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Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse

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INTRODUCTION

Recent evidence suggests that we are failing in our mission to keep children safe from abuse.¹ To succeed in that mission, we must understand the nature of the problem. Initially, we must understand that severe child abuse does not always occur suddenly and without warning. In many instances, in fact, children who die from abuse have been beaten over a long period time.² Thus, the abuse is not simply the product of one isolated event; it represents a pattern of violence.³ Furthermore, in such situations, often people who know that children are being beaten do nothing to protect the child from further abuse.⁴ Many people, for instance, family members living in a home where abuse takes place, friends, neighbors, and relatives outside the home may know about the beatings from first-hand observations of the abuse or its aftermath. Given the gravity of the mission, one might expect the law to require some response by these people. Certainly, their knowledge puts them in the best position to intervene to stop the violence.⁵ Yet, when they do not act on what they know, tort law has traditionally excused their failure, and thus, become a silent partner in the abuse.⁶

1. The National Center on Child Abuse Prevention Research found a 40% increase in child abuse reporting between 1985-91. DEBORAH DARO & KAREN MCCURDY, CURRENT TRENDS IN CHILD ABUSE REPORTINGS AND FATALITIES 2 (National Committee for the Prevention of Child Abuse Working Paper No. 808, 1992). The increases were attributed to economic stress due to poverty, unemployment, and related work concerns; increased public awareness; improvements in the internal counting systems of state agencies; and substance abuse. *Id.* at 5.

2. One author has stated: "This is consistent with modern medical and social science data recognizing a 'battered child syndrome' as a recurring pattern of child abuse." RUTH FLEET THURMAN, CLIENT INCEST AND THE LAWYER'S DUTY OF CONFIDENTIALITY 23 (1985) (citations omitted). See also Susan A. Collier, Note, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC. L.J. 189, 191 (1983) (asserting that "child battering typically escalates and more serious injuries are inflicted . . .").

3. THURMAN, *supra* note 2, at 15.

4. All states impose mandatory reporting requirements on professionals who have evidence of child abuse. Those professionals may include medical personnel, school personnel, law enforcement agencies, mental health personnel, clergy, and daycare workers. For a comprehensive list of requirements of each state, see LEONARD KARP AND CHERYL KARP, DOMESTIC TORTS, 269-94 (Supp. 1993) [hereinafter KARP]. The issue of professionals' liability for failing to protect a child from abuse is outside the scope of this article.

5. Twenty states impose a mandatory reporting requirement on all people to report child abuse. For a complete list, see KARP, *supra* note 4, at 269-94. These states impose a reporting requirement, not a duty to protect, and with only one exception, do not impose civil liability. See R.I. GEN. LAWS § 40-11-6.1 (1990 & Supp. 1993). The criminal liability that attaches to a failure to report typically is a misdemeanor accompanied by a fine of \$100 or less. See, e.g., N.M. STAT. ANN. § 32A-4-3 (Michie 1993).

6. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (Blackmun, J., dissenting) (criticizing systematic judicial inaction). See also Martha L. Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*,

Regardless of the law's traditional position, society needs to protect children from abuse. This article proposes that an adult who knows or should know of ongoing child abuse should have an affirmative duty to take reasonable steps to protect the child from that abuse. If the breach of that duty is a cause in fact of the child's injuries, then the adult should be liable to the child for damages under common-law negligence doctrine. Tort liability would be a significant step towards ensuring that children who are injured by abuse would be compensated for their injuries. Moreover, recognition of an affirmative duty would send a clear message that ignoring child abuse will not be tolerated. Sending this message would go far towards achieving the ultimate goal: curbing child abuse.

The remainder of this article is divided into four parts. Part I reviews the "no-duty rule," the traditional tort law principle that people do not owe an affirmative duty to protect others. The law has created exceptions to the no-duty rule when a person, either by virtue of his relationship with another party or because of his conduct, has a duty to act. Part I discusses these exceptions and explores their application in the context of the potential liability of an adult for failing to protect a child from abuse. This section demonstrates that the no-duty rule and its exceptions do not offer adequate protection to abused children in such cases.

Part II further addresses the limitations of this approach through a discussion of three well-known cases: *Farwell v. Keaton*,⁷ *Tarasoff v. Regents of the University of California*,⁸ and *DeShaney v. Winnebago County Department of Social Services*.⁹ Each of these cases pinpoints a different problem with the existing law. Together, the three cases suggest that use of the current no-duty rule is flawed when the issue is failure to protect from child abuse. Availability of the exceptions does not guarantee that courts will impose liability on adults who know of ongoing child abuse and fail to take steps to prevent that abuse. Instead, the application of the rule and its exceptions has allowed courts to avoid confronting the core issues that underlie liability in these cases. This section demonstrates the limitations of the exceptions, and concludes that the approach as a whole risks leaving an injured child without a legal remedy.

Part III identifies the policies which underlie the imposition of an affirmative duty of care. These policies were recently articulated by a New Jersey court as justifying the creation of an affirmative

43 VAND. L. REV. 1665 (1990) (making explicit the analogy between the defendants' and courts' failure to act in *DeShaney*).

7. 240 N.W.2d 217 (Mich. 1976).

8. 551 P.2d 334 (Cal. 1976).

9. 489 U.S. 189 (1989).

duty to prevent a person from driving drunk.¹⁰ Although this holding is limited, the reasoning employed in that case presents a model for courts to replace the no-duty rule with an affirmative duty of care in a failure to protect from child abuse case. When the issue is a matter of great public concern, such as drunk driving or child abuse, the law should not assume that a defendant will be obligated to act under an exception to the no-duty rule. Instead, overwhelming policy considerations dictate that courts should impose a duty upon defendants to use reasonable care to protect other drivers from drunk drivers, or in the case of child abuse, to keep children from harm. Part III also traces a parallel trend in the criminal law which has been motivated by these policies. As this section demonstrates, courts have been increasingly willing to interpret their states' criminal laws to hold parents liable for failing to protect their children from abuse.

Finally, Part IV uses two hypotheticals to explore the intricacies of a negligence cause of action for failing to protect a child from abuse. The first hypothetical considers a mother's obligation to protect her son from her boyfriend's abuse. In the second scenario, a neighbor, who hears sounds of abuse in an adjacent apartment and sees evidence of it, does not intervene. Liability in both cases hinges on the existence and scope of the defendant's duty and the determination of whether the defendant is the cause-in-fact of the plaintiff's injuries. These two cases address these questions separately but also explore the connection between duty and causation in failure to act cases.

The Conclusion considers the extent of an adult's liability for failure to protect a child from abuse under traditional negligence principles. This section reiterates the policy concerns underlying the imposition of a duty of care on adults who know of ongoing child abuse. Although the extent of the abuse will vary, this article concludes that the seriousness of the problem of child abuse warrants that people who know of abuse take appropriate steps to prevent it.

I. IDENTIFYING THE PROBLEMS: THE CURRENT RULE AND EXCEPTIONS

The current no-duty-to-rescue rule in tort law is rooted in the early common-law distinction between misfeasance, or action, and nonfeasance, or inaction.¹¹ The law imposed a duty of care in misfea-

10. *Lombardo v. Hoag*, 566 A.2d 1185 (N.J. Super. Ct. Law Div. 1989), *rev'd*, 634 A.2d 550 (N.J. Super. Ct. App. Div. 1993).

11. The *Restatement (Second) of Torts* provides in relevant part: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965) [hereinafter RESTATEMENT]. See W. PAGE KEETON ET AL.,

sance cases because the defendant affirmatively acted to injure the plaintiff. However, the law did not recognize a comparable duty in nonfeasance cases—those in which a defendant's failure to act resulted in the plaintiff's injury.¹² In part, this distinction was based on the idea that a person should be held responsible for the consequences of his conduct but not for risks which he did not create, and thus, arguably could not control.¹³

Relying on this approach, a person who knew or should have known about ongoing child abuse would maintain that his failure to intervene to protect the child from abuse, or in other words, his inaction, did not give rise to a legal duty. If he had acted affirmatively, then he could be held responsible for the consequences of his conduct. In a failure to act case, however, he did not create, and thus, could not control the abuse. Therefore, he should not be held liable for failing to protect a child from abuse.

Although some courts and commentators have emphasized the significance of the action/inaction distinction in creating a legal duty,¹⁴ others have not been comfortable drawing a clear line between the two.¹⁵ In *Whittaker v. Sandford*,¹⁶ for example, the

PROSSER AND KEETON ON THE LAW OF TORTS, § 56, at 373 (5th ed. 1984) [hereinafter KEETON ET AL.]. See also Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908). Bohlen emphasized the bright-line distinction:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction [sic], a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

Id. at 219.

12. KEETON ET AL., *supra* note 11, § 56, at 373.

13. *Id.* at 374-75.

14. See, e.g., Bohlen, *supra* note 11, at 219-21. One of the cases often cited for the no-duty-to-rescue proposition is *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959). In that case, the defendant dared a business invitee to jump into water and then let him drown. The court concluded that although his conduct was morally reprehensible, the defendant owed no legal duty to the plaintiff because his failure to rescue the drowning plaintiff was nonfeasance, or failure to act, rather than an affirmative act.

15. Many commentators have criticized the no-duty-to-rescue rule. See John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of the Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867 (proposing that the existing no-duty to rescue rule be replaced with an affirmative duty to act reasonably under the circumstances); Anthony D'Amato, *The 'Bad Samaritan' Paradigm*, 70 NW. U. L. REV. 798 (1975) (reconceptualizing the paradigmatic way tort law has established a rule that there is no duty to warn or rescue); Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972) (exploring the background and application of a Vermont statute extending a general duty to rescue persons in danger); Robert J. Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252, 253 (1983) (arguing that application of a duty to rescue can be "justified on individualistic grounds"); Jay Silver, *The Duty to Rescue, A Reexamination and Proposal*, 26 WM. &

Supreme Court of Maine determined that a defendant's refusal to release the plaintiff from a boat satisfied the element of an act of physical restraint of a false imprisonment claim, and thus gave rise to a legal duty. The defendant had invited the plaintiff onto his boat with the assurances that she would be able to leave as soon as they reached their destination, but then would not give her a rowboat to reach shore. The court concluded that the refusal of promised transportation to someone who had no other way to leave the boat was the equivalent of turning a key in a lock.¹⁷ By his failure to give the plaintiff access to shore, the defendant in *Whittaker* was just as responsible for creating, and thus controlling, a risk to the plaintiff as if he had locked the plaintiff in the hold of the ship.¹⁸

The *Whittaker* court's decision suggests that the line between action and inaction is not a bright-line distinction. In *Whittaker*, the court imposed a duty on a defendant whose misconduct could be characterized as a failure to act. In effect, the court recognized that no practical distinction existed in that case between affirmatively acting to help a person in need and doing nothing in the first place. The exceptions that have been carved out of the no-duty rule further underscore the conceptual difficulty of distinguishing between action and inaction and signal courts' discomfort with the current no-duty rule.¹⁹

MARY L. REV. 423 (1985) (noting that countries not following the common law have had little resistance to finding a public duty to rescue and proposing a model "Duty to Render Aid" statute); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) (examining the legal, ethical, moral, economic and philosophical arguments for and against a general duty to rescue); Jack Wenik, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787 (1985) (proposing criminal liability upon eyewitnesses for failing to report felonies).

16. 85 A. 399 (Me. 1912).

17. The court compared action to inaction: "The boat is the key. By refusing the boat he turns the key. The guest is as effectually locked up as if there were walls along the sides of the vessel." *Id.* at 402.

18. *Id.*

19. RESTATEMENT, *supra* note 11, §§ 314A, 314B, 321, 322, 324. To fully illustrate the point it is helpful to read the listed *Restatement* sections in conjunction with one another. They are:

§ 314A. Special Relationships Giving Rise to Duty to Aid or Protect

- (1) A common carrier is under a duty to its passengers to take reasonable action
 - (a) to protect them against unreasonable risk of physical harm, and
 - (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
- (2) An innkeeper is under a similar duty to his guests.
- (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
- (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

The law recognizes a duty to exercise reasonable care if any one of the exceptions to the no-duty rule is met.²⁰ One type of exception examines the relationship between the plaintiff and the defendant.²¹ This special relationship exception imposes an affirmative duty on the defendant to protect the plaintiff even though the defendant's conduct did not create the risk to the plaintiff.²² According to the *Restatement (Second) of Torts*, special relationships exist between common carriers and their passengers, innkeepers and their guests, landholders and their invitees, and masters and servants.²³ In addition, a special relationship is created between "[o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection."²⁴ Although the *Restatement* does not identify

§ 314B. Duty to Protect Endangered or Hurt Employee

(1) If a servant, while acting within the scope of his employment, comes into a position of imminent danger of serious harm and this is known to the master or to a person who has duties of management, the master is subject to liability to a failure by himself or by such person to exercise reasonable care to avert the threatened harm.

(2) If a servant is hurt and thereby becomes helpless when acting within the scope of his employment and this is known to the master or to a person having duties of management, the master is subject to liability for his negligent failure or that of such person to give first aid to the servant and to care for him until he can be cared for by others.

§ 321. Duty to Act When Prior Conduct is Found to be Dangerous

(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

§ 322. Duty to Aid Another Harmed by Actor's Conduct

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

§ 324. Duty of One Who Takes Charge of Another Who is Helpless

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or

(b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

Id.

20. See KEETON ET AL., *supra* note 11, § 56, at 376-77.

21. RESTATEMENT, *supra* note 11, § 314A.

22. KEETON ET AL., *supra* note 11, § 56, at 376.

23. RESTATEMENT, *supra* note 11, § 314A.

24. *Id.* See also KEETON ET AL., *supra* note 11, § 56, at 374 (noting that the obligation is imposed on a "limited group of relations, in which custom, public sentiment and views

who falls within this last category, courts and commentators have interpreted it to include familial relationships, such as parents and children, and husbands and wives.²⁵

In some instances, it might be demonstrated that an adult who fails to protect a child from abuse has a special relationship with that child. If the adult is the child's parent, then she is required by law to be responsible for the child in her custody.²⁶ If the adult is another relative or a babysitter, then she may still fall within this special relationship category as someone who has "voluntarily take[n] custody" of the child.²⁷ A person might be said to have voluntarily taken custody of a child by the fact of living in the same residence as the child. Other people who observe the abuse of a child, however, may not have voluntarily taken custody of that child, and thus, may not fall within the special relationship exception. For example, a stranger on the street who witnesses the abuse is unlikely to have the kind of connection with the child that could be characterized as a special relationship. Nevertheless, that person should not be able to turn away from what she has seen. Children may reasonably expect the adults with whom they come in contact to protect them from harm. If these adults do not act, they should not be absolved of responsibility simply because they do not fit within the special relationship exception to the no-duty rule.

Another exception serves as a corollary to the special relationship exception. In some cases, a duty arises when the rescuer and the victim are strangers, but the rescuer has a relationship with the person who is threatening the victim.²⁸ The duty created under this exception differs in one respect from the one imposed under the special relationship exception. In this case, the defendant's duty is

of social policy have led the courts to find a duty of affirmative action.").

25. KEETON ET AL., *supra* note 11, § 56, at 377 and cases cited therein. Early commentators recognized a duty limited to furnishing necessities that was created by a family relationship:

[A]dmitting the existence of the duty in its broadest scope, it is predicated upon the ability of the one upon whom the duty is alleged to rest to afford the necessary protection and the dependence and helplessness of him who claims that the duty is owing to him. It is certain also that the family relation must exist; neither mere association without such relation nor a meretricious relationship creates such a duty.

Bohlen, *supra* note 11, at 227.

26. Statutes in every state impose a duty of financial support on parents. *See, e.g.*, CAL. CIV. CODE §§ 196, 196a (West Supp. 1988). In addition, every state has enacted child abuse and neglect laws to protect children when parents fail to meet their responsibilities. *See, e.g.*, CAL. WELF. & INST. CODE §§ 300, 363 (West Supp. 1987).

27. RESTATEMENT, *supra* note 11, § 314A.

28. RESTATEMENT, *supra* note 11, § 315. For example, most states hold parents liable to third parties for the torts of their children. *See* KEETON ET AL., *supra* note 11, § 123, at 913.

not to protect the victim but to control the dangerous individual.²⁹ The law seeks to impose liability for failure to act on a defendant who fails to control someone with whom she has a special relationship, and thus, a legal obligation to control.³⁰ This exception might not consistently be found to apply to a defendant in a failure to protect from child abuse case.³¹ The defendant who observes the abuse may not have a relationship with the abuser that allows her to control his conduct, and even if she does, the defendant may not be able to control someone who is already violent.

The remaining exceptions focus on the defendant's conduct rather than on his relationships, and arguably, could be characterized as involving action rather than inaction.³² As such, the courts have analyzed these exceptions under traditional negligence principles.³³ The courts' willingness to view these cases as involving the defendant's action rather than his inaction emphasizes the precariousness of the distinction and argues in favor of an approach which replaces the exceptions with a general duty of care.

One such exception arises when an actor creates a risk that puts others in danger.³⁴ As noted above, a major reason for not imposing liability for inaction is the assumption that the defendant has not engaged in risk-creating behavior.³⁵ If a defendant has engaged in such behavior, the exception converts the defendant's conduct from inaction to action, thereby placing it outside of the no-duty rule. An adult who fails to protect a child from ongoing abuse would

29. RESTATEMENT, *supra* note 11, § 315. This section provides:

There is no duty to so control the conduct of a third person as to prevent him from causing physical harm to another person unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

30. RESTATEMENT, *supra* note 11, §§ 317-320.

31. See *Fisher v. Metcalf*, 543 So.2d 785, 787 (Fla. Dist. Ct. App. 1989). In *Fisher*, the court affirmed the trial court's dismissal of a cause of action brought by children against their father's psychiatrist for failing to report child abuse. In addition to determining that the psychiatrist did not owe a duty to the children under state statutes, the court considered and rejected the children's claim of a common-law duty under *Restatement (Second) of Torts* § 315. The court concluded that the psychiatrist did not have the ability to control the father's behavior and that the psychiatrist's reporting obligation did not create a special relationship between the children and him.

32. RESTATEMENT, *supra* note 11, §§ 321, 322, 324.

33. See *State Dep't of Highway Safety v. Kropff*, 491 So.2d 1252, 1255 (Fla. Dist. Ct. App. 1986) (concluding that a police officer who had undertaken to secure an accident scene had a duty to use reasonable care to protect people on the scene).

34. RESTATEMENT, *supra* note 11, §§ 321, 322.

35. See *supra* text accompanying note 13.

fall into this category if his behavior is considered to create a risk that puts the child in danger. If, however, the abuser is identified as the risk-creator, a court would not find that the defendant's inaction falls within this exception to the no-duty rule.

The final exception imposes a duty of care when one has undertaken to assist someone in need.³⁶ This exception applies in cases where a person has begun to assist another and the person being helped relies on that assistance. One rationale for this exception is that having undertaken the assistance, a defendant may have deprived the victim of the assistance of others. Adults who have started to intervene in an abusive situation and then have stopped, or who have otherwise discouraged others from intervening by their own efforts, may fall within this exception. The issue is whether these individuals have "taken charge" of the situation in a way that legally obligates them to continue such aid to the injured party.³⁷ A court might have to define "taken charge" broadly to include an adult who has failed to prevent ongoing abuse. However, enlarging the scope of that concept might cause people to turn away from ongoing abuse. Rather than getting involved in the first place, they might simply ignore their suspicions. If they do not act at all, people who do nothing about abuse cannot be seen as "taking charge" of the situation. Judicial use of this exception might discourage such people from trying to stop what they know is happening.

Even with the host of exceptions to the no-duty rule, the current approach does not adequately protect children from abuse. Under the general rule, a duty of care is imposed if the defendant acted. The defendant can be liable for inaction if he fits within one of the exceptions to the no-duty rule. The line between action and inaction and the contours of the exceptions may be malleable enough to permit courts to impose liability on a person who observes but does nothing about child abuse. However, courts are unlikely to extend such liability in a consistent manner. Thus, the existing rule and exceptions do not guarantee that a defendant's failure to act will amount to legal liability towards the child. Therefore, the possibility remains that this approach could produce an unacceptable result: it could leave an abused child without a remedy against the person who stood by silently while the abuse took place.

II. CONFRONTING THE PROBLEMS OF THE CURRENT APPROACH

The three cases discussed below offer different approaches to the no-duty rule and exceptions.³⁸ Each decision has been criticized,

36. RESTATEMENT, *supra* note 11, § 324.

37. *Id.*

38. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989);

and the controversy surrounding these cases goes beyond their particular facts to the nature of the no-duty rule itself.³⁹ Each court's varying treatment of the rule and exceptions in these three cases coupled with negative reaction to the decisions suggests the need to replace the no-duty rule with an affirmative duty of care for adults who fail to protect children from abuse.

A. *Expanding the Exceptions to the No-Duty Rule: Farwell v. Keaton*

One Michigan Supreme Court decision shows how far that court was willing to go to expand the exceptions to the no-duty rule. In *Farwell v. Keaton*,⁴⁰ the Michigan high court upheld a jury verdict which imposed an affirmative duty on a sixteen-year-old defendant to seek medical attention for his injured friend.⁴¹ After consuming five or six beers, the two boys got into an altercation with a group of six other boys which led to the plaintiff, Richard Farwell, being severely beaten.⁴² Siegrist, the defendant in question, applied an ice pack to Farwell's head after he found Farwell underneath a car following the fight. Siegrist proceeded to drive Farwell around for a couple of hours, and then left him asleep in the back seat of a car in his grandparents' driveway. Farwell's grandparents found him unconscious in the car the next morning, and he died in a hospital three days later.⁴³ At trial, a neurosurgeon testified that Farwell probably would not have died had he received medical attention the night before.⁴⁴

The court found that either of two exceptions to the no-duty rule might apply in this case. First, the court determined that Siegrist had started to help Farwell and that Farwell was relying on Siegrist's aid. Siegrist had "taken charge" of the situation by putting ice on Farwell's head and driving him around.⁴⁵ When Siegrist abandoned Farwell overnight in the car, he deprived him of the assistance of others. Thus, Siegrist's partial assistance left Farwell

Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976); *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976).

39. See Minow, *supra* note 6, at 1675 (criticizing Justice Rehnquist's formalistic approach in *DeShaney*); Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976) (taking issue with the *Tarasoff* court's assumption that therapists can predict violence and protect their patients' potential victims); Adler, *supra* note 15, at 877 & n.42 (discussing the jurisprudence of *Farwell*).

40. *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976).

41. *Id.* at 222.

42. *Id.* at 218.

43. *Id.*

44. *Id.*

45. *Id.* at 220.

worse off than he would have been otherwise.⁴⁶

Second, the court found that the special relationship exception would include Siegrist and Farwell, even though they were not involved in one of the traditionally identified special relationships.⁴⁷ Because Siegrist and Farwell were "companions on a social venture," the court found that Siegrist had voluntarily taken custody of the injured Farwell in a way that deprived him of other opportunities for protection.⁴⁸ The court imposed a duty on Siegrist under the special relationship exception to encourage people engaged in a common endeavor to help their friends in need. To allow someone who can help another without endangering himself to escape legal liability would be "shocking to humanitarian considerations' and [would] fly in the face of 'the commonly accepted code of social conduct.'"⁴⁹

The dissenting opinion challenged the majority's analysis of both exceptions.⁵⁰ First, the dissent refused to accept the majority's finding that Siegrist had voluntarily assumed the duty of caring for Farwell.⁵¹ In the dissent's view, nothing in the evidence suggested that Siegrist should have understood the seriousness of Farwell's injuries; only a trained physician could diagnose them. Since Farwell did not complain about them, Siegrist's conclusion that Farwell was sleeping because he was tired, not because he had suffered massive head injuries, was reasonable.⁵² Therefore, the evidence did not support either of the majority's conclusions: that Siegrist offered assistance, or that Farwell relied on such a representation.

In addition, the dissent rejected the majority's expansion of the special relationship exception "which elevates a moral obligation to the level of a legal duty."⁵³ The court noted that mere social companions are not "co-adventurers" who engage in a dangerous venture with the expectation that they will take care of each other.⁵⁴ Absent further evidence that Farwell depended on Siegrist for assistance, the dissent reasoned, the court should not impose an affirmative duty of care on Siegrist to help Farwell. Thus, the dissent maintained that Siegrist behaved reasonably under the circumstances

46. *Id.*

47. *Id.* at 222; *see supra* text accompanying notes 21-31.

48. *Id.* at 222 ("Under these circumstances, to say that Siegrist had no duty to obtain medical assistance or at least to notify someone of Farwell's condition and whereabouts would be 'shocking to humanitarian considerations' and fly in the face of 'the commonly accepted code of social conduct.'" (quoting *Hutchinson v. Dickie*, 162 F.2d 103, 106 (6th Cir. 1947))).

49. *Id.*

50. *Id.* at 224 (Fitzgerald, J., dissenting).

51. *Id.*

52. *Id.* at 224 & n.2.

53. *Id.* at 224.

54. *Id.* at 224 n.4.

and should not be held accountable for Farwell's death.

In spite of the dissent's remonstrances, however, the *Farwell* majority was not reluctant to impose liability on a friend who failed to seek assistance for his companion's injuries. It follows, therefore, that a court would consider adults who fail to seek assistance for a child's injuries to be equally culpable. In a failure to protect from abuse case, a plaintiff could argue that a duty of care has been created under either of the *Farwell* exceptions. First, by her awareness of the abuse, the adult held herself out as being able to help the abused child, and the child relied on that assistance. The defendant "took charge" of the situation when she decided not to do anything about the abuse. Like Siegrist who abandoned Farwell without telling anyone that he needed medical attention, the adult in this case has abandoned the child-plaintiff to the abuser when she does not seek medical attention for him or did not do anything to stop the abuse. Just as Siegrist's decision to leave Farwell unattended in the car hid his injuries from others, so too does the defendant's decision not to act help to hide the child's injuries from the rest of the world. Quite possibly, the defendant's conduct left the child worse off than if she had not been involved.

Furthermore, if the special relationship exception includes social companions, then it also includes many relationships between the abused child and the adults who fail to protect that child. Farwell and Siegrist were together only for an evening, yet that connection was sufficient to establish Siegrist's duty to help his injured friend. Someone who is aware of ongoing child abuse has at least the level of connection with the child that Siegrist had with Farwell—and probably a greater one. Moreover, the nature of the relationship is more compelling because it is between a child and an adult as opposed to between two adults. A child relies on adults around him for care and protection. These adults are in the best position to protect the children around them. Indeed, the adults are often the only vehicle for protection available to the child; therefore, it would "fly in the face of 'the commonly accepted code of social conduct'"⁵⁵ if these adults were not required to provide that protection.

If courts were to follow *Farwell*, then perhaps they would impose liability for failure to protect a child from abuse under one of the exceptions to the no-duty-to-rescue rule. Yet, most courts have declined to adopt *Farwell's* expansive reading of the exceptions; instead, *Farwell* stands at the outer reaches of negligence law.⁵⁶

55. *Id.* at 222 (citation omitted).

56. Recent decisions suggest that courts are interpreting the exceptions narrowly to limit defendants' liability. *See, e.g.,* *Martin v. Shea*, 463 N.E.2d 1092, 1093 (Ind. 1984) (holding that host had no duty to control the conduct of his guests for the safety of other

Courts may prefer to read the exceptions to the no-duty rule more narrowly for a variety of reasons, including consideration of the historical boundaries of the exceptions, fear of eroding the no-duty rule, and concern about the inconsistent applications and unpredictable results that broad interpretations would produce. This reluctance to follow *Farwell* underscores the need to replace the no-duty rule and its exceptions with a workable alternative which encourages the prevention of child abuse by extending liability to persons who might have stopped it. As currently implemented, the no-duty rule and its exceptions fail to reach the heart of the problem: the need to impose liability on those who fail to protect children from abuse. By rejecting *Farwell's* broad reading of the special relationship exception, courts may be able to avoid imposing liability on people who remain silent when confronted with child abuse.

B. *Exploring the Inconsistencies in the Exceptions: Tarasoff v. Regents of the University of California*

A famous case decided contemporaneously with *Farwell* points out the inconsistencies that plague application of the current rule and exceptions. In *Tarasoff v. Regents of the University of California*,⁵⁷ the Supreme Court of California considered negligence claims against the university board of regents, campus psychologists and campus police after a former psychiatric outpatient at the campus hospital killed his ex-girlfriend. The defendant-therapist had been seeing Prosenjit Poddar on an outpatient basis. When Poddar told his therapist that he intended to kill his former girlfriend, the therapist notified both his superior and campus police. The campus police questioned Poddar but did not detain him because they did not think that he was dangerous.⁵⁸ The therapist's superior determined that no further action had to be taken, and Poddar never saw the therapist again. Two months later, Poddar murdered his former

guests); *Ashburn v. Ann Arundel County*, 510 A.2d 1078 (Md. 1986) (concluding that a police officer owed no duty of care to a pedestrian struck by a drunk driver even though the officer had detected the driver's condition before the accident); *Hammers v. Farm Bureau Town & Country*, 792 S.W.2d 19 (Mo. Ct. App. 1990) (finding that insurance company that provided automobile insurance to a senile woman did not have a duty of care arising from a special relationship either with the insured or with the person injured by the insured); *Owens v. Garfield*, 784 P.2d 1187 (Utah 1989) (holding that parents whose child was sexually molested by a babysitter had no cause of action against state and county officials who suspected that abuse was taking place and were investigating the babysitter; the state had no special relationship with either the babysitter or the child-victim that would give rise to a duty to warn the child's parents).

57. 551 P.2d 334 (Cal. 1976).

58. *Id.* at 339-40.

girlfriend, Tatiana Tarasoff.⁵⁹ Her parents sued, alleging among other theories, negligent failure to protect their daughter.

The court determined that the defendant-therapist was liable for failing to protect Tatiana Tarasoff from Prosenjit Poddar's violence.⁶⁰ In determining that the therapist owed Tarasoff a duty of care, the court ostensibly relied on the special relationship exception to the no-duty rule. The court noted that the therapist's duty could be established through his relationship with either Poddar—"the person whose conduct needs to be controlled"—or Tarasoff—"the foreseeable victim of that conduct."⁶¹ Although the court concluded that the therapist's relationship with his patient established the duty, the duty was not to control his patient, Poddar. Instead, the court departed from the *Restatement* provisions and concluded that the relationship between the therapist and Poddar gave rise to a duty to protect Tarasoff.⁶² The court, however, declined without explanation to find that a similar special relationship existed between the police and either Tarasoff or Poddar that would give rise to a legal duty.⁶³

The *Tarasoff* court concluded that the special relationship between therapist and patient gave rise to the therapist's duty of care in two ways. First, the court reasoned, the relationship gave the therapist the opportunity to detect the danger to the victim.⁶⁴ Second, once the danger had been detected, the relationship enabled the therapist to protect the victim from the patient's dangerous conduct.⁶⁵ An examination of these bases for the duty, however, reveals that the duty arises in spite of, not because of, the special relationship which existed between Poddar and his therapist.

First, the defendant is not in a better position to detect danger to the victim because he is the patient's therapist. The *Tarasoff* court acknowledged how difficult it is for a therapist to predict

59. *Id.* at 339.

60. *Id.* at 342-49.

61. *Id.* at 343.

62. *See supra* text accompanying notes 21-31 for a discussion of the special relationship exceptions. The *Restatement (Second) of Torts* provides that a duty of care arises from either "(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right to protection." *RESTATEMENT supra* note 11, § 315.

63. *Tarasoff*, 551 P.2d at 349.

64. *Id.* at 345 ("[T]he pleadings do not raise any question as to failure of defendant therapists to predict that Poddar presented a serious danger of violence. On the contrary, the present complaints allege that defendant therapists did in fact predict that Poddar would kill . . .").

65. *Id.* ("In our view, . . . once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.").

whether or not his patient presents a serious risk of violence to another person.⁶⁶ Moreover, even if the therapist can detect danger to the victim, the therapist's confidential relationship with his patient may undermine his ability to protect the victim. The *Tarasoff* court did not follow *Restatement* principles and impose a duty on the therapist to control his patient;⁶⁷ instead, the court recognized a broader "duty to exercise reasonable care to protect the foreseeable victim of that danger."⁶⁸ The court suggested that using reasonable care could include warning the intended victim or those close to the victim, notifying the police or taking "whatever other steps are reasonably necessary under the circumstances."⁶⁹

All of these steps jeopardize the therapist-patient relationship because they demand that the therapist reveal his patient's confidences. A patient must believe that he can confide his innermost secrets to his therapist without fear of disclosure. The therapist, in turn, earns the trust of his patient by guaranteeing the confidentiality of their conversations. Legislatures have recognized the need for confidentiality between therapist and patient with evidentiary privileges and laws, such as California's Lanterman-Petris-Short Act,⁷⁰ which defines a therapist's duty to withhold confidential information.⁷¹ The *Tarasoff* court acknowledged that the confidential nature of the relationship allows patients to confide violent fantasies which they do not plan to carry out.⁷² However, requiring a therapist to disclose his patient's confidential communications without any proof that the information in these disclosures is accurate jeopardizes this relationship unjustifiably.

The same court that used the special relationship exception to impose a duty of care on a therapist did not find that a similar special relationship existed between the campus police and either Poddar or *Tarasoff*. Although the police had Poddar in their custody, determined that he "appeared rational," and released him, the court found that the police owed no duty of care.⁷³ However, the two criteria on which the court relied for establishing the therapist's duty

66. *Id.* ("We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence.")

67. Even if the court had imposed the duty to control, it would have been difficult for the therapist to meet that obligation. He had recommended that the campus police detain Poddar, and they did but soon released him. He had not seen Poddar for the two months before Poddar killed *Tarasoff*, and Poddar had only been an outpatient. *Id.* at 339-41.

68. *Id.* at 345.

69. *Id.* at 340.

70. CAL. WELF. & INST. CODE §§ 5328-5329 (West 1984 & Supp. 1994).

71. *Tarasoff*, 551 P.2d at 348. See also Stone, *supra* note 39, at 366-69 (discussing the importance of confidentiality in the therapist-patient relationship).

72. *Id.* at 347.

73. *Id.* at 339-40.

under the special relationship exception are more than met by the police officers. First, whereas the court found it significant that the therapist had an opportunity to assess Poddar's danger, it minimized the role of the police, whose job requires that they determine whether someone presents a danger to others. The campus police did make such a determination; however, they misjudged Poddar when they concluded that he "appeared rational."⁷⁴ Second, unlike therapists, police officers are charged with protecting others from harm. The campus police failed to protect Tarasoff from Poddar. Thus, the court easily could have concluded that the campus police fit within the special relationship exception and owed Tarasoff a duty of protection. Because the court did not reach that conclusion, the duty of care must have originated outside of the special relationship exception.

The therapist's duty of care was created in part because of the urgency of a problem that the *Tarasoff* court identified several times as the "public interest in safety from violent assault."⁷⁵ The court's desire to protect the public from violence overcame competing concerns about the ability and desirability of therapists detecting dangerous patients and protecting potential victims from harm. Similarly, the urgency of the problem of child abuse requires that a duty of care be imposed on people who know of ongoing child abuse and do nothing to protect the child from the abuse. As the *Tarasoff* opinion demonstrates, the special relationship exception produces inconsistent results; the court imposed a duty of care on therapists, but not on the campus police. A legacy from *Tarasoff* is that courts should abandon the pretense of finding a duty through constructs such as the special relationship, and instead, should establish a duty to protect based on the overwhelming public need to curb child abuse.

C. *Avoiding the Implications of the No-Duty Rule: DeShaney v. Winnebago County Department of Social Services*

The United States Supreme Court did not heed the lesson of *Tarasoff*—that a reliance on the no-duty rule and exceptions can be misplaced—when it decided *DeShaney v. Winnebago County Department of Social Services*.⁷⁶ In *DeShaney*, the Court considered whether a county social services agency was liable under the substantive Due Process Clause of the Fourteenth Amendment for

74. *Id.*

75. *Id.* at 346. The court also stated: "The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved." *Id.* "The protective privilege ends where the public peril begins." *Id.* at 347.

76. 489 U.S. 189 (1989).

failure to protect a child from his father's repeated beatings. The Court had to determine whether the agency had a duty to protect the child either because it had acted in a way that gave rise to an affirmative obligation to protect the child or because it had formed a special relationship with the child. Although the issue of the agency's duty arose under substantive Due Process, the Court's analysis relied on the principles of the no-duty rule and its exceptions. In determining that the state did not violate the child's Due Process rights, the Court failed to confront the core issue: the willingness of the legal system to let a wrong go unrighted.⁷⁷

The "undeniably tragic"⁷⁸ facts of *DeShaney* involved the repeated abuse of four-year old Joshua DeShaney by his father, Randy. The local department of social services (DSS) learned of the beatings through a variety of sources: Randy's second wife (who was not Joshua's mother), its own caseworker,⁷⁹ emergency room personnel,⁸⁰ neighbors, and the police.⁸¹ After first hearing about the abuse from Randy's second wife, DSS interviewed Randy but did not follow up.⁸² Neighbors also reported to the police that they had seen or heard Randy beating Joshua, and the police relayed the information to DSS.⁸³ DSS received further notice of the abuse from emergency room personnel when Joshua was taken to the hospital after a severe beating.⁸⁴ DSS investigated and decided not to remove Joshua from the home; Randy agreed to get support services for himself and Joshua.⁸⁵ A month later, Joshua was taken to the emergency room

77. Of course, *DeShaney* can be read as a pure federalism case. See, e.g., James T. R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After DeShaney*, 93 W. VA. L. REV. 251 (1990) (pointing out the "federalism-based narrowness" of the *DeShaney* decision). However, this case is not about whether the state of Wisconsin had a right to decide if it should act; it is about a state that, having acted, promised to do something and then reneged on that promise. "Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse." *DeShaney*, 489 U.S. at 208 (Brennan, J., dissenting). Justice Brennan noted that Wisconsin's system acted in a way similar to the rescuer who abandons the rescue: "[C]hildren like Joshua are made worse off by the existence of this program when the persons or entities charged with carrying it out fail to do their jobs." *Id.* at 210. In that regard, the state is similar to the parent who, by virtue of her presence in the home, has agreed to protect children from abuse and then does not do so. See *infra* part IV.A.(1)-(4).

78. 489 U.S. at 191.

79. *Id.* at 192-93.

80. *Id.*

81. *Id.* at 209 (Brennan, J., dissenting).

82. *Id.* at 192.

83. *Id.* at 209 (Brennan, J., dissenting).

84. *Id.*

85. *Id.* at 192.

for a second time with "suspicious injuries."⁸⁶ DSS was again notified, and again decided not to remove Joshua from the home. A DSS caseworker visited the DeShaney home monthly during the next six months. She noted that Randy was not complying with the terms of the voluntary agreement that he had entered into with the agency. She also observed "a number of suspicious injuries on Joshua's head," noted her "continuing suspicions" of abuse, but "did nothing more."⁸⁷ Emergency room personnel contacted DSS for a third time after Joshua was again treated for more injuries that "they believed [were] caused by child abuse."⁸⁸ This time, when the DSS caseworker visited the DeShaney home, she was told that Joshua was too sick to see her. Once again, she did nothing.⁸⁹ A few months later, Randy beat Joshua into a coma: Joshua sustained brain damage so severe that he will probably live in an institution for the profoundly retarded for the rest of his life.⁹⁰

The majority opinion, authored by Chief Justice Rehnquist, determined that DSS's conduct did not violate Joshua DeShaney's substantive Due Process rights because the state had merely failed to act.⁹¹ The only remaining question was whether the state had entered into a special relationship with Joshua DeShaney which would impose an affirmative duty of protection on it. The Court concluded that this duty arises under the special relationship exception only "when the State takes a person into its custody and holds him there against his will."⁹² The Court reasoned that unlike other situations involving prisoners or state mental patients,⁹³ the state did not have Joshua physically in its custody against his will when the beatings occurred. Therefore, the state had not entered into the kind of relationship that would make it legally responsible for his safety.⁹⁴ The majority concluded that as "undeniably tragic" as the facts of *DeShaney* were, DSS was not liable although it "stood by and did nothing when suspicious circumstances dictated a more active role for [it]."⁹⁵

86. *Id.*

87. *Id.* at 192-93.

88. *Id.* at 193.

89. *Id.*

90. *Id.*

91. *Id.* at 194-95.

92. *Id.* at 199-200.

93. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (establishing that Due Process requires that the state provide medical care for prisoners because they cannot do so for themselves); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that a mentally retarded person involuntarily committed to a state institution has constitutionally protected liberty interests under the Due Process Clause of the Fourteenth Amendment).

94. *DeShaney*, 489 U.S. at 200-01.

95. *Id.* at 203.

It is unclear whether an adult who stands by and does nothing in the face of child abuse would be liable under Justice Rehnquist's majority's analysis in *DeShaney*. Clearly, the Due Process Clause would not be at issue because the state would not be a party to the case, but the question of common-law tort liability remains open.⁹⁶ When considering such liability, a court could conclude that a special relationship giving rise to a legal duty exists between the person who knows of the abuse and the abused child. The custody requirement may be satisfied if the child is in that adult's care, and the child is held against his will because he has no reasonable means of escape from the abuse. However, if custody means control, then the adult might argue that she was not in control of the child when the abuse took place; the abuser controlled the situation. The defendant's lack of control is more justifiable if she is not related to the child, and the child is being abused by a parent.

To the extent that Justice Rehnquist's opinion would provide guidance to state courts deciding tort cases, his reading of the special relationship exception leaves open the possibility of liability for adults who fail to protect abused children but does not guarantee the imposition of a duty under that exception. In fact, he notes the danger of yielding to "natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them."⁹⁷ For Justice Rehnquist, then, judges, like social workers, can stand by and watch a wrong go unrighted.⁹⁸ Just as the social worker ignored Joshua's cries for help, so too can the Court turn a deaf ear to those pleas. The danger of the majority's narrow reading of the state's obligation under the Due Process Clause to protect Joshua DeShaney is that it will be used as precedent to limit the liability under state tort law of individuals who fail to protect children like Joshua from abuse.

In dissent, Justice Brennan rejected the majority's premise that the state did not have a duty because it had not acted—because it, in Justice Rehnquist's words, "stood by and did nothing."⁹⁹ Instead, Justice Brennan began by evaluating "the action that Wisconsin ha[d] taken with respect to Joshua and children like him, rather than on the actions that the State ha[d] failed to take."¹⁰⁰ Drawing

96. A scenario left unresolved by *DeShaney* is the case of a foster parent who looks the other way while a third party abuses her foster child. The Court did not reach the question of the state's liability under the Due Process Clause for a foster parent's failure to protect her child from abuse. *See id.* at 201 n.9.

97. *Id.* at 202-03.

98. *But see infra* text accompanying notes 106-08 for a discussion of Justice Blackmun's dissenting opinion. *See DeShaney*, 489 U.S. at 212-13 (Blackmun, J., dissenting).

99. *Id.* at 203 (Brennan, J., dissenting).

100. *Id.* at 205 (emphasis in original).

on the same facts, Justice Brennan saw action where the majority saw only inaction.¹⁰¹ On one level, Justice Brennan's opinion can be seen as construing "action" broadly under the current no-duty rule, thereby placing the state's conduct within it. On another level, however, Justice Brennan invites a new outlook on the existing system: one which rejects the action/inaction distinction and evaluates the reasonableness of the defendant's conduct to determine if a duty exists.

For Justice Brennan, the state's duty arose when it represented to the public that it had taken care of the problem of Randy DeShaney abusing his son, Joshua, and that for that reason others need not worry about his welfare. The state had established a child abuse reporting system which "invit[ed]—indeed, direct[ed]—citizens and other governmental entities to depend on local departments of social services such as [DSS] to protect children from abuse."¹⁰² All of the people who reported Randy's abuse of Joshua to the agency—the police, Randy's second wife, neighbors and emergency room personnel—believed that the state would protect Joshua from harm.¹⁰³ When the state assured the public through the enactment of its statutory scheme that it would protect Joshua and others like him, it became obligated to keep its promise. Yet, despite its awareness that Joshua was being abused, the state did not intervene to protect him. Joshua's social worker, assigned by DSS, had "continuing suspicions that someone in the DeShaney household was physically abusing Joshua,"¹⁰⁴ and was not surprised by his injuries: "I just knew the phone would ring some day and Joshua would be dead."¹⁰⁵ She did not, however, take steps to remove Joshua from the home. Thus, the state failed to fulfill its duty to protect Joshua DeShaney.

Under Brennan's reading of *DeShaney*, adults who know about ongoing child abuse and fail to take action owe a duty under a broad definition of "action." These adults have acted if, by their silence, they represent to others that the abuse is either not serious or is

101. See *supra* note 77.

102. *DeShaney*, 489 U.S. at 208 (Brennan, J., dissenting).

103. *Id.* at 209-10. In his dissent, Justice Brennan stated:

[A] private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS.

Id.

104. *Id.* at 193.

105. *Id.* at 209 (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 300 (7th Cir. 1987)).

under control. The reason they have "acted" within the meaning of the law is that this representation could cause others, even though they suspect abuse, to do nothing because they defer to the judgment of one who they assume would have actually observed the abuse. Thus, if adults who know about abuse tacitly offer assurances that all is well, the law should require that they back up those assurances with action. Adults who do not report abuse, who do not intervene while abuse is taking place, and who do not seek medical attention for an abused child have harmed the child. Like the social worker and DSS in Brennan's view of *DeShaney*, these adults have acted in a way that created an affirmative duty of care; they violated that duty when they failed to follow through on their initial representations.

Justice Blackmun, in a separate dissenting opinion, agreed with Justice Brennan's characterization of the state's behavior as action rather than as inaction.¹⁰⁶ Moreover, for Justice Blackmun, the duty to act affirmatively was not confined to the social worker and DSS. In Blackmun's view, the Court itself also failed in its duty to Joshua—the duty to right the wrong that had been done to him. Justice Blackmun compared his brethren to pre-Civil War judges, who claimed that the law prevented them from compensating fugitive slaves for their injuries.¹⁰⁷ Like those judges, Blackmun explained, this Supreme Court maintained that it was unable to act under the existing no-duty rule and exceptions. Rejecting this sterile formalism, Justice Blackmun advocated a different approach: "a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."¹⁰⁸

Blackmun's "sympathetic reading" would not allow adults to stand by silently and watch children get abused under any circumstances. If the current no-duty rule and exceptions can be interpreted in a way that covers a household member's failure to protect a child being abused in the home, then he probably would accept that approach to the problem. However, the divergent opinions authored by Justices Rehnquist and Brennan make clear that judges can interpret the same rule, yet reach different results. Justice Blackmun would not endorse an approach which produces such inconsistent results because it would not adequately protect abused

106. *Id.* at 212 (Blackmun, J., dissenting) ("As Justice Brennan demonstrates, the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney—intervention that triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed.").

107. *Id.* (arguing that "formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment").

108. *Id.* at 213 (quoting ALAN STONE, *LAW, PSYCHIATRY, AND MORALITY* 262 (1984)).

children.¹⁰⁹ Therefore, he might consider abandoning the current approach and replacing it with an affirmative duty of care on adults to protect children from abuse.

The progression in *DeShaney*—from Justice Rehnquist's to Justice Blackmun's opinion—was from inaction to action, and from ignoring to accepting responsibility. For Justice Rehnquist, the failure of the social worker and county department of social services to act was justified because they were not legally responsible for Joshua DeShaney. Justice Brennan, however, did not excuse their refusal to accept responsibility. He did not see their conduct as a failure to act; rather, he found that they acted when they signaled to others that they would be responsible for any investigation of abuse, and then failed to follow through on their findings. Justice Blackmun expanded the scope of responsibility to include a justice system which failed to provide a remedy where a wrong had been committed. The reasoning of Justices Brennan and Blackmun permits the inference that if social workers, county agencies and courts must accept responsibility for a child who is being abused, then certainly an adult who knows about such abuse should also accept such responsibility. This person, perhaps a relative or even a parent, should be held responsible for failing to protect that child from that abuse.

Even Justice Rehnquist suggested that a remedy against those who fail to protect children from abuse could come through state tort law.¹¹⁰ Justice Rehnquist intimated that the state of Wisconsin might wish to hold itself responsible in tort for failure to protect children from the abuse. Yet, there is an irony in this call to find a special relationship in tort when he could not find one through the Due Process Clause. As states consider who should be held responsible for this type of abuse after *DeShaney*, they may be inclined to hold adults who know of such abuse liable instead of themselves accepting or sharing such responsibility. Yet, in creating this liability against these adults under the current no-duty rule, state courts would face the same difficulties that the *DeShaney* Court faced distinguishing action from inaction and fitting a defendant's conduct into one of the exceptions to the rule.¹¹¹ Furthermore, the no-duty approach may fail to reach the underlying problem: the protection of children from abuse. The solution to the current rule's inadequacies is to replace the no-duty rule and exceptions with an affirmative duty of care.

109. *Id.*

110. *Id.* at 201-02 ("It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.").

111. See *supra* part I for a discussion of the current approach and its problems.

As demonstrated above, the current no-duty rule and exceptions do not adequately address the urgent problem of preventing child abuse. *Farwell* and subsequent cases indicate that the exceptions must be interpreted broadly to impose a duty for failure to act, and in many cases, the courts are reluctant to do so. *Tarasoff* demonstrates that reliance on an exception to the no-duty rule can be dangerously misplaced; a duty is established in spite of, not because of, the special relationship exception. Furthermore, the exceptions can be interpreted inconsistently to impose a duty on some groups, but not on others. Finally, the Supreme Court's decision in *DeShaney* illustrates the failure of the current approach to right a wrong in the child abuse context. This failure, however, is not inevitable. If the courts fashion a narrowly-tailored affirmative duty of care to apply in the special context of abuse of children, then plaintiffs such as Joshua DeShaney would be provided with a remedy for the wrong committed against them. In addition, such a rule would advance the ultimate goal—curbing child abuse. Therefore, the sweep of these three cases suggests that courts should replace the no-duty rule with an affirmative duty of care for people who know or should have known of ongoing child abuse and fail to take reasonable steps to protect the child.

III. ESTABLISHING AN AFFIRMATIVE DUTY OF CARE

A. *The Policy Rationale*

The recognition of an affirmative duty comports with long-standing policies that underlie a general duty of care. One commentator identified these policies as "morality, the economic good of the group, practical administration of the law, justice as between the parties and other considerations relative to the environment out of which the case arose."¹¹² These policies support imposing a duty of care on adults who know about abuse to take steps to prevent it.

First, morality considerations dictate that people should take care of each other.¹¹³ The obligation to assist abused children arises out of the "natural responsibilities of social living and human relations"¹¹⁴ Adults who know about ongoing child abuse should

112. Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 45 (1962). See also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 53 at 325-26 (4th ed. 1971) ("[D]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."); Adler, *supra* note 15, at 901-04 (proposing that an affirmative duty of care based on policy considerations replace the traditional no-duty rule).

113. See *infra* part III.B. for a discussion of *Lombardo v. Hoag*, 566 A.2d 1185 (N.J. Super. Ct. Law Div. 1989), *rev'd*, 634 A.2d 550 (N.J. Super. Ct. App. Div. 1993).

114. *Wytupeck v. Camden*, 136 A.2d 887, 893 (N.J. 1957).

take care of abused children by trying to stop the abuse.¹¹⁵

Second, the imposition of a duty will advance the economic well-being of abused children. Children who are abused suffer from injuries for which they should be compensated. If they are not compensated by someone responsible for allowing the abuse to continue, then society will end up bearing the costs of their injuries either through the cost of social programs, or in many cases, by a continuation of the chain of abuse. These costs may be heavy because of the longlasting psychological as well as physical scars from abuse.

Third, the use of a reasonable care standard will avoid the administrative problems of drawing lines between action and inaction and defining the scope of the exceptions to the no-duty rule.¹¹⁶ Because those lines are drawn in different places under the current approach,¹¹⁷ courts can reach inconsistent results, and people are left unsure about their obligation to help others in distress.

Fourth, justice between the parties suggests that adults who know about ongoing abuse are in the best position to do something about it. Children are not in a position to protect themselves, and consequently, turn to the adults around them for protection. When those adults ignore child abuse, they have failed in their "natural responsibilities of social living and human relations,"¹¹⁸ and therefore, they should be required to compensate children for their failure to act. Their liability will send out the message to others tempted to ignore abuse that such behavior will not be tolerated.

115. See Bohlen, *supra* note 11, at 232 ("[T]he duty of care is predicated upon the ability of the one to afford protection and the helpless inability of the other to protect himself; and [the latter's] consequent necessary dependence and reliance upon his associates' care."). See also Janel Clarke, *One Phone Call Breaks a Cycle of Silence*, CHI. TRIB., July 25, 1993, § 6, at 8 (describing author's need to report child abuse that she observed). *But see* Farwell v. Keaton, 240 N.W.2d 217, 224 (Mich. 1976) (Fitzgerald, J., dissenting) ("No authority is cited for this proposition [to establish a duty of care] other than the public policy observation that the interest of society would be benefitted if its members were required to assist one another.").

116. See *supra* part II.

117. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). Juxtaposing statements made by Chief Justice Rehnquist and Justice Brennan illustrates the justices' varying placement of these lines. The Chief Justice noted: "[t]he harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203. Justice Brennan, conversely, emphasized that he "would begin from the opposite direction. [He] would focus first on the action that Wisconsin *has* taken with respect to Joshua and children like him, rather than on the actions that the State failed to take. Such a method is not new to [the Supreme] Court." *Id.* at 205 (Brennan, J., dissenting). The former approach effectively exculpates the state because it views the abuser as the sole wrongdoer; the latter approach recognizes that often there is more than one blameworthy party.

118. *Wytupeck*, 136 A.2d at 893.

Finally, the imposition of a duty of care would fulfill the goal of "molding of law in response to the needs of the environment"¹¹⁹ by targeting a national problem: the underreporting of child abuse.¹²⁰

B. *A Model Approach: Lombardo v. Hoag*¹²¹

One court, relying on some of these policies, concluded in a drunk driving case that the no-duty-to-rescue standard should be replaced with a duty of reasonable care. The court's opinion in that case serves as a model for establishing a duty of care in failure to protect from child abuse cases. Extending the logic of that case, if individuals have an affirmative duty to protect the general public from a drunk driver, then certainly adults have a responsibility to protect children they know from an equally dangerous force: the person who would abuse them.

In *Lombardo v. Hoag*, a New Jersey court allowed a third party, who was severely injured in an accident caused by the drunk driving of a car owner, to bring a negligence cause of action against a defendant who was not the car owner.¹²² The defendant, a friend of the car owner, had driven himself, the owner and another passenger home after an outing because he thought that the owner was too drunk to

119. Green, *supra* note 112, at 45; *see also* Wytupeck, 136 A.2d at 894 ("'Duty' is not a rigid formalism according to the standards of a simpler society, immune to the equally compelling needs of the present order; duty must of necessity adjust to the changing social relations and exigencies and man's relation to his fellows . . .").

120. *See infra* text accompanying notes 209-11 for a discussion of the impact of underreporting on establishing cause in fact in a negligence case.

121. *Lombardo v. Hoag*, 566 A.2d 1185 (N.J. Super. Ct. Law Div. 1989), *rev'd*, 634 A.2d 550 (N.J. Super. Ct. App. Div. 1993). Although the ruling of the trial judge with respect to creating a broad duty of care was reversed, the appellate court allowed the negligence claims against the defendant to stand. 634 A.2d at 559. The value of *Lombardo* is not in its weight, but in its wisdom. The reversal was addressed to correct the potential broad reading of the trial judge's ruling with regards to "duty." *Id.* ("[A]n over-broad duty would open a Pandora's Box of potential liability and responsibility problems."). However, the policy reasons for creating such a duty in a more narrowly-tailored fashion would still apply.

Moreover, the *Lombardo* court is not the only court to reject the no-duty rule and exceptions and create a duty of care based on policy considerations. *See, e.g.*, Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (abandoning the distinctions among trespassers, licensees and invitees and adopting the reasonable person standard to determine if the defendant was negligent in failing to warn the plaintiff of a defective faucet handle); Soldano v. O'Daniels, 190 Cal. Rptr. 310, 315-17 (Ct. App. 1983) (ignoring the common-law exceptions to the no-duty rule and imposing an affirmative duty of care based on public policy on a bartender who refused to allow an individual to telephone the police for someone in trouble and refused to telephone the police himself); *see also* Adler, *supra* note 15, at 870 (recommending that the misfeasance/nonfeasance distinction be abandoned and replaced with a duty arising from policy considerations to act reasonably under the circumstances).

122. 566 A.2d at 1185, 1190.

drive. After the defendant arrived home safely, the defendant returned the keys to the car owner and allowed him to drive away. When the car owner caused an accident that injured the plaintiff, the plaintiff was allowed to sue the nonowner defendant (among others) in negligence.¹²³

The court examined the defendant's conduct and determined that he could not be held liable under either state statutes or any of the exceptions to the no-duty rule.¹²⁴ However, the court's analysis did not end there.¹²⁵ Instead, the *Lombardo* court found that the defendant could be held liable under general negligence principles.¹²⁶ In reaching that conclusion, the court examined the policies that gave rise to the defendant's affirmative duty of care to the accident victim and concluded that the duty was created by a combination of public policy, morality and fairness considerations.¹²⁷

The court first cited case law and statutes that reflected the state's strong public policy against drunk driving.¹²⁸ The court noted the state's commitment to curb drunk driving as expressed in decisions such as *Kelly v. Gwinnell*.¹²⁹ In that case, the New Jersey Supreme Court imposed liability on a social host for injuries to a third party after the host served drinks to a visibly intoxicated guest

123. *Id.* at 1190.

124. *Id.* at 1187-88.

125. Other courts, however, have declined to impose liability under almost identical circumstances. See *McGee v. Chalfant*, 806 P.2d 980, 985 (Kan. 1991). In *McGee*, the Supreme Court of Kansas considered the duty of friends who dropped their friend off at his car knowing that he was drunk, to the plaintiff who was injured by the friend's drunk driving. *Id.* at 982. The court rejected the plaintiff's argument that the defendants had taken control of their friend by taking him to his car and allowing him to drive drunk. *Id.* at 985. The court concluded that because the defendants did not undertake a duty to prevent him from driving drunk, they could not be held liable for the subsequent accident. *Id.* at 986.

126. *Lombardo*, 566 A.2d at 1189-90. As indicated *supra* note 121, this portion of the trial court's opinion was upheld. 634 A.2d at 559.

127. *Lombardo*, 566 A.2d at 1188-89. In one New Jersey decision that discussed *Lombardo*, the court declined to impose an affirmative duty on a driver who failed to make sure that his passenger had fastened her seatbelt. *Poole v. Janeski*, 611 A.2d 169, 171 (N.J. Super. Ct. Law Div. 1992). The court distinguished the two cases by noting that public concern about the state's seatbelt policy does not rise to the same level as concern about its drunk driving policy. *Id.* The court noted that the language and policy of the seat-belt statute do not place responsibility on drivers to ensure that their adult passengers use their seatbelts. *Id.* The court concluded, however, by observing that it might be willing to recognize the kind of affirmative duty imposed in *Lombardo* if presented with another case: "A situation could conceivably arise where public policy, fairness and morality combine so as to justify imposing this type of duty, but such circumstances are not found in this case." *Id.*

128. *Lombardo*, 566 A.2d at 1188.

129. *Id.* (citing *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984)).

and then allowed the guest to drive.¹³⁰ The no-duty approach did not serve the policy goal expressed in *Kelly*: the elimination of drunk driving.¹³¹ Public policy would be better served if courts imposed a duty to use reasonable care on those best able to prevent drunk driving.

Similarly, the current no-duty approach would not serve the public policy goal of curbing child abuse. Public policy considerations equal to those that underlie the *Kelly* and *Lombardo* decisions support the creation of a duty for failing to prevent child abuse. Mandatory reporting laws and other child abuse legislation demonstrate the desire to stop abuse.¹³² The imposition of tort liability on adults who fail to protect children from abuse would further strengthen that commitment. The public policy rationale for imposing a duty in child abuse cases is more compelling than in drunk driving situations in at least one respect. The duty to take preventive action was imposed before the injury occurred in *Lombardo*, but the duty to prevent harm in child abuse cases would most likely arise after an incident of abuse because it would be predicated on an individual's knowledge. In *Lombardo*, the defendant owed a duty to prevent his friend from driving because of the risk that a drunk driver presents to himself and others. Although the car owner did injure someone, the duty to take affirmative action was imposed before the injury became a reality. In child abuse cases, the duty likewise would be imposed because of the risk that a third party presents to a child. The duty, however, arises after an incident of abuse has occurred, in the hope of preventing future incidents and injuries. The imposition of a duty is more justifiable in child abuse cases specifically because the history of abuse is persuasive indicia that future injury is likely to occur. Thus, the higher degree of likelihood of injury in child abuse cases strengthens the public policy argument for imposing a duty of care.

The *Lombardo* court also discussed morality and fairness arguments that favored imposing a duty of care on the defendant to prevent drunk driving.¹³³ The court criticized the existing law for

130. *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984).

131. *Id.* at 1222.

132. This legislation, however, may not extend to a situation where, for example, the state fails to warn parents that their child is at risk of being abused. *Owens v. Garfield*, 784 P.2d 1187, 1190 (Utah 1989). In *Owens*, the Supreme Court of Utah declined to impose liability on the state for failing to warn parents of child abuse allegations against their babysitter on either common-law or statutory grounds. *Id.* at 1189-91. The court concluded that the state did not have either a special relationship with the babysitter that would create a duty to control her conduct or a special relationship with the abused child that would create a duty to protect the child. Moreover, the child who was abused did not fall within the class of people protected under the state child abuse statute. *Id.* at 1191.

133. *Lombardo*, 566 A.2d at 1189-90.

ignoring the moral implications of a case:

The difference [between the thinking of a lawyer and a layperson] is that the lay person perceives law as a reflection of morality, and therefore, concludes that a breach of morality is a breach of the law. The lawyer, however, thinks of the law in a different fashion. He thinks in terms of categories, established by legislative enactments and court opinions. He separates the law from morality¹³⁴

The court further lamented the lack of morality in the law, citing the famous example of the absence of a duty to rescue a drowning person.¹³⁵ The court concluded that the current no-duty rule was simply unacceptable in allowing a person to stand by while another is injured.¹³⁶ For the *Lombardo* court, the law must represent what laypeople, not lawyers, want; it noted that the public "demands that a person exercise a duty of care towards another person in order to insure that the other person remains free from harm."¹³⁷ The drowning person example underscores the dominant value behind the existing no-duty rule: individual autonomy. This value, however, is not absolute.¹³⁸ *Lombardo* suggests that morality and fairness may require that this value give way to a duty to help those in need.¹³⁹

These same morality and fairness principles dictate that a duty should be imposed on adults who know about ongoing child abuse to make reasonable efforts to prevent the abuse. The need to stop child abuse overwhelms considerations about individual autonomy. Like the defendants in *Lombardo*, people who know or should know of a serious public problem—drunk driving or child abuse—and are in a position to try to prevent the problem should not avoid liability by claiming that they have a right not to get involved. These people instead have a responsibility to intervene in a way that is aimed to protect the abused child and prevent further abuse.

134. *Id.*

135. *Id.*; see also KEETON ET AL., *supra* note 11, § 56, at 375 (discussing the drowning man hypothetical).

136. *Lombardo*, 566 A.2d at 1189.

137. *Id.*

138. See *infra* text accompanying notes 175-81 for a discussion of balancing the interests under the Learned Hand test. See also *supra* text accompanying notes 20-37 for a discussion of the various exceptions to the no-duty rule.

139. *Lombardo*, 566 A.2d at 1189. Commentators have suggested that this caretaking value may be rooted in various traditions. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 1, 30-36 (1988) (suggesting the imposition of a duty to rescue based on a feminist ethic of care and interconnection); Randy Lee, *A Look at God, Feminism and Tort Law*, 75 MARQ. L. REV. 371, 386-407 (1992) (responding to Professor Bender and suggesting that an affirmative duty to rescue may be premised on Judeo-Christian philosophy).

C. *A Criminal Law Analogy*

The recognition of tort liability in cases where a person fails to intervene to prevent ongoing child abuse would reflect a parallel trend in criminal law. Several courts have imposed criminal liability on a parent who failed to protect his or her child from the other parent's abuse.¹⁴⁰ In these cases the courts have held criminally responsible a parent who neither lifted a hand to hurt nor to help the child. Relying on state criminal laws, the courts determined that their state's legislature intended to treat a parent's failure to act in the same way that it would punish the affirmative act of abuse.¹⁴¹ Although the courts have not yet extended such criminal liability to people other than parents, the courts and legislatures have sent a strong message to parents about their responsibility toward their children.¹⁴² If parents do not take action to prevent abuse, they may face criminal liability.¹⁴³

By holding parents who fail to protect their children criminally liable, a state signals its commitment to curbing child abuse. Imposing tort liability on adults who fail to use reasonable care to prevent abuse in the home would similarly discourage abuse. The imposition of tort liability would be a public acknowledgment that the adult was a wrongdoer when she failed to intervene in the child's

140. See *Michael v. Alaska*, 767 P.2d 193 (Alaska Ct. App. 1988) (upholding father's second-degree assault conviction for failing to prevent his wife's abuse of their child); *Illinois v. Staniel*, 606 N.E.2d 1201 (Ill. 1992) (upholding defendant's murder conviction because of her failure to protect her children from the murderer); *North Carolina v. Walden*, 293 S.E.2d 780 (N.C. 1982) (upholding a mother's conviction for aiding and abetting an assault with a deadly weapon by another person on her child); *Rhode Island v. Cacchiotti*, 568 A.2d 1026 (R.I. 1990) (upholding a mother's conviction for involuntary manslaughter when she failed to seek medical attention for her son after he was severely beaten by her boyfriend); *Wisconsin v. Williquette*, 385 N.W.2d 145 (Wis. 1986) (upholding mother's conviction for child abuse because she left her children with their father who she knew was physically and sexually abusing them).

141. See, e.g., *Michael*, 767 P.2d at 199. "It seems clear under the law that where the parent fails to carry out this duty and the child is injured as a result, the parent has caused the child's injuries and may be held criminally liable." *Id.*

142. See *Pope v. Maryland*, 396 A.2d 1054 (Md. 1979) (reversing the child abuse conviction of a family friend who did not intervene while a mother beat her child to death in the friend's home).

143. See Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 LAW & INEQ. J. 359, 375-87 (1987) (discussing the rationale behind imposing criminal liability for parents' failure to protect their children from abuse); Nancy A. Tanck, Note, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children From Abuse*, 1987 WIS. L. REV. 659, 684-86 (criticizing the Wisconsin Supreme Court's decision to impose liability on a mother who failed to protect her children from their father's abuse in *Wisconsin v. Williquette*). Because criminal liability is traditionally considered more severe than civil liability, courts willing to find such criminal liability may also be willing to uphold a private action. Moreover, a private action probably would lie against the parent. See Collier, *supra* note 2, at 192.

abuse. Such recognition of the defendant's wrongful conduct would encourage this defendant and others to modify their future behavior by taking steps to prevent abuse. Thus, tort liability would deter future inaction and help to prevent future abuse.

In addition, the scope of tort liability can be broader than the scope of criminal liability because the nature of the liability differs.¹⁴⁴ Thus, adults other than the child's parents can be liable for failing to use reasonable care to prevent abuse. Criminal law aims to punish the wrongdoer, and tort law seeks to compensate the injured party.¹⁴⁵ It may be problematic to incarcerate a non-parent for failing to protect a child from parental abuse because that person never had legal responsibility for the child. However, that person can be expected to acknowledge his role facilitating in the child's injury and to compensate the injured child under tort principles. Therefore, the recognition of a duty of care for adults would complement existing criminal law and fulfill two goals of tort law. First, recognition of a duty of care will discourage household members from ignoring abuse in their homes, and second, tort liability would provide a remedy to an abused child.

IV. DEFINING THE CAUSE OF ACTION: TWO SCENARIOS

The shortcomings of the no-duty rule and exceptions in the context of child abuse cases, coupled with the policy reasons underlying the imposition of a duty of care on people who do nothing in the face of known child abuse, support the need for a common-law negligence approach to these cases. Once that need has been established, the intricacies of a negligence cause of action for failing to protect children from abuse must be explored. This section presents two scenarios to address the specific, subtle issues that might arise when a negligence claim is brought against individuals who know of ongoing child abuse but do nothing to stop it. The first case considers liability for a parent's failure to protect her child from abuse, and the second examines the liability of a non-family member for failing to protect a child from abuse.

A. *The Case of the Negligent Parent*

Vicki Jones and Darren Smith, both age nineteen, have been living together for six months.¹⁴⁶ After the couple had been dating for

144. See Collier, *supra* note 2, at 192 (discussing the advantages and disadvantages of imposing civil and criminal liability for failure to report child abuse).

145. KEETON ET AL., *supra* note 11, § 2, at 7.

146. Although this hypothetical is not based on one case, it represents a common pattern in child abuse cases: a child abused by his mother's boyfriend. One national survey estimates that the boyfriend or girlfriend of a parent is responsible in one out of four

three months, Darren moved into the five-room apartment that Vicki shares with her eighteen-month-old son, Jeff. Darren is not Jeff's father; Jeff's father has no contact with Vicki nor with his son. Since he moved in, Darren, who works at night, has watched Jeff in the afternoons while Vicki has attended a computer programming class. Vicki does not work. The transition from dating to living together has not been completely smooth. Darren has become increasingly moody and withdrawn from Vicki. Sometimes he can be charming and outgoing, but often he is sullen, especially when Jeff demands a lot of his mother's time. Vicki has noticed that Jeff sometimes has large bruises on his legs, buttocks and back when she gets home from class.¹⁴⁷ When she asked Darren about the bruises, he commented that Jeff, an active toddler, hurt himself while playing. Vicki had observed that Jeff does fall down while playing, but she had never noticed such bruises when he has been with her. Vicki believed Darren's explanation and has not pressed the issue any further because she did not want either to jeopardize their relationship, which means a great deal to her, or to anger Darren. One afternoon, Vicki arrived home from work to find a note from Darren saying that he had to take Jeff to the hospital after a bad fall. When Vicki reached the hospital, the emergency room doctor informed her that Jeff had suffered a concussion from a sharp blow to the head and must remain there overnight. Furthermore, the doctor also told Vicki that he suspected child abuse and was reporting Darren to the local department of social services. The issue is whether Vicki could be liable in tort for failure to protect Jeff from Darren.

1. *Parental Immunity.* When the defendant is the child's parent, the threshold question of parental immunity must be addressed. Under the doctrine, children could not sue their parents in tort for injuries caused by parental misconduct.¹⁴⁸ The rule and

child abuse cases where the perpetrator is known. See Flynn McRoberts & John Gorman, *Child Abuse Often Points to Boyfriend*, CHI. TRIB., Mar. 11, 1993, at A1 (citing statistics from the National Incidence Study by Westat). The national average is reflected in local statistics. Four months into a year-long series about the murder of children in the Chicago area, *The Chicago Tribune* observed that five out of the twenty children killed in 1993 were "alleged to have been beaten or shaken to death by their mothers' boyfriends." Colin McMahon, *A Mother's Trust Turns to Tragedy*, CHI. TRIB., May 21, 1993, at A1.

147. A typical child abuse case often involves a boyfriend or father beating a child while the child's mother knows about the abuse but does not intervene. McRoberts & Gorman, *supra* note 146, at A1.

148. See generally KEETON ET AL., *supra* note 11, § 122, at 904-09; Gail Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982) (examining the "historical and social basis of parent-child immunity"); Martin J. Rooney and Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the*

rationale were set forth in a trio of cases.¹⁴⁹ Three primary reasons were identified in support of the doctrine of parental immunity: the need to maintain family harmony;¹⁵⁰ the need of parents to control their children;¹⁵¹ and concern about the financial effects of tort liability on a family.¹⁵² Since the rule was established a century ago, however, changing attitudes about the importance of each of these rationales have eroded the rule.

The first concern—that the lawsuit would disrupt family harmony—is undercut by consideration of the event that gave rise to the claim. Recently, courts have begun to recognize that a parent's tortious conduct would have already disrupted family harmony, and would continue to disrupt it if the child were not permitted to formally address it by attempting to recover for the injuries caused by that behavior.¹⁵³ Also, the existence of liability insurance shifted the adversarial relationship away from among family members to between a family member and the insurance company.¹⁵⁴ Furthermore, the second concern identified—that tort liability would undermine parental authority—was overstated because parents do not have total discretion in raising their children.¹⁵⁵

Parent, 25 NEW ENG. L. REV. 1161 (1991) (detailing the history of parent-child immunity in the United States).

149. *Hewellette v. George*, 9 So. 885 (Miss. 1891) (denying a child the opportunity to sue her mother for false imprisonment), *overruled by* *Glaskox v. Glaskox*, 614 So.2d 907 (Miss. 1992); *McKelvey v. McKelvey*, 77 S.W. 664 (Tenn. 1903) (denying a child the right to sue parents for cruel and inhuman treatment), *overruled by* *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994); *Roller v. Roller*, 79 P. 788 (Wash. 1905) (denying a daughter the opportunity to seek damages against her father for rape).

150. *Hewellette*, 9 So. at 887. The court in *Hewellette* stated:

The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.

Id.

151. *McKelvey*, 77 S.W. at 664 (“At common law the right of the father to the control and custody of his infant child grow out of the corresponding duty on his part to maintain, protect, and educate it. These rights could only be forfeited by gross misconduct on his part.”).

152. *Roller*, 79 P. at 789 (expressing concern that (1) a damage award to one child might make parents less capable of supporting other minor children in the family; and (2) if a child died following successful receipt of a damage award against the parent, the money would, in all likelihood, be returned to the parents as an inheritance).

153. *See, e.g., Sorensen v. Sorensen*, 339 N.E.2d 907 (Mass. 1975).

154. *Streenz v. Streenz*, 471 P.2d 282, 284 (Ariz. 1970).

155. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (balancing Amish parents' right not to send their children to American public schools against the state's interest in universal education); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (balancing a parent's right to bring up the child in a way that she sees fit, a child's right to exercise her religious beliefs and the state's interests in protecting the welfare of its children); *In re Green*, 292 A.2d 387 (Pa. 1972) (balancing the state's interest in enhancing a child's

The final concern—the perceived financial burden liability would create upon the family—should not be a bar to allowing the child to recover.¹⁵⁶ From the outset, depending upon how one defines the term “cost,” the “cost” of child abuse will be carried by the family unit initially, especially where the child is not permitted to recover. Thus, judicial concerns about the burden upon families seem misplaced in this context. Moreover, focusing on where the burden should be placed within the family, it is clear that allowing recovery is desirable because children will be compensated for their injuries. The child might further benefit if he is removed from the abusive home and takes the money with him. In addition, the child’s only compensation for his injuries might come from the person who failed to protect him from abuse. Most homeowners insurance policies do not cover the intentional torts of the abuser, but they are likely to cover negligent conduct, such as failure to protect from abuse.¹⁵⁷

In sum, none of these concerns overrides the need to compensate children who are injured as a result of parents ignoring child abuse in the home. Child abuse shatters domestic tranquility, does not represent a reasonable exercise of parental authority, and costs children (and the family) and society in both the short- and long-term. Thus, the policies behind parental immunity do not withstand scrutiny in child abuse cases.

Courts have used two approaches to modify the doctrine of parental immunity. One early modification only partially abolished the doctrine. In *Goller v. White*,¹⁵⁸ the Wisconsin Supreme Court abrogated the doctrine of parental immunity but preserved two situations where parents would be immune: “(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food,

physical well-being against both the parent’s religious beliefs and the child’s preferences).

156. The concerns about the financial effects on a family often center around two issues: (1) liability prompting fraud and collusion among family members, and (2) liability depleting a family’s financial resources. The first concern can be addressed by structuring an award so that a parent does not have access to it. For example, the money could be put in a trust account administered by a third party. The second concern is easily resolved because the increase in the cost of liability insurance will not be great enough to affect family finances significantly. See *Roller*, 79 P. at 789.

157. See Todd J. Gillman, *Sex Abuse Suit a Worry for Insurers*, THE DALLAS MORNING NEWS, Nov. 1, 1992, at A45. *But cf.* Eric T. Lanham, Comment, *Suing Parents in Tort for Child Abuse: A New Role for the Court Appointed Guardian Ad Litem?* 61 UMKC L. REV. 101, 114-16 (1992) (discussing the lack of specific insurance coverage for conduct such as negligent failure to prevent child abuse under most homeowners insurance policies).

158. See *Goller v. White*, 122 N.W.2d 193 (Wis. 1963).

clothing, housing, medical and dental services, and other care.”¹⁵⁹ It is not difficult to see, however, that many situations would lend themselves to arguments that one of these two exceptions was met.

A more recent approach abolished the doctrine entirely. In *Gibson v. Gibson*,¹⁶⁰ the Supreme Court of California concluded that partial abrogation of parental immunity presented too many opportunities for arbitrary line drawing about what constituted parental authority or discretion. The court proposed that parents’ conduct should be evaluated under the “reasonable, prudent parent standard.”¹⁶¹ Under this standard, a parent who does not behave as a reasonable, prudent parent would under similar circumstances face tort liability for negligence. The determination of reasonableness under *Gibson* might take into account the status of the child involved,¹⁶² the presence or absence of other children in the family who demand parental attention, and the “economic, social and physical environment” in which the family lives.¹⁶³ Jury members, drawing from their own experiences, could determine whether a parent was acting reasonably.

Although either approach could result in liability, the *Gibson* reasonable parent standard is preferable to the *Goller* approach when the issue is parental failure to protect children from abuse. To illustrate, it might be difficult for a parent like Vicki to insulate herself from liability under the *Goller* approach; she would have to demonstrate that her failure to protect her children represented an exercise of parental authority or discretion. Perhaps such a defendant could argue that a failure to supervise her child or investigate her suspicions were acts of parental discretion, but she would not be able to successfully claim that knowing about the abuse and ignoring it falls within the scope of parental authority and discretion. The *Goller* partial abrogation standard requires courts to consider the defendant’s conduct in each case to determine if parental failure to protect from abuse is shielded by one of the two exceptions. These broad exceptions could deprive Jeff and other children of the opportunity to recover from parents who allowed them to be injured.

The *Gibson* standard demands that Vicki and other parents

159. *Id.* at 198.

160. 479 P.2d 648 (Cal. 1971).

161. *Id.* at 653.

162. The child’s status includes “such variable matters as the age, mental and physical health, intelligence, aptitudes and needs of the child involved” *Anderson v. Stream*, 295 N.W.2d 595, 599 (Minn. 1980).

163. *Id.* The Minnesota Supreme Court had previously adopted the *Goller* partial abrogation standard with one change: the alleged negligent act had to involve the exercise of reasonable parental authority. *Silesky v. Kelman*, 161 N.W.2d 631, 638 (Minn. 1968), *overruled by Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980).

conform their conduct to a level of care that is expected of anyone who undertakes parenting responsibilities. Clearly, this would include protecting their children from known dangers. Children depend on their parents for protection, and parents are in the best position to provide that protection. Parents who fail to provide that protection should not be able to hide behind sweeping assertions of parental authority or discretion.¹⁶⁴ It would indeed be ironic if parents, who owe a greater duty to their children than do other adults, were immune from liability while other family and non-family members might not be afforded such protection. In *DeShaney*, the Supreme Court considered imposing liability on a state social worker for failing to protect a child from his father's abuse.¹⁶⁵ If courts seriously contemplate extending liability to people who are not the child's parents and are not even family members, then they certainly should expect parents to protect their children from ongoing abuse. In the hypothetical, Vicki's conduct should be judged against societal norms of parental behavior to ensure that she and other parents make reasonable efforts to protect their children from abuse. Therefore, the *Gibson* approach directs that parents such as Vicki must not be immune from liability as a result of their status as parents.

2. *Duty and Breach.* Whether a parent like Vicki owes her child a duty of care turns on the question of whether the risk of harm to the child was something that the parent should "reasonably [have] perceived."¹⁶⁶ Under the facts in the hypothetical, if Vicki reasonably should have perceived the risk of leaving her son alone with her boyfriend, then she owed the child a duty to protect him from that risk.

The determination of the foreseeability of the risk to Vicki depends first on identifying the appropriate standard of care against which her conduct can be evaluated, and second, assessing the reasonableness of her conduct in light of that standard. Another way of asking the first question is: "Whose eyes do you look through to evaluate the defendant's conduct?"¹⁶⁷ Courts usually look through the eyes of a reasonable, prudent person under the circumstances;¹⁶⁸

164. The opposing argument—that the child is eager to accept all of the benefits that his parents bestow, but then will not accept the burdens of that relationship—does not withstand scrutiny when the burden asked of the child is abuse.

165. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 191 (1989).

166. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

167. One of my colleagues, Randy Lee, frames the issue this way. *See also Palsgraf*, 162 N.E. at 100 ("[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.").

168. *Vaughan v. Menlove*, 132 Eng. Rep. 490, 493 (C.P. 1837). One commentator

however, under *Gibson*, a court would look through the eyes of the reasonable, prudent parent.¹⁶⁹ If a reasonable, prudent parent would have conducted herself in the way that Vicki did, then Vicki's conduct would be deemed reasonable under the circumstances. If, however, Vicki's failure to intervene fell below the level of care expected of the reasonable, prudent parent, then her conduct would be deemed unreasonable, and she would have breached her duty of care.

It is unclear whether the reasonable, prudent parent standard requires more or less from a defendant than the reasonable, prudent person standard.¹⁷⁰ An argument might be made that it requires less because it takes into account "such variable matters as . . . the economic, social and physical environment in which the conduct occurs"¹⁷¹ Thus, one might argue that given Vicki's youth and inexperience, she may have been acting like a reasonable, prudent parent under the circumstances. The argument would emphasize that Vicki should not be held liable if she were not at fault, and that she was not at fault because she did not have the ability to prevent the abuse.¹⁷² She is a teen-aged, single parent struggling to raise a child under adverse conditions. The conclusion to this line of argument is that Vicki's status does not require as much of her as it would the reasonable, prudent person under the circumstances.

However, although it makes sense to look at who Vicki is when determining what standard of care she should be held to, this does not mean that the law cannot set a minimal standard of care

wrote: "It is frequently said that if the defendant as an ordinarily prudent person foresaw or should have foreseen some harm to the victim or other person so situated, defendant was under a duty to exercise reasonable care to avoid such harm." Green, *supra* note 112, at 45.

169. *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971) ("The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: What would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"). See *supra* text accompanying notes 160-63 for additional discussion of the reasonable, prudent parent standard.

170. See, e.g., *Anderson v. Stream*, 295 N.W. 595, 598-99 (Minn. 1980) (discussing the level of care required under the reasonable parent standard).

171. *Id.* at 599.

172. Vicki's inability to protect Jeff would be further exacerbated if Darren had been abusing Vicki as well. If she had been battered, then she may have been unable physically as well as psychologically to prevent the abuse from occurring. The psychological reasons that she might not be able to break the cycle of violence are complex and interrelated: fear of Darren (especially that he might retaliate against Jeff), financial and emotional dependence on him, isolation from others, an inability to recognize an abusive situation because of her background, and the lack of a safe, alternative place to go. See LENORE WALKER, *THE BATTERED WOMAN SYNDROME* (1987) (describing the three-phase cycle in the battering relationship); Johnson, *supra* note 143, at 377-81 (discussing the dynamics of family violence).

expected of her. That standard could be elevated based on the circumstances. For example, it might be appropriate to expect more of Vicki if she were a child psychologist who had a professional understanding of the dangers of child abuse, or a more mature parent with a better support network. In those cases, the parent, by virtue of education or experience, would be better able than Vicki to identify and act on the problem. When looking at "who Vicki is," however, we must be careful not to stereotype her based on the label "young, single mother," nor should we excuse her conduct for that reason. It would be patronizing as well as counter-productive to assume that a parent such as Vicki can meet only a substandard level of care because of her status. Therefore, while a parent might be held to a higher standard if circumstances so indicate, that parent should never be permitted to do less than the reasonable, prudent person.

Having established that Vicki's conduct should be evaluated by looking through the eyes of the reasonable, prudent parent, a court assessing her conduct is likely to conclude that it was unreasonable under the circumstances. In determining that Vicki's conduct fell below the standard of care of a reasonable, prudent parent, and thus was unreasonable, a court will consider the connection or relationship between plaintiff and defendant, and the defendant's actions in light of that relationship. Courts have observed that a sufficient connection between plaintiff and defendant must exist such that the plaintiff is in the defendant's "range of apprehension,"¹⁷³ or group of people to whom the defendant owes a duty of care. For example, in *Lombardo v. Hoag*, the court delineated the defendant's range of apprehension broadly to include members of the general public—strangers to the defendant.¹⁷⁴ In this case, the connection between the plaintiff and the defendant is much closer than it was in *Lombardo*; here they are mother and son. As his mother, Vicki owed Jeff a duty to ensure that he remained free from harm because he was subject to her care. Children depend on their parents for care, and parents are in the best position to protect their children from harm. Vicki should be held legally responsible for her failure to keep Jeff safe from harm.

Once this relationship has been established, a court can begin to evaluate the reasonableness of Vicki's conduct. Over the years, courts have developed various tests to determine reasonableness. One such test was presented in *United States v. Carroll Towing*.¹⁷⁵ In that case, Judge Learned Hand proposed a test to evaluate the

173. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

174. *Lombardo v. Hoag*, 566 A.2d 1185, 1186-87 (N.J. Super. Ct. Law Div. 1989), *rev'd*, 634 A.2d 550 (N.J. Super. Ct. App. Div. 1993). *See supra* part III.B.

175. 159 F.2d 169, 173 (2d Cir. 1947).

reasonableness of the defendant's conduct. His test, which takes the form of a mathematical formula, balances the interests of the defendant against those of the plaintiff.¹⁷⁶ Under his test, the "burden of adequate precautions," or cost to the defendant of eliminating the risk, comprises one side of the equation.¹⁷⁷ The other side of the equation consists of the probability that the injury will occur multiplied by the severity of that injury if it does occur.¹⁷⁸ If the burden of adequate precautions is greater than the probability and severity of the injury, then the defendant's conduct was reasonable. A defendant's conduct is unreasonable if the probability and severity of the injury outweigh the cost to him of eliminating the risk.

The cost to a defendant of eliminating the risk of harm, or "the burden of adequate precautions,"¹⁷⁹ depends on two factors: the defendant's knowledge of the risk, and the action required to eliminate the risk.¹⁸⁰ A defendant's knowledge would be measured by the reasonableness standard—whether the defendant knew or should have known of the ongoing abuse.¹⁸¹

Given the signs of abuse in the household, the burden on Vicki to recognize the danger to Jeff was low.¹⁸² Although no one directly

176. The same analysis could be done using a test from the *Restatement (Second) of Torts*. See RESTATEMENT, *supra* note 11, §§ 291-93. The *Restatement* test also measures the reasonableness of the defendant's conduct by weighing its risks against its utility. *Id.* The only difference between the Hand and *Restatement* tests is that the *Restatement* test focuses on the effect of the conduct on society rather than on the individuals involved. The same result would be reached in this case if the *Restatement* test were used: society has such a strong interest in preventing child abuse that the defendant's conduct would be considered unreasonable and the risk of harm foreseeable.

177. *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947).

178. Judge Hand explained this test: "[L]iability depends on whether B [the burden of adequate precautions] is less than L [the potential injury] multiplied by P [the probability of injury]; i.e., whether $B < PL$." *Id.*

179. *Id.*

180. See generally *Delair v. McAdoo*, 188 A. 181 (Pa. 1936).

181. See *Lombardo v. Hoag*, 566 A.2d 1185, 1190 (N.J. Super. Ct. Law Div. 1989) ("The bottom line is that if defendant Niemeyer knew or should have known that defendant Hoag was intoxicated and unable to drive, then he should have done whatever a reasonable person would have done under the circumstances . . ."), *rev'd*, 634 A.2d 550 (1993).

182. Although Vicki was not present when the beatings took place, she need not witness the abuse to be aware of it. Courts in two recent cases determined that mothers knew about ongoing abuse in the home even though neither mother actually observed the abuse. *Richie v. Richie*, No. 91-03635 (D. Minn. Oct. 5, 1992); *Elliott v. Dickerson*, No. 91-1524-B (D. Tex. Oct. 17, 1992). In both cases, girls who had been sexually abused by their father or stepfather in their homes successfully sued their mothers for negligently failing to protect them from abuse. In *Richie*, a jury awarded the daughter \$1.4 million compensatory damages against the parents. *Richie*, No. 91-03635, slip op. at 2. In *Elliott*, the jury awarded the two daughters \$1.7 million against the mother. *Elliott*, No. 91-1524-B, slip op. at 3. In these cases, as in Vicki's, the mothers did not have to be present while the abuse took place to know that her child was at risk. The mothers in *Richie v. Richie* and

informed Vicki that Darren was abusing Jeff, she saw the aftermath of that abuse—bruises and marks on Jeff—and she was concerned enough to ask Darren about what was going on. Under these facts, Vicki knew or should have known of the abuse. Furthermore, Vicki was in the best position to learn about the ongoing abuse in the home. Vicki lived with the abuser, Darren, and the abused, Jeff, and she saw signs of abuse. Yet, she unquestioningly accepted the explanations of Darren, whom she had known for less than one year, about the origin of Jeff's bruises. Society wants to encourage those who have access to information about child abuse to seek out that information. When people like Vicki have access to this information but do not use it, they should be held responsible for the consequences of that choice. Having established that the knowledge part of the burden would be met in the hypothetical, the next step is to evaluate the burden to Vicki of eliminating the risk of harm to her child.

The burden on Vicki to take precautions to eliminate the risk was low; she need only have taken minimal steps to protect Jeff. In *Lombardo*, the court stated "that if the defendant Niemeyer knew or should have known that Hoag [the car owner] was intoxicated and unable to drive, then he should have done whatever a reasonable person would have done under the circumstances to see that Hoag did not drive his vehicle."¹⁸³ The court found that any of the following would have been reasonable conduct: dropping Hoag off at

Elliot v. Dickerson claimed that they did not know about the abuse. See Gillman, *supra* note 157, at A45; In *Richie*, the father who was molesting his daughter removed all of the bedroom and bathroom doors. The complaint against the mother alleged that she saw her husband coming out of their daughter's room late at night several times and that relatives had repeatedly warned her about her husband's conduct. Tim Nelson, *Woman Awarded \$2.4 Million From Dad, Mom, For Sex Abuse*, ST. PAUL PIONEER PRESS, Oct. 3, 1992, at A1. The daughter estimated that her father had molested her at least 250 times during a six-year period. *Id.* In *Elliott*, the two daughters testified that their stepfather molested them over a five-year period that began when they were six and eight years old. They claimed that they told their mother that their stepfather was molesting them and that she confronted him once about his conduct. Mary Hull, *Mother Held Liable for Stepfather's Sexual Abuse*, TEX. LAW., Oct. 26, 1992, at 10. When he denied the allegations, the mother told her daughters to "resist [his] advances if he tried it again." *Id.* The mother continued to leave her daughters home alone with him, and the abuse continued.

Courts in cases like *Richie* and *Elliott* could easily find that the defendants knew or should have known about the abuse. The mothers had been told of their husbands' conduct in both cases; in one case the mother acknowledged the information by confronting her husband and giving advice to her daughters about how to avoid the abuse. Even if the mothers maintained that they did not actually know of the abuse because they had not witnessed it, a court could determine that they should have known of the abuse had they chosen not to deny the evidence that confronted them.

183. *Lombardo v. Hoag*, 566 A.2d 1185, 1190 (N.J. Super. Ct. Law Div. 1989), *rev'd*, 634 A.2d 550 (N.J. Super. Ct. App. Div. 1993).

his home and returning his car the next day; driving Hoag home in another car; telephoning Hoag's family for assistance; or trying to persuade Hoag not to drive.¹⁸⁴ The defendant was not obligated to take extraordinary measures, simply reasonable ones. In any event, he did nothing.

As a reasonably prudent parent, Vicki should have inquired further into Darren's behavior herself or contacted the appropriate state agency to investigate. These simple, precautionary measures would not have demanded much of Vicki and can be expected of reasonable, prudent parents. Vicki's failure to take steps to prevent the abuse constituted unreasonable conduct, and therefore, she breached her duty of care to Jeff.¹⁸⁵ In addition, Vicki could have taken other effective measures such as not leaving Jeff alone with Darren, removing Darren from the home, or severing all contact with Darren if he persisted as a threat to Jeff. A defendant in Vicki's position may try to argue that the financial and emotional costs of these measures outweigh the probability multiplied by the severity of the injury. For example, the financial costs might be prohibitive if Vicki could not afford a babysitter for Jeff every time that she went out and could not take him with her everywhere she went. The emotional costs of upsetting her relationship might be great if Vicki refused to leave Jeff alone with Darren, asked Darren to move out, or tried to end their relationship. All of these steps would risk angering Darren; Darren's anger at the situation could turn into violence toward Vicki and Jeff.¹⁸⁶ Furthermore, Vicki's emotional attachment to Darren would make it more difficult to sever the ties. Thus, a defendant in Vicki's position might maintain that she could not take these additional steps to protect Jeff because the burden of adequate precautions would be prohibitively high. These excuses, however, crumble in the face of child abuse. Neither the financial burden nor the emotional price that a defendant like Vicki must allegedly bear to eliminate the risk of harm outweighs the probability of injury to her child multiplied by the likely severity of the injury.

The burden of adequate precaution must be weighed against the likelihood of injury occurring and the seriousness of that injury. The probability of the abuse continuing if Vicki does nothing is measured by the existence of "some real likelihood of some damage and the likelihood is of such appreciable weight and moment as to

184. *Id.*

185. See *infra* text accompanying notes 160-63 for further discussion of the reasonable, prudent parent standard.

186. If Darren were abusing Vicki as well, the validity of this argument would be clearer. See *supra* note 172.

induce, or which reasonably should induce, action to avoid it on the part of a person with a reasonably prudent mind."¹⁸⁷ Using this standard, a plaintiff would argue that the likelihood of injury standard is more than satisfied in a case such as the hypothetical: the injury has occurred, has become a reality, and will continue to occur if the defendant's conduct remains unchecked. The likelihood is of appreciable weight because of the cyclical nature of child abuse and the amount of evidence of that abuse. The likelihood is of appreciable moment because the chance of injury is imminent and ongoing. In the hypothetical, Vicki noticed bruises on Jeff, suspected that her boyfriend was abusing her son, and still failed to act. Vicki increased the risk of serious harm to Jeff every day she silently stood by while the abuse continued. By her failure to act, she virtually guaranteed that Jeff would continue to be beaten and would suffer injuries. Thus, in these cases, a defendant's failure to act gives rise to a probability that the child will continue to be abused and injured.

A victim such as Jeff in the hypothetical would suffer from both emotional and physical injuries. The physical injuries are evident in the bruises and broken rib that Jeff sustained. The emotional injuries that he has suffered may manifest themselves immediately or later.¹⁸⁸ His emotional injuries may take the form of depression, humiliation, anger, and anxiety.¹⁸⁹ All are reactions common to individuals who are abused as children.¹⁹⁰ Although the emotional injuries are not necessarily as quantifiable as the physical injuries, the emotional injuries can be more severe and longer-lasting. Thus, the potential for severity is great. When these factors are placed into the Learned Hand formula articulated in *Carroll Towing*, the probability of injury multiplied by the severity of that injury which would result from Vicki's failure to protect Jeff from abuse outweighs the burden on Vicki to take adequate precautions to eliminate the risk. Thus, Vicki's conduct would be deemed unreasonable, and she would be considered to have breached the duty of care that she owed to her child.

3. *Causation*. Once the duty and breach of that duty have been established, a plaintiff must establish causation in a negligence

187. *Gulf Refining v. Williams*, 185 So. 234, 236 (Miss. 1938).

188. For example, the jury in one recent case awarded a young woman who had been molested by her father damages for past and future emotional distress and for past and future mental health therapy. *Richie v. Richie*, No. 91-03635, slip op. at 2 (D. Minn. Oct. 5, 1992). See also *supra* note 182.

189. See generally DAVID A. WOLFE, *THE EFFECTS OF CHILD ABUSE AND NEGLECT: ISSUES AND RESEARCH* (1991).

190. *Id.*

claim.¹⁹¹ The plaintiff must establish that the defendant was both the cause in fact and the proximate or legal cause of his injuries. In a failure to protect from abuse case, the plaintiff may experience some difficulty in establishing cause in fact. Courts have at their disposal a number of tests to determine causation in any particular case. Therefore, it is appropriate to examine under these various tests whether causation would be established under the facts of the hypothetical above.

The question of whether Vicki's conduct is a cause in fact of Darren's continued abuse of Jeff is intertwined with the nature of the duty that she owes to Jeff. A court will turn initially to the "but for" test to determine whether Vicki's conduct is a cause in fact of the abuse.¹⁹² Using the "but for" test, the plaintiff has to establish that the event would not have occurred "but for" the defendant's negligent conduct.¹⁹³ Stated another way, the defendant's conduct is not a cause in fact of the event if the event would have taken place anyway.¹⁹⁴ Therefore, in a failure to protect from abuse case, the plaintiff must prove that the abuse would not have continued to occur "but for" the defendant's negligent conduct.

The definition of Vicki's negligent conduct is essential to determining whether the "but for" test has been satisfied. The more that is required of Vicki for her conduct to be negligent, the easier it is to establish "but for" causation. For example, if Vicki were required to take extreme measures, such as leaving town with Jeff to escape from Jeff's abuse, and she did not do so, then her failure to flee would be a "but for" cause of any further abuse of Jeff. Of course, however, no court would require Vicki to take such extreme measures. As noted in the above discussion of the Learned Hand test, Vicki is only required to take reasonable action, not extreme measures, to prevent further abuse to Jeff.¹⁹⁵ Although in our scenario, "but for" causation could be easily established, a court would find that the burden on Vicki to eliminate the risk would be far too great, and thus, she would not have a duty to take such extreme steps.

191. I am grateful to my colleague Randy Lee for his insights about this section.

192. Cause in fact can be established by a defendant's inaction as well as his action. See KEETON ET AL., *supra* note 11, § 41, at 265 ("The conception of causation in fact extends not only to positive acts and active physical forces, but also to pre-existing passive conditions which played a material part in bringing about the event. In particular, it applies to the defendant's omissions as well as his acts."); see also David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1337 (1992) (discussing "the particular problems that arise in applying causation principles in omissions cases.").

193. See KEETON ET AL., *supra* note 11, § 41 at 266.

194. *Id.*

195. In other words, courts will not require a defendant to take extreme measures, although those measures might be better calculated to prevent harm to the plaintiff.

Conversely, if Vicki's duty demands that she take reasonable precautions to eliminate the risk and she does not do so, then she may satisfy the duty and breach elements in a negligence cause of action, but may not meet the requirements of the "but for" cause in fact test. For example, Vicki's reporting the abuse to child welfare officials could be considered taking reasonable precautions to prevent the abuse, and her failure to notify them of Darren's abuse of Jeff represented a breach of that duty. As *DeShaney* indicates, however, Vicki's failure to report the beatings might not operate as a "but for" cause of the abuse because the involvement of a state agency does not always guarantee protection of the child.¹⁹⁶ The facts of *DeShaney* demonstrate that reporting Randy DeShaney's abuse of his son, Joshua, to child welfare authorities did not prevent further abuse, and may even have made the beatings worse.¹⁹⁷ Joshua's stepmother, family friends, and medical personnel reported Randy's ongoing abuse to child welfare officials several times.¹⁹⁸ Yet, while child welfare officials supposedly were monitoring the situation, Randy's beatings of Joshua grew more severe until Joshua sustained permanent, serious brain damage.¹⁹⁹ The lesson of *DeShaney* for Jeff and other abused children is that "reasonable precautions" do not necessarily stop the abuse and protect the child; in fact, interventions may jeopardize the child's safety even further. Thus, failure to intervene by reporting the abuse is not a "but for" cause of the abuse.

The difficulty then in imposing tort liability under the "but for" cause standard for failing to protect a child from ongoing abuse is establishing duty and cause in fact together. Using that approach, the cost to the defendant of eliminating the risk, and thus the duty, may be too high to satisfy the "but for" test. When the duty is lowered to require the defendant to take reasonable precautions to eliminate the risk, the "but for" test may not be met. Therefore, courts should consider alternative cause-in-fact tests in developing this cause of action.

One such test is set forth in *Reynolds v. Tex. & Pac. Ry.*²⁰⁰ Under the *Reynolds* two-part approach, courts must consider first whether the defendant's negligence greatly multiplies the chances of an accident to the plaintiff, and second, whether the negligence is of

196. Not only does such reporting not guarantee an end to the abuse—tragically, in situations where the abuser is aware that he is under suspicion, the beatings may increase in frequency or severity.

197. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 192-93 (1989).

198. *Id.*

199. *Id.* at 193.

200. 37 La. Ann. 694 (1885).

a character naturally leading to the occurrence of an accident.²⁰¹

In *Reynolds*, the court determined that a defendant's negligence in failing to light a stairway and provide a handrail significantly increased the chance that someone would fall down those stairs and injure himself.²⁰² The court allowed the plaintiff to recover damages from the defendant railway company for injuries she sustained when she fell down the stairs.²⁰³ The burden on the defendant railroad company to install a handrail and lights was minimal, and the failure to take these precautions significantly increased the chances that someone would fall down the stairs.

Under the *Reynolds* approach, the determination of whether Vicki's conduct greatly multiplies the chances of the abuse of Jeff depends on whether her failure to intervene significantly increased the possibility of injury to him.²⁰⁴ Vicki could have tried to protect Jeff by limiting his contact with Darren or by removing Darren from the home.²⁰⁵ It may be impossible to limit contact among people who live together as a family—especially when they live in close quarters. Vicki, Jeff and Darren lived in a five-room apartment, so Vicki could not keep her son and boyfriend apart. It might, however, have been possible to prevent Darren from being alone with Jeff. Of course, this would require planning and expense on Vicki's part, but if the alternative jeopardizes the safety of her child, then her choice should be clear. Although removing Darren from the home or moving out of the home herself would impose a high cost on Vicki, those measures might protect her son and herself from harm. If those precautions are reasonable and Vicki does not take them, then she has greatly multiplied the chances of further abuse.²⁰⁶ Her failure to limit Darren's contact with Jeff or remove Darren from the home could significantly increase the possibility of abuse by giving Darren more opportunities to beat Jeff.

201. *Id.* at 698. On the issue of probability, the *Reynolds* court proclaimed: [W]here the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that [the accident] might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury.

Id.

202. *Id.*

203. *Id.* at 696-98.

204. *Id.* at 698.

205. *See supra* text accompanying notes 184-85.

206. Vicki's failure to meet the minimal burden of warning the authorities about the ongoing abuse, however, might not significantly increase the chances that the abuse would continue. As *DeShaney* demonstrates, Vicki's reporting the abuse of Jeff to the child welfare department might have done nothing to stop, and could have worsened, the abuse.

Under *Reynolds*, Vicki's conduct must also be "of a character naturally leading to [the] occurrence [of the abuse]."²⁰⁷ Jeff must demonstrate that Vicki's failure to act ordinarily results in continuing abuse. Jeff should not have a hard time meeting this part of the *Reynolds* test, even if Vicki's negligent conduct is defined as failing to report the abuse to the appropriate authorities. Courts and commentators have viewed defendants' failure to report child abuse as establishing a sufficient causal connection between negligent conduct and injury.²⁰⁸ Although Vicki's merely reporting the abuse might not have been sufficient to fulfill her legal duty, some would argue that failure to report child abuse "naturally leads" to further abuse and thus satisfies the causal connection. One commentator labeled failure to report child abuse a "precursor" to continued abuse.²⁰⁹ Courts have also noted a link between failing to report child abuse and increased incidents of that abuse.²¹⁰ At least one writer has suggested that an abuser might interpret other people's failure to make any efforts to stop the abuse as implicit approval of his conduct.²¹¹

The *Reynolds* approach, however, misses the point. The question is not whether the abuse will continue if Vicki fails to report it; the issue is whether the abuse will stop if Vicki reports it. The abuse in *DeShaney* did not stop when Joshua's stepmother reported it to child welfare officials; it did not stop when neighbors reported it; and it did not stop even when doctors reported it. Similarly, in the hypothetical, nothing suggests that Darren's abuse of Jeff will stop if Vicki reports it. Nothing connects Vicki's failure to report the abuse and Darren's abuse of Jeff. Under *Reynolds*, Vicki's failure to report the abuse did not "naturally lead" to the occurrence of further abuse.

Another test the courts might use to determine causation is the substantial factor test. This test is often used when two or more events contribute to a single injury.²¹² Courts have used this test in the criminal context when determining a parent's guilt for failure to report child abuse. For example, the court in *Wisconsin v. Wil-*

207. *Reynolds*, 37 La. Ann. at 698.

208. See *Landeros v. Flood*, 551 P.2d 389, 395 (Cal. 1976); Collier, *supra* note 2, at 191.

209. Collier, *supra* note 2, at 191 ("Failure to act on behalf of the child is a precursor to further injury. In the absence of intervention, child battering typically escalates and more serious injuries are inflicted upon the child.") (footnotes omitted).

210. *Landeros*, 551 P.2d at 395 & n.9.

211. Collier, *supra* note 2, at 191 ("Furthermore, the perpetrator may believe that acquiescence by knowledgeable adults is a form of acceptance. Acquiescence may serve to reinforce the abuser's belief that the child deserves these beatings. The child is thus in danger of future beatings.") (footnote omitted).

212. See generally *Anderson v. Minneapolis St. P. & S. Ste. M. Ry.*, 179 N.W. 45 (Minn. 1920).

*Williquette*²¹³ concluded that the conduct of a mother who failed to take any action to stop her husband's abuse of their children constituted a cause in fact of the children's injuries. Although the father's conduct was a "direct cause" of the abuse, the mother's conduct was a "substantial factor which increased the risk of further abuse."²¹⁴ The court did not explicitly define substantial factor but reached its conclusion based upon the following facts: the mother allegedly knew of the abuse; she continued to leave the children alone with their father when she went out; and she did nothing to prevent the abuse.²¹⁵

Both sides in a failure to protect case can argue the substantial factor test in support of their positions. For example, in the hypothetical, Vicki will maintain that even if her failure to intervene did contribute to the ongoing abuse, this contribution was insignificant compared to what Darren did, and thus, was not a material or substantial factor in causing Jeff's injuries.²¹⁶ Relying on *Williquette*, Jeff would counter that although Darren was a direct cause of the abuse, Vicki's inaction was a substantial factor in the abuse. She suspected that Darren was abusing Jeff, she continued to leave Jeff alone with Darren, and she took no measures to protect him. Therefore, because the hypothetical is factually analogous to *Williquette*, Vicki's failure to protect Jeff was a substantial factor in causing Jeff's injuries.

Aside from establishing cause in fact, a plaintiff must also prove that a defendant's behavior was a proximate cause²¹⁷ of his injury. Vicki's failure to protect Jeff from abuse was a proximate cause of his injuries. The California Supreme Court analyzed this element of a negligence claim when a physician failed to diagnose battered child syndrome and thus failed to report that diagnosis in *Landeros v. Flood*.²¹⁸ The child had been beaten severely several times before she was brought to the hospital emergency room. When she arrived, she had several broken bones, bruises all over her back, cuts on her body and a skull fracture.²¹⁹ After treating her physically apparent injuries, the physician released her to her mother's care without diagnosing her condition or reporting it to child welfare

213. *Wisconsin v. Williquette*, 385 N.W.2d 145 (Wis. 1986).

214. *Id.* at 150.

215. The court noted that she could have reported the abuse or removed the children from her husband's care. *Id.* at 149-50.

216. *See, e.g., id.* at 149-52.

217. Judge Andrews defined proximate cause: "What we mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928).

218. 551 P.2d 389, 391 (Cal. 1976). The reporting duty in *Landeros* arose under California state statutes. *Id.* at 392.

219. *Id.* at 391.

authorities. Nine weeks later, her condition was diagnosed and reported by another hospital.²²⁰

The defendant-physician who had first examined the child argued that the continued beatings, inflicted by the child's mother and her husband after the emergency room visit, operated as a superseding cause of the child's injuries and thus relieved him of responsibility.²²¹ The court concluded that although the subsequent abuse was an intervening act, it did not sever the connection between the emergency room physician's negligent failure to act and the child's injuries, and thus was not a superseding cause.²²² The defendant should have foreseen that the abuse of the child would continue. Similarly, a defendant like Vicki would be unsuccessful in arguing that Darren's continued beating of Jeff constituted a superseding cause of Jeff's injuries. Darren's abusive conduct did not break the connection between Vicki and Jeff; instead, Vicki's failure to take any steps to stop the abuse made Darren's continued beating of Jeff foreseeable.

The conclusion that Vicki's failure to protect Jeff acted as a proximate cause of his injuries is further supported by public policy.²²³ Legislatures, which have been traditionally viewed as articulating policy through their law-making capacity, have imposed criminal penalties on parents who fail to protect their child from abuse in the home.²²⁴ In recognizing a tort cause of action for similar conduct, courts would simply be following the lead of the legislatures. Courts, legislatures, and the rest of society expect parents to protect their children from harm. Children turn to their parents for care and protection, and society encourages them to do so. When parents ignore the abuse of their child, they let not only their children down but also other children and the rest of society. Parents must accept responsibility for the consequences of their inaction; public policy demands that they compensate their child

220. *Id.*

221. *Id.* at 395.

222. *Id.* ("It is well settled in this state . . . that an intervening act does not amount to a 'superseding cause' relieving the negligent defendant of liability . . ."). Instead, the court determined that the trial court had dismissed the plaintiff's claim prematurely. The plaintiff had a right to present evidence that the physician's failure to diagnose and report the abuse made the subsequent beatings foreseeable to him. *Id.* at 395-96.

223. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103-04 (N.Y. 1928) (Andrews, J., dissenting) ("Proximate cause . . . is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account.").

224. *See, e.g.*, CONN. GEN. STAT. ANN. § 53-21 (1987) (stating that a person is guilty of child abuse if he "willfully or unlawfully causes or permits any child . . . to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired"); MISS. CODE ANN. § 97-5-39 (Supp. 1986) (a person is guilty of child abuse if he "omits the performance of any duty").

who is injured when they turn away.

4. *A Note on Damages.* As in any tort action, a finding of liability with respect to a defendant will be accompanied by an obligation to pay damages to an injured plaintiff.²²⁵ However, in the specialized context of failure to protect from child abuse, concerns about the feasibility of collecting damages from parents have been raised.²²⁶ One aspect of this issue centers on a supposed connection between child abuse and one's socioeconomic status. Some studies indicate that people in households with incomes of \$15,000 or less are four times more likely to abuse their children than those in homes with incomes above that level.²²⁷ Because the parent who fails to prevent the abuse lives in that household, it is assumed that she has a low income, no insurance, and is therefore judgment-proof. Other researchers, however, counter that the incidents of child abuse in households with incomes of above \$15,000 may be significantly underreported in proportion to the reporting of abuse in poor homes.²²⁸ People with greater financial resources may be more aware of the need to hide child abuse and are in a better position to do so.²²⁹ The stigma attached to child abuse makes such abuse by middle-class parents highly newsworthy.²³⁰ The ability of middle-

225. In the case of failure to protect from abuse, a reasonable, prudent parent whose failure to protect a child from abuse caused the child's injuries must compensate the child. Once the child has established physical injuries, the parent should pay for the child's medical expenses, pain and suffering and emotional distress. RESTATEMENT, *supra* note 11, § 905. Plaintiffs in these cases may also be able to recover for their diminished childhood, although some courts may include such recovery under emotional distress. Although the parent might argue that an infant's pain and suffering is difficult to ascertain and impossible to prove, most courts have rejected this argument. *See, e.g.,* Capelouto v. Kaiser Found. Hosp., 500 P.2d 880, 883-84 (Cal. 1972). The jury members can draw on their own experiences to determine that abuse produces pain, suffering and emotional distress. *See, e.g.,* State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952) (concluding that a jury is better able to determine "whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury"). Thus, the child should be able to recover damages for mental as well as physical injuries.

226. Lanham, *supra* note 157, at 112-16.

227. U.S. DEPT OF HEALTH & HUMAN SERVS., STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT, Contract No. 105-85-1702, Study Findings, 5-30 (1988) (on file with the *Buffalo Law Review*).

228. CYNTHIA C. TOWER, UNDERSTANDING CHILD ABUSE AND NEGLECT 60 (1988).

229. Interview with Cristine Kearney, American College of Social Workers (ACSW), in Geneva, Ill. (June 27, 1993) (notes on file with the author).

230. *See, e.g.,* Jennifer Lenhart & Flynn McRoberts, *Abandoned Kids' Parents Land in Jail*, CHI TRIB., Dec. 30, 1992, at 1 (chronicling the case of the couple living in an affluent Chicago suburb who left their daughters home alone during the Christmas holidays while they vacationed in Mexico). The case attracted worldwide publicity, in part, because the parents were middle-class. *Id.* Don Baldwin & Elizabeth Birge, *Schoos Give*

class parents to hide the abuse makes it more difficult for people outside the home to detect that such abuse is occurring.²³¹ Therefore, it is imperative that the parent or other responsible adult living in the home who knows of the abuse intervene to protect the child. That person may be the only one to witness the abuse or its effects and the only one who can protect the child. Speculation about that individual's financial status should neither drive, nor thwart, this cause of action.

A second aspect of the feasibility of collecting damages revolves around liability insurance. The assumption that most abusers, and likewise most people who live with abusers, do not have homeowners insurance policies again rests on the unproven assumption that they are poor. However, two recent decisions which have allowed tort claims to be brought for parents' failure to protect from abuse tend to undermine this assumption. In *Elliott v. Dickerson*²³² and *Richie v. Richie*,²³³ the courts allowed daughters to recover from their mothers for failure to protect them from sexual abuse by their father and stepfather, respectively.²³⁴ In both cases, the mothers' homeowners insurance policies provided the means of recovery.²³⁵ Courts then should not assume that parents who fail to protect children from abuse are judgment-proof. Even if most parents cannot pay, courts should not insulate those defendants who have insurance or assets like the mothers in *Elliott* and *Richie* from liability.

Regardless of the defendant's solvency, courts should recognize a tort claim against parents who fail to protect a child from abuse in the home. Even if no money can be recovered, there is a value to the child in a public declaration that what happened to him or her was wrong. Furthermore, the state sends the message that inaction resulting in a child's abuse will not be tolerated. Parents will be on notice that they are expected to use reasonable care to prevent abuse in their home or face liability and the stigma associated with child abuse. Hopefully, this message will encourage those who sit passively in the face of abuse to stand up and act—for children.

In sum, Vicki should be held liable for failing to take rea-

Daughters Up for Adoption, CHI. TRIB., July 11, 1993, at 1 (reporting that the couple terminated their parental rights and gave up their daughters for adoption).

231. Middle-class families are less likely to be monitored by a governmental agency because they generally do not receive subsidies, either in the form of state welfare or federal Aid to Families with Dependent Children (AFDC). Interview with Cristine Kearney, *supra* note 229.

232. *Elliott v. Dickerson*, No. 91-1524-B/F (D. Tex. Oct 17, 1992).

233. *Richie v. Richie*, No. 91-03635 (D. Minn. Oct. 5, 1992).

234. *See supra* note 182.

235. *See Gillman, supra* note 157, at A45; Nelson, *supra* note 182, at A1.

sonable steps to protect her son Jeff from abuse. Modern tort law does not shield her from liability under a claim of parental immunity. A strong public policy against child abuse demands that a duty be imposed on her to protect her son. That duty requires her to conform her conduct to that of a reasonable, prudent parent and take reasonable steps to prevent the ongoing abuse of her son. Because Vicki did not take such steps, she breached her duty of care to her son. Under the substantial factor test for causation, that breach of duty operated as a cause in fact of her son's injuries. Although there were events that occurred between Vicki's failure to intervene to stop the abuse and Jeff's injuries, notably Darren's beating of Jeff, those events were not sufficient to break the chain of causation between Vicki's negligent conduct and Jeff's injuries. Thus, Vicki was a proximate cause of those injuries. Finally, concerns about the feasibility of collecting damages from parents such as Vicki should not preclude these claims.

B. *The Case of The Uninvolved Neighbor*

The next scenario, which examines the obligations of a neighbor who fails to report child abuse, raises questions about the limits of liability in such cases. The legal basis for liability in this hypothetical is less clearly imbued in tradition than is the basis for holding parents liable for failing to protect their children. However, the same policy considerations that supported imposing a duty of care on parents underlie the need to extend that duty to others who know of child abuse but fail to act on that knowledge.²³⁶

Paul Harris lived next door to the Frank family in a large apartment complex. The Franks have three children, aged four, two and six months. Paul frequently overheard heated, verbal arguments between the parents, Linda and Rob Frank, arguments which often sounded as though they culminated in physical fights. The arguments always occurred late in the evening after Rob returned home; Paul met him coming in a few times and smelled liquor on his breath. Paul heard furniture being overturned and thrown and the sound of heavy thuds against the wall. Paul also heard the children screaming during these fights; usually, their cries escalated as these fights continued. Paul noticed that Linda, who initially was friendly and outgoing when the family moved in six months before, had become withdrawn. She rarely ventured outside the apartment, and when she did, she wore dark glasses and barely acknowledged Paul if she met him. Paul also saw the two older children playing in the

236. The analysis in this section raises only the new issues presented by this type of claim and does not review the issues that were covered extensively in the first hypothetical. See *supra* part IV.A.

courtyard of the apartment. He saw large bruises on their bodies on more than one occasion. The issue is whether the Frank children could maintain a suit against Paul for failing to intervene under these circumstances.

1. *Duty and Breach.* Unlike the negligence case against Vicki, in which her duty was more easily established because of her parental status, Paul's duty is less easy to determine.²³⁷ A court will focus on the same issues presented in Vicki's duty analysis: what standard of care Paul should be held to, and under that standard, whether his failure to act was reasonable under the circumstances.

Paul's failure to intervene should be judged against the conduct expected of the reasonable, prudent person under the circumstances. Using the reasonable person approach, courts can take into account all of the circumstances surrounding Paul's decision not to get involved. Under any interpretation of this standard, Paul's failure to intervene falls below the minimal level of care expected of an adult who is aware of ongoing child abuse.

Having established that Paul's conduct must be evaluated in light of what is expected of a reasonable, prudent person, the issue becomes whether his conduct fell below that standard of care. Paul's conduct was unreasonable under the circumstances because he reasonably should have perceived the risk of harm to the Frank children. Paul will first argue that it was not reasonable for him to perceive the risk because the Frank children were not in his range of apprehension. Paul was not related to them, he had not undertaken to protect them, and he had no control over their father's conduct. Thus, the kind of connection between plaintiff and defendant that gave rise to Vicki's duty to Jeff simply does not exist in this case.

Furthermore, Paul will maintain that he should not be expected to forge this kind of connection. The decision to assist others involves a moral choice, and should not be converted into a legal duty.²³⁸ The principle of individual autonomy runs deep through the American legal system, and spawned the no-duty to rescue rule.²³⁹

237. See *supra* part IV.A.3 for a discussion of causation.

238. See *Farwell v. Keaton*, 240 N.W.2d 217, 224 (Mich. 1976) (Fitzgerald, J., dissenting). Judge Fitzgerald wrote:

No authority is cited for this proposition [that a legal duty exists] other than the public policy observation that the interest of society would be benefitted if its members were required to assist one another. This is not the appropriate case to establish a standard of conduct requiring one to legally assume the duty of insuring the safety of another.

Id.

239. KEETON ET AL., *supra* note 11, § 56, at 373; see also Adler, *supra* note 15, at 914-17 (criticizing the argument that individual autonomy should preclude replacing the no-duty rule with an affirmative duty of care).

The no-duty rule assumes that people take on a burden when they help someone who is in trouble; the concept underlying the no-duty rule is that the burden should be taken on voluntarily instead of being imposed on them.²⁴⁰ Because people should be able to determine who and when they will help, Paul should not be required to intervene in a private family matter. Thus, the argument concludes, the choice should be his, not the legal system's.

When the issue is child abuse, however, this approach is fundamentally flawed for several reasons.²⁴¹ First, as the current exceptions to the no-duty rule suggest, the principle of individual autonomy is not absolute.²⁴² The right not to get involved may be superseded by a pre-existing relationship between plaintiff and defendant,²⁴³ between defendant and a third party,²⁴⁴ and in situations where the defendant has begun to act.²⁴⁵ In this case, Paul's right of self-determination must give way to a stronger, competing consideration: the need to protect children. In addition, exculpating Paul in this situation in the name of individual autonomy ignores the seriousness of family violence. Paul should not be able to claim that he has no duty to intervene because this is a private family matter and he is a stranger to the family. Families do not have the right to choose child abuse as they would make other choices which would be within the scope of "private family matters." Violence against children is a societal problem and responsibility for allowing it must not be confined within a family. Because Paul should have known that his inaction might cause further injury to the Frank children, they were in his range of apprehension.

240. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 200-01 (1973) (arguing that people should not be forced to behave altruistically).

241. In a recent newspaper column, one writer responded to the argument that child abuse is a parent's problem, not a neighbor's. When the writer observed a boyfriend abusing his girlfriend's children, she recognized that she had to intervene regardless of what the children's mother did. She wrote:

I was witnessing children being attacked, and it could easily have turned from rage into destruction—possibly even death.

Other neighbors out in their yards witnessed the event. We were stunned into silence by what had happened.

I felt as they did, reluctant to interfere in another's family domain, yet I had to do something for those kids.

Dazed, I walked into my house, called a child-abuse hotline and then our local police. . . .

I must not keep silent. Whenever I see the opportunity, I must find the courage to speak up for life.

Clarke, *supra* note 115, § 6, at 8.

242. See *supra* text accompanying notes 20-37.

243. RESTATEMENT, *supra* note 11, §§ 314, 314A.

244. RESTATEMENT, *supra* note 11, §§ 315, 320.

245. RESTATEMENT, *supra* note 11, § 324.

Using the Learned Hand test, the burden of adequate precautions on Paul to eliminate the risk was outweighed by the probability and seriousness of the injuries to the Frank children. The burden of adequate precautions was low because Paul had knowledge of the ongoing abuse and was in a position to act on that knowledge. Paul knew or should have known of the ongoing abuse: he heard thuds against the wall, saw bruises on the children, smelled liquor on Mr. Frank's breath, and observed changes in Mrs. Frank's demeanor. Unlike Vicki, however, he did not live in the same house where the abuse took place, and thus, did not have the same access to information that she did to confirm his suspicions. Because he was not in the position to corroborate what he had thought to be true, the same burden to act that was imposed on Vicki cannot be imposed on him.

Paul still has a duty to take reasonable precautions to eliminate the risk, but what would constitute a "reasonable" precaution by Paul would be different from what would be "reasonable" as applied to Vicki.²⁴⁶ Although the duty "var[ies] with the facts of each case," the defendant must take appropriate steps to eliminate the risk.²⁴⁷ The reasonable precautions that Paul would be required to take would be less than those expected of the therapist in *Tarasoff*, the defendant in *Lombardo*, or Vicki in the earlier hypothetical because his options are more limited than are theirs. For example, unlike Vicki, Paul is not in a position to remove the Frank children from their parents' custody himself or to keep the abuser(s) away from them. In his case, reasonable care might be limited to reporting what he had heard and seen to the police or child welfare officials.²⁴⁸

246. The court would be following the directive of the California Supreme Court set forth in *Tarasoff*:

Obviously, we do not require that the therapist, in making that determination [that the patient poses a serious threat of violence], render a perfect performance; the therapist need only exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances."

Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (citations omitted).

As the *Tarasoff* court noted, once a therapist knows or should have known of his patient's dangerousness, he has "a duty to exercise reasonable care to protect the foreseeable victim of that danger." *Id.*

247. *Id.*

248. A defendant such as Paul may argue that the reporting requirement may lead to both the overreporting and the underreporting of child abuse: individuals will either look for child abuse where it does not exist or run from it when they see it. The requirement of acting with reasonable care, however, eliminates both of these concerns. The overreporting problem is resolved because defendants are not required to seek out child abuse where they have no evidence that violence exists. In addition, the requirement that the abuse be ongoing and meet the statutory definition of abuse addresses the isolated incident of a person who sees a parent spanking a child in a grocery store. The corre-

Those authorities can investigate Paul's allegations to determine their accuracy; if he was mistaken, Paul's reporting should be excused as long as he was acting in good faith.²⁴⁹ The burden on Paul to report what he had observed was minimal and did not outweigh the probability and seriousness of the Frank children's injuries.²⁵⁰

An analysis of the probability and seriousness of the Frank children's injuries is similar to the discussion of the likelihood and gravity of Jeff's injuries in the earlier hypothetical.²⁵¹ The probability of abuse occurring was more than a likelihood; it had happened in the past and was virtually guaranteed to take place again absent any intervention. Moreover, the physical injuries from child abuse range from minor abrasions to death, and the emotional damage can be deep and longlasting. The burden on Paul of reporting his suspicions does not compare to the likelihood and magnitude of the risk. Paul's conduct was unreasonable under the reasonable, prudent person standard of care, and thus, he breached his duty of care to the plaintiffs.

2. *Causation.* The same problems associated with establishing causation which existed in the earlier hypothetical also exist when Paul is the defendant: the less that is required of the defendant to eliminate the risk, the more difficult it is to establish that the defendant was a cause in fact of the abuse.²⁵² Paul's burden of adequate precautions may be low, but it is more difficult to establish that his failure to report the abuse operated as a cause in fact of the Frank children's injuries. As demonstrated in the earlier hypothetical, the causal connection could be satisfied if Paul's failure to report the abuse was a material or substantial factor in exposing the children to further abuse.²⁵³

sponding underreporting problem is addressed by the knowledge standard. A defendant who seeks to avoid getting involved by ignoring abuse will be liable if he knew or should have known of that abuse. Thus, in the hypothetical, Paul's desire to feign ignorance of what was going on next door would not allow him to avoid exercising reasonable care to prevent the abuse.

249. A person in Paul's position should heed Justice Blackmun's advice in *DeShaney* and act: "We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 213 (Blackmun, J., dissenting) (quoting ALAN STONE, LAW, PSYCHIATRY, AND MORALITY 262 (1984)).

250. Indeed, the burden on Paul of reporting such abuse is arguably much less than the burden of reporting would have been on Vicki in the earlier hypothetical. In Paul's case, unlike in Vicki's, he need not face difficult facts about his own living situation and reveal such personal details to the authorities. Instead, he need only report what he has observed and let the proper authorities investigate further.

251. See *supra* text accompanying notes 187-90.

252. See *supra* text accompanying notes 191-216.

253. That factual determination, of course, would depend on the effectiveness of

Like Vicki, Paul will claim that the abuser's conduct represented a superseding cause of the injuries and thus severed his responsibility to the Frank children.²⁵⁴ Moreover, he will argue that Mrs. Frank's failure to act was another intervening event which further absolves him of liability for the abuse. However, Paul may have been in a better position to protect the Frank children than their own mother was. The facts indicate that Mrs. Frank, like her children, may have been abused by her husband. It is unreasonable though for Paul to assume that the problem belongs to someone else. He identified the problem, and he can do something about it. The question remains, however, whether by reporting the abuse, Paul will actually protect the Frank children from future abuse or expose them to greater violence. This question cannot be answered definitively without further examination of the child welfare system.²⁵⁵ It is clear, however, that by reporting such abuse Paul and others similarly situated would have taken a step towards curbing this abuse in that after the reporting, more people are in a position to help the children. Paul, and others so situated, should not be allowed to turn away from what they see and know.

CONCLUSION

The current no-duty-to-rescue rule and exceptions do not adequately protect children from abuse. Instead, the defendant's conduct should be evaluated under traditional negligence principles. An adult defendant who knows or should know of ongoing child abuse has an affirmative duty to use reasonable care to protect children from that abuse. This duty is based on society's overwhelming need to identify child abuse early and to intervene to prevent it before the harm is irreparable. The nature of that duty may vary depending on a particular defendant's ability to prevent the harm and is tailored to the circumstances of the particular case. In some cases, the duty may be simply to warn the appropriate authorities, while the duty may require more of a defendant in other cases. Once the defendant's duty and breach have been established, it must be determined whether the defendant is a cause in fact of the child's injuries. This issue presents a challenge for plaintiffs trying to recover

child welfare authorities in preventing abuse once they have been notified of it.

254. See *supra* text accompanying notes 217-22.

255. For a discussion of the child welfare system, see Jeanine L. English & Michael R. Tritz, *In Support of the Family: Family Preservation as an Alternative to Foster Care*, 4 STAN. L. & POL'Y REV. 183 (1993); David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992); Paul Johnson & Katharine Cahn, *Improving Child Welfare Practices Through Improvements in Attorney-Social Worker Relationships*, 54 U. PITT. L. REV. 229 (1992).

under negligence theory because the less that is required of the defendant to establish a duty, the more that may be required to satisfy the element of cause in fact.

Society has targeted child abuse as a serious problem, but we have not yet figured out how best to confront it. One way would be to hold responsible those who know or should know of ongoing abuse within a family, but fail to acknowledge the problem and act on it. These individuals are in the best position to identify violence in the home and to intervene to prevent the violence. Children depend on the adults around them for care and protection, and society expects adults who know that children are in danger to act on that information. When Vicki, Paul and others turn away from child abuse, and we allow them to do so, we are all included in the shame of their silence.