otherwise designated as a bicycle route by the municipality."[398]

Recall *Santelli*, where a township failed to post a newly-created curve in the road, resulting in a fatal nighttime crash: the municipality breached a duty imposed *by the state itself* through the motor vehicle code, and was still held to be immune.[399] The implications are enormous: no statewide administrative or legislative act is sufficient to make any currently "permitted" user a "permitted and intended" user at a particular location unless the local municipality agreed to implement the change, or the change *was incorporated into the Illinois Tort Immunity Act itself*. On the other hand, one defined category of roadway users (motor vehicles) is considered "permitted and intended" *regardless* of the expressed intent of any municipality, even though section 10/3-102(a) makes no mention of what groups are intended and which groups are not. This doctrine, first advanced in *Deren* (1973) and *Wojdyla* (1992), was, in both cases, a bald assertion unsupported by precedent.[400]

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397. Brief of Appellees at 36, *Boub II* (No. 84246), *available at* 1998 WL 34114737.

398. *Diefendorf v. City of Peoria*, 720 N.E.2d 655, 661 (Ill. App. Ct. 1999) (Breslin, J., dissenting).

399. 584 N.E.2d at 460. "The Illinois Motor Vehicle code in no way negates the immunity granted to the City by the Tort Immunity Act for failure to post warning signs. . . ." *Id.*

400. *Wojdyla*, 592 N.E.2d at 1102-03. "To determine the intended use. . . .

In other words, the intended/not intended dichotomy is a common law construction that creates a partial local government override of legislative and statewide administrative mandates for some groups, but explicitly preempts this override for others. In neither case is there any legislative policy input to define the dichotomy.

Returning back to 42 U.S.C. § 1985, if bicyclists are simply considered a subclass of the relevant legal classification (those designated under common law as subject to local government immunity decision making), then a much stronger case can be made that they are a class-based group, are deliberately discriminated against, and that this discrimination is invidious because no rational public policy is served. These elements were summarized in *Bray*:

> A conspiracy is not "for the purpose" of denying equal protection simply because it has an effect upon a protected right. The right must be *aimed at*; its impairment must be a conscious objective of the enterprise. Just as the "invidiously discriminatory animus" requirement . . . requires that the defendant have taken his action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," so also the "intent to deprive of a right" requirement demands that the defendant do more than merely be aware of a deprivation of a right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it.[401]

Wayne Township's brief in *Boub II* makes clear that it was precisely the differentiation of generally-intended users and locality-dependent intended users that is the purpose of the Illinois Tort Act:

> In this era of tax caps and dwindling government budgets, it would be patently unfair to permit the intent of some other person or entity—a user, a planning commission, some agency of the state or federal government, etc.—to define the scope and extent of a local public entity's duty of care. . . .[402]

And the Illinois Supreme Court agreed:

> We believe that imposition of municipal liability in the circumstances shown here is more appropriate for the legislature to initiate, if it is to be done at all. In this regard, 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 the special requirements of bicyclists.[403]

This is, of course, exactly the point the City of Chicago made

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These are the indications of intended use." *Id.*

401. 506 U.S. at 275-76 (citations omitted).

402. Brief for Appellees at 31, *Boub II* (No. 84246), *available at* 1998 WL 34114737.

403. *Boub II*, 702 N.E.2d at 543.

in *Curatola* when it introduced its "enormity of the burden" test. Lacking a coherent legal structure—the result of reading ITLA's "intended and permitted" language in isolation from its "reasonably foreseeable" clause—Illinois courts have given local governments the power to arbitrarily and invidiously determine the duty of care owed to a legal user of its roadways, even if such use is normal and routine. No notice and hearing is required before such a determination is made—the lack of appropriate signage, marking and other facilities treatment is per se the only determinative element. As Justice Heiple warned in his dissent in *Boub II*: "Given the majority's ruling, the only safe bicycle in Illinois is a stationary exercise bike located in one's home or at the gym."[404]

404. *Id.* at 545.