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The Tort Duty of Parents to Protect Minor Children

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Articles

THE TORT DUTY OF PARENTS TO PROTECT MINOR CHILDREN

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I. THE UNCERTAIN VOICE OF AMERICAN TORT LAW

MUST a parent rescue a minor child from a risk of physical harm not created by the parent?[1] It is easy to think of facts that raise this

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1. This Article is concerned with failure to act, rather than with improper action, which is to say, with nonfeasance rather than misfeasance. Whether a parent whose careless *action* causes injury to a minor child will be subject to liability will depend upon ordinary negligence principles and whether there is some immunity, defense or privilege that prevents legal responsibility. The question here is different: namely, whether a parent whose conduct has not created a risk of harm to a child has a duty to intervene to rescue a minor child from harm caused by some other person or injurious set of events. Admittedly, it is often difficult to distinguish nonfeasance from misfeasance, and cases often contain allegations of both forms of misconduct. *See* Gen. Accident Ins. Co. of Am. v. Allen, 708 A.2d 828, 831 (Pa. Super. Ct. 1998) (alleging "negligent *acts or omissions*" on part of children's stepmother where mother of children claimed father's wife "owed a duty to the minor children to protect them from harm") (emphasis added).

question. Suppose, for example, that a child is hit on the street by a passing car, or an uncle is suspected of taking sexual liberties with a toddler, or a youth who "knows" how to swim suddenly begins to drown. Does the parent, upon learning of the crisis, have a duty to exercise reasonable care to avert the harm or render assistance by reason of the parent-child relationship?[2]

The bonds between parent and minor child are so universally recognized that sound moral principles would resoundingly say, "yes." American law, however, answers more hesitantly. Whether and to what extent a parent is under a *legal* duty to protect a minor child may depend upon both the nature of the threatened harm and the purpose of the question.

Criminal law often places health care professionals[3] and sometimes others,[4] including parents,[5] under a duty to safeguard the interests of mi-

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2. It is possible that a duty of care may arise on grounds independent of the parental relationship. For example, a person's non-tortious involvement in the facts leading up to another's need for assistance sometimes—but certainly not always—imposes a duty to render aid. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 39 (Proposed Final Draft No. 1, 2005) ("When an actor's prior conduct, even though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm."); *see also infra* note 90 (discussing duty based on custody of another). This Article is concerned solely with the question of whether a duty arises based on the parental relationship.

3. "Every state has enacted a statute that requires certain professionals to report suspected incidents of child abuse or neglect to the appropriate state authority." Steven J. Singley, Comment, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. JUV. L. 236, 236 (1998) (analyzing mandatory reporting laws); *see also* Amy L. Nilsen, Comment, *Speaking Out Against Passive Parent Child Abuse: The Time Has Come to Hold Parents Liable for Failing to Protect Their Children*, 37 HOUS. L. REV. 253, 257-59 (2000) (offering historical perspective on child abuse reporting laws).

4. *See, e.g.*, TENN. CODE ANN. § 37-1-403(a)(1) (2005) (describing persons required to report child abuse). The Tennessee statute states:

> Any person who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately if the harm is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or that, on the basis of available information, reasonably appears to have been caused by brutality, abuse or neglect.

Id.; *see also* TEX. FAM. CODE ANN. § 261.101(a) (Vernon 2004) ("A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.").

5. The language of some child abuse reporting statutes is broad enough to impose an obligation on parents. *See* ARIZ. REV. STAT. ANN. § 13-3620 (2004) (defining "person" with duty to report abuse or neglect of child as "parent, stepparent or guardian of the minor"). In most states, however, statutes are worded in a manner that excludes parents from the scope of duty. For example, West Virginia's applicable statute specifically imposes a duty on:

> [A]ny medical, dental or mental health professional, christian science practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical

nor children by requiring them to report instances of suspected neglect or abuse to the appropriate authorities.[6] Dereliction of that obligation can result in criminal sanctions.[7] Under other laws, parents can sometimes be held criminally responsible for child neglect based on allowing a minor child to remain with a known abuser[8] or failing to secure needed medical care for the child.[9] These provisions mean that at least in some states, under criminal law, the "relationship between a parent and a child exemplifies a special relationship where the duty to protect is imposed."[10]

> services personnel, peace officer or law-enforcement official, member of the clergy, circuit court judge, family law master, employee of the division of juvenile services or magistrate [who] has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect . . . .

W. Va. Code Ann. § 49-6A-2 (West 2004).

6. *See* Jessica R. Givelber, Note, *Imposing on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169, 3181 (1999) (noting that all fifty states have enacted mandatory child abuse reporting statutes). In her discussion of mandatory child abuse reporting statutes, Givelber notes that:

> All of the mandatory child abuse reporting statutes have seven basic elements. These include: (1) a definition of conditions worthy of reporting; (2) a list of the persons required to report; (3) the degree of certainty necessary to warrant reporting the suspected abuse; (4) penalties imposed for failure to report; (5) criminal and/or civil immunity available to reporters; (6) abrogation of certain/all confidential communication privileges; and (7) delineation of the reporting procedures.

Id. at 3181-83 (footnotes omitted).

7. *See, e.g.*, TEX. FAM. CODE ANN. § 261.109 (Vernon 2004) (defining knowing failure to report as class B misdemeanor).

8. *See* State v. Williquette, 385 N.W.2d 145, 150 (Wis. 1986) (finding that mother's conduct in leaving children with their abusive father was more than omission and was sufficient to trigger criminal liability for child abuse). One commentator, discussing courts that have imposed criminal liability on parents, explains:

> 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. 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. If parents do not take action to prevent abuse, they may face criminal liability.

Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 434 (1994).

9. *See* State v. Cacchiotti, 568 A.2d 1026, 1026-27, 1031 (R.I. 1990) (upholding involuntary manslaughter conviction of mother who failed to seek medical attention for her son after he was severely beaten by mother's boyfriend); *cf.* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 111 (2000) ("Most states, however, exempt religious parents from prosecution, or limit their exposure to criminal liability, when their failure to seek medical care for their sick or injured children is motivated by religious belief.").

10. *Williquette*, 385 N.W.2d at 152; *see also* State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982) (upholding conviction of mother who failed to prevent harm to child). The North Carolina court stated that "[w]here the common law has im-

If, however, the issue concerns tort rather than criminal liability the answers to parental-duty questions are uncertain. While some child neglect or abuse reporting statutes expressly or implicitly create a civil cause of action,[11] most do not.[12] And, beyond that, thus far, there is little case

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posed affirmative duties upon persons standing in certain personal relationships to others, such as the duty of parents to care for their small children, one may be guilty of criminal conduct by failure to act or, stated otherwise, by an act of omission." *Id.* at 785; *see also* Brooke Kintner, Note, *The "Other" Victims: Can We Hold Parents Liable for Failing to Protect Their Children from Harms of Domestic Violence*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 271, 274 (2005) ("[P]arents have a legal duty to take reasonable measures to care for and protect their children. This means that if someone or something is harming their children, they have an affirmative duty to make a reasonable effort to step in and prevent the harm."); David S. Lockmeyer, Note, *At What Cost Will the Court Impose a Duty to Preserve the Life of a Child?*, 39 CLEV. ST. L. REV. 577, 592 n.81 (1991) (asserting "parents have a duty to aid their children" and citing criminal law precedent); Ricki Rhein, Note, *Assessing Criminal Liability for the Passive Parent: Why New York Should Hold the Passive Parent Criminally Liable*, 9 CARDOZO WOMEN'S L.J. 627, 629 (2003) (indicating that "[n]umerous states have increasingly punished the passive parent through failure to protect theories or statutes"). *But see* Commonwealth v. Raposo, 595 N.E.2d 773, 777 (Mass. 1992) (holding that parent's mere omission to act in protecting child is not equivalent of intentionally aiding commission of felony against child).

11. *See* Landeros v. Flood, 551 P.2d 389, 393-94 (Cal. 1976) (asserting that physician and hospital that negligently failed to diagnose battered-child syndrome and report case to the state authorities could be liable to child for harm resulting from return of child to abusive mother); Arbaugh v. Bd. of Educ., 591 S.E.2d 235, 239 n.3 (W. Va. 2003) (noting child abuse reporting statutes . . . "expressly create a private cause of action . . . [in] Arkansas, Colorado, Iowa, Michigan, Montana, New York and Rhode Island"). The Arkansas statute contains various reporting provisions. One provision in the Arkansas law applies to "[a]ny person with reasonable cause to suspect child maltreatment," which presumably includes parents. ARK. CODE ANN. § 12-12-507(a) (2004). Another provision expressly imposes a reporting obligation on people in twenty-nine various categories, including foster parents. *See id.* § 12-12-507(b)(11). The Rhode Island statute imposes a reporting obligation on "[a]ny person who has reasonable cause to know or suspect that any child has been abused or neglected . . . or has been a victim of sexual abuse by another child . . . ." R.I. GEN. LAWS § 40-11-3 (2004). With respect to sanctions, the Rhode Island law provides:

> Any person . . . required by this chapter to report known or suspected child abuse or neglect . . . who knowingly fails to do so . . . shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than five hundred dollars ($500) or imprisonment for not more than one year or both. . . . [And also] civilly liable for the damages proximately caused by that failure.

Id. § 40-11-6.1.

12. *See* Marquay v. Eno, 662 A.2d 272, 278 (N.H. 1995) (holding that statute requiring "any person" to report suspected knowledge of child abuse or neglect did not create private cause of action because neither statute nor legislative history directly revealed any such legislative intent); Perry v. S.N., 973 S.W.2d 301, 309 (Tex. 1998) (holding, in action based on failure to report abuse allegedly witnessed at day-care center, that violation of child abuse reporting statute was not negligence per se); *Arbaugh*, 591 S.E.2d at 241 (holding that child abuse reporting statute did not give rise to implied private civil cause of action); Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons and Abused Children?*, 40 SANTA CLARA L. REV. 991, 1022 (2000) ("Most courts, however, have declined to find a civil duty to report child abuse, whether

law to support judicial recognition of a general tort duty on parents to protect their minor children from physical harm caused by others.[13]

The evolving *Restatement (Third) of Torts* ("*Restatement*") does not recognize the parent-minor child relationship as an exception to the basic no-duty-to-rescue rule,[14] though the American Law Institute has been urged to endorse such language.[15] According to the Reporters for the new *Re-*

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based on the reporting statute or common law."); *see also* Singley, *supra* note 3, at 237 ("[C]ontend[ing] that imposing civil liability upon mandatory reporters for failing to report suspected abuse is counterproductive to protecting children at risk; current criminal sanctions are sufficient to compel compliance by reporters.").

13. Some cases indicate that plaintiffs argue the existence of a duty of care owed by a parent to a minor child. *See* Cambridge Mut. Fire Ins. Co. v. Perry, 692 A.2d 1388, 1390-91 (Me. 1997) (holding that intentional injury exclusion did not bar insurance coverage where child alleged that defendant mother failed to protect her from sexual abuse by father); *see also* Gen. Accident Ins. Co. of Am. v. Allen, 708 A.2d 828, 835 (Pa. Super. Ct. 1998) (ruling that insurance company was required to defend wife from allegations that she failed to protect her husband's children from sexual abuse by her husband).

14. *See generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005) (stating that actor whose conduct has not created risk of physical harm does not have duty of care unless court determines that one of exceptions is applicable).

> According to Section 40 of the *Restatement (Third) of Torts*, which discusses "Duty to Another Based on Special Relationship with the Other":
>
> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
>
> (1) a common carrier with its passengers,
>
> (2) an innkeeper with its guests,
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> (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
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> (4) an employer with its employees who are:
>
> (a) in imminent danger; or
>
> (b) injured and thereby helpless,
>
> (5) a school with its students,
>
> (6) a landlord with its tenants, and
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> (7) a custodian with those in its custody, if:
>
> (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and
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> (b) the custodian has a superior ability to protect the other.

Id. § 40.

15. *See* Am. Law Inst., *Discussion of Restatement of the Law Third, Torts: Liability for Physical Harm (Basic Principles)*, 2004 A.L.I. PROC. 378. Professor Mary Coombs of Florida, urging the American Law Institute to recognize the parent-minor child relationship as an exception to the basic no-duty-to-rescue rule, stated:

> I understand there is always this tension in a Restatement between simply restating what is and trying to move the law forward. Let me urge you to move more towards moving the law forward in terms of familial relationships, parents and minor children, in § 41, either by including it as a subsection or, at least when you have Comment *n* on duty of custodians, to include the familial material, the parents as custodians . . . .

Id. at 432. One of the authors of this Article, Professor Vincent R. Johnson, said:

statement,[16] aside from a few cases cited in the notes,[17] "there has been almost no judicial consideration of the affirmative duties of family members to each other."[18] The commentary to the *Restatement*, however, clearly invites doctrinal development, stating: "One likely candidate for an addition to recognized special relationships is the one among family members. This relationship, particularly among those residing in the same household, provides as strong a case for recognition as a number of the other special relationships recognized in this Section."[19]

The absence of tort precedent relating to parents and minor children is less probative than might first appear. The development of case law in this area was discouraged by once vibrant, common law immunities and privileges that prevented parents from being held liable for harm to minor

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> I would like to endorse the idea of adding to the black letter an eighth subsection saying that one of the relationships that imposes a duty is an adult with a minor child standing in a close familial relationship. I don't think that would be unduly aggressive for The American Law Institute. If there is a paucity of published cases on that subject, I guess that would not bother me. I think that the law, in part, is published cases, but it's also what is taught in law schools and what appears in casebooks and treatises, and to [say] that there is a duty owed by an adult to a minor child would not be going too far, and that leaves aside other problematic familial relationships and whether there should be a duty . . . .
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> . . . I'm thinking of an example where there are divorced parents. The mother has custody during one part of the week. During that part of the week, the father sees the child on the street after school being attacked by some gang of hoodlums. I can't imagine that the father does not have a duty to intervene even though he is not in custody. I think we could go that far.

Id. at 434.

16. The Reporters include Professor Michael D. Green of Wake Forest University School of Law and Dean William Charles Powers, Jr., of the University of Texas School of Law. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM iv (Proposed Final Draft No. 1, 2005).

17. The Reporters' Note to the *Restatement (Third) of Torts: Liability for Physical Harm* states:

> [T]he only case that squarely addresses whether a family member owes an affirmative duty to other family members held an aunt did not owe an affirmative duty to her nephew. Several cases recognize the duty of custodial parents to their children. However, a number of these courts do not view the parent's duty to the child as an affirmative one. . . . Hence, these cases are not strong support for recognition of family as a special relationship imposing an affirmative duty. As well, courts in many of these cases primarily focus on whether parental immunity should be abolished and, if so, the scope of liability that remains for parents, thereby distracting attention from whether a parent has a special relationship with a child that imposes affirmative duties that go beyond providing necessary care, supervision, and provision for an unemancipated minor.

Id. § 40 Reporters' Note cmt. o (citations omitted).

18. *Id.*

19. *Id.* § 40 cmt. o.

children.[20] As a result of judicial and legislative abrogation,[21] those obstacles to recovery are now greatly reduced.[22] A type of de facto immunity, however, still lives on in certain jurisdictions. Liability insurance policies sometimes exclude from coverage injuries to family members. Those exclusions, which "may have stunted doctrinal development in this area,"[23] might continue to discourage the filing of claims.[24]

The dearth of reported cases on the question of parental civil liability should not obscure the fact that there is support for the principle that parents have a duty to protect minor children. Commentators frequently

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20. *See, e.g.*, Matarese v. Matarese, 131 A. 198, 199 (R.I. 1925) (holding that minor child could not maintain action against her father for injuries arising from auto accident). According to one court:

> The notion that a parent might be immune from liability for tortious conduct toward his or her child was not recognized in the United States until 1891, when the Supreme Court of Mississippi refused to permit a suit brought by a child against her mother, alleging that the mother had falsely imprisoned the child in an insane asylum. . . . Although the court cited no authority for this proposition, courts in all but eight other states followed Mississippi's lead and adopted some form of parental immunity.

Rousey v. Rousey, 528 A.2d 416, 417 (D.C. 1987) (declining to adopt parental immunity).

21. *See generally* RESTATEMENT (SECOND) OF TORTS § 895G(1) (1965) ("A parent or child is not immune from tort liability to the other solely by reason of that relationship.").

22. The *Restatement (Third) of Torts* expansively says that "family immunities have long been removed as an impediment to [the] development" of case law recognizing affirmative duties among family members. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. o (Proposed Final Draft No. 1, 2005). While that is true in many jurisdictions, in other states obstacles remain, particularly with respect to parental immunity, rather than spousal immunity. *See* Squeglia v. Squeglia, 661 A.2d 1007, 1013 (Conn. 1995) (finding that parental immunity bars actions based on strict liability, as well as negligence); Frye v. Frye, 505 A.2d 826, 839 (Md. 1986) (declining to abrogate parental immunity in negligence cases); *see also* Mitchell v. Davis, 598 So. 2d 801, 805 (Ala. 1992) (applying parental immunity to negligence claims against foster parents and governmental agencies acting *in loco parentis*); Nilsen, *supra* note 3, at 285 (stating that in Texas "[t]he doctrine of parental immunity will continue to bar a child's recovery from a passive parent as long as courts continue to narrowly interpret its exceptions").

23. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. o (Proposed Final Draft No. 1, 2005) (explaining potential reason for lack of precedent for family relationships as basis for affirmative duty).

24. *See* Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251, 252 (2002) (noting insurance exclusions as form of interspousal tort immunity). The author noted:

> Insurance companies for decades have included "family member exclusions" in homeowner and automobile liability policies. These exclusions provide that family members can not make claims against the policy. . . . The aim [of the exclusions] is to protect against collusive suits. Court decisions in both homeowners and automobile contexts have struck some of these exclusions down as against public policy, particularly in the automobile context.

Id.; *see also* Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 139, 156 (2005) (discussing exclusion).

recognize the parent-child relationship as imposing an affirmative duty of care.[25] Dicta in cases state that the duty exists,[26] and occasional decisions have relied upon the principle to resolve disputes.[27] For example, in *Laser v. Wilson*,[28] the high court of Maryland found that the parents of a two-year-old child, and not their hosts, who had invited the parents and their child to a family gathering, had the duty to protect the child from the obvious danger of an open stairwell.[29] In a Texas case, a trial court entered a tort verdict against a mother who had failed to protect her daughters from abuse by their father.[30] In another passive-parent case, in Minnesota, "the mother of a 21-year-old woman who was molested by her father as a child [was] found jointly liable for part of a $2.4 million jury award against him."[31]

There is good reason for courts to hold that parents have an affirmative duty under tort law to protect their minor children from serious physi-

25. *See* Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of* In Loco Parentis*: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 21 (acknowledging that in some contexts children may have right to sue their parents for negligence, in light of clear parental duty to protect children); Givelber, *supra* note 6, at 3179 (indicating that "relationships within the exception [to no-duty-to-act rule in tort law] include those where the potential victim has some special dependence on the potential rescuer, such as children to their parents"); Nilsen, *supra* note 3, at 287 (asserting that "[p]arents have a right and a duty to protect their children").

26. *See, e.g.*, Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979) (recognizing "special relationship" between parent and child).

27. *See, e.g.*, Phillips v. Deihm, 541 N.W.2d 566, 573 (Mich. Ct. App. 1995) (declaring, in action against grandmother based on her failure to prevent abuse of grandchild by grandfather, that "[a] duty can arise by statute, as well as by common law"). The court held that any "person over eighteen years of age who is responsible for a child, as defined by [statute], has a duty to act reasonably to prevent the sexual abuse of that child." *Id.*

28. 473 A.2d 523, 529 (Md. 1982).

29. *See id.* (recognizing parents' supervisory role). The court stated that the parents have a responsibility to "see that the child does not fall down steps (with or without banisters), touch hot stoves, play with matches, cut himself with kitchen knives, endanger himself by investigating the electrical contrivances endemic to our age or by the climbing propensities of most active children." *Id.*

Sometimes the expectation that parents will protect their children from harm prevents a finding that harm to a child was legally caused by a third party. *See* O'Clair v. Dumelle, 735 F. Supp. 1344, 1351 (N.D. Ill. 1990) (refusing to impose liability on homeowner for drowning of child due to *unforeseeability* of mother's failure to supervise child), *aff'd*, 919 F.2d 143 (7th Cir. 1990); Williamson v. Tyson Foods, Inc., 626 So. 2d 1261, 1266 (Ala. 1993) (holding that employer could not be held liable for injuries to child in premises liability action because failure of father to protect child from risk that was well-known to father was not foreseeable to employer).

30. *See* Nilsen, *supra* note 3, at 254-55 (citing Todd J. Gillman, *Sex Abuse Suit a Worry for Insurers: Mom, Stepdad Ordered to Pay Kids $3.4 Million*, DALLAS MORNING NEWS, Nov. 1, 1992, at 45A (discussing $3.4 million verdict entered against abusive father and passive mother for which mother was fifty percent responsible)).

31. Mark Hansen, *Liability for Spouse's Abuse: New Theory Holds Mothers Accountable for Failing to Protect Children*, 79 A.B.A. J. 16, 16 (Feb. 1993).

cal harm. Quite simply, it is morally reprehensible for parents knowingly to allow their minor child to drown, to be sexually abused or to suffer from lack of medical attention. American tort law often imposes a duty to act in cases where non-action is highly blameworthy.[32] Recognizing an obligation on parents to aid minor children to prevent serious physical harm would therefore, in an important respect, be consistent with rules that already exist. As discussed below, other arguments can also be made in favor of imposing a tort duty on parents based on well-recognized public policies relating to deterrence,[33] minimal burden[34] and community consequences.[35] It is primarily the blameworthiness of parental non-action, however, that justifies recognition of a tort duty to protect minor children.

This Article discusses the doctrinal landscape and the policy considerations relevant to the issue of parental liability under American tort law. The Article concludes that American courts should recognize a broadly applicable affirmative duty on the part of parents to aid their minor children to prevent serious physical harm.

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32. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (listing "moral blame" as factor in determining whether there is duty to act); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (3d ed. 2005) ("According to the fault principle, only if the defendant's conduct is blameworthy should liability be imposed."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 23 (5th ed. 1984) ("[I]t is undoubtedly true that in the great majority of the cases liability in tort rests upon some moral delinquency on the part of the individual."). Blameworthiness plays not just a role, but a key role, in some areas of tort law. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (stating that defendant's reprehensibility is "[t]he most important indicium of the reasonableness of a punitive damages award"). Further, in analyzing conditional fault in tort law, Robert E. Keeton notes:

> In modern Anglo-American tort law, fault has been considered the one generally acceptable reason for . . . loss shifting. For more than a century, at least, fault has been the principal theme of tort law. . . .
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> . . . .
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> . . . [I]f fault was not from the first the main theme of the common law of what we now know as torts, it came to be such before the present day.

Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 401-02, 404 (1959).

33. An argument based on deterrence is as follows:

> The deterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents. According to this principle, tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage.

JOHNSON & GUNN, *supra* note 32, at 7. For a further discussion of arguments supporting the imposition of a tort duty based on deterrence, see *infra* Part III-B.

34. For a discussion of arguments supporting the imposition of a tort duty based on minimal burden, see *infra* Part III-C.

35. For a discussion of arguments supporting the imposition of a tort duty based on community consequences, see *infra* Part III-D.

II. THE SPECIAL RELATIONSHIP BETWEEN A PARENT AND MINOR CHILDREN

In general, it is still true that:

> [T]here is no duty to render assistance to another who is in peril, no matter how easily aid might be furnished, and regardless of whether the failure to act is inadvertent or intentional. This was the law a hundred years ago, and, in the absence of an exception, it is still the rule today.[36]

In determining whether there is an exception to the general rule so that one person has an affirmative duty to protect another from physical harm, courts often reason in terms of whether there is a "special relationship." If there is a special relationship between the person on whom the duty would be imposed and the person who would be benefited, an affirmative duty obliges the one to exercise reasonable care to protect the other from harm.[37]

Although the new *Restatement* says that the words "special relationship" have no real significance other than to express the conclusion that a

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36. JOHNSON & GUNN, *supra* note 32, at 471; *see also* Murillo v. Seymour Ambulance Ass'n, 823 A.2d 1202, 1207 (Conn. 2003) (finding that hospital had no duty to prevent injury to plaintiff, non-patient, who fainted and broke her jaw while watching needle being inserted into her sister's arm); Fiala v. Rains, 519 N.W.2d 386, 389 (Iowa 1994) (holding woman not liable for failing to warn friend of her disgruntled boyfriend's violent propensities); Remsburg v. Montgomery, 831 A.2d 18, 36-38 (Md. 2003) (holding that hunting party leader had no duty to protect property owner from leader's adult son, who was hunting party member that accidentally shot and injured property owner); Entex v. Gonzalez, 94 S.W.3d 1, 5 (Tex. App. 2002) (holding that utility had no duty to inspect customer's wiring or appliances before supplying natural gas); A.H. Belo Corp. v. Corcoran, 52 S.W.3d 375, 377-78, 382 (Tex. App. 2001) (finding that television station and reporter, who had interviewed mother and her abducted child in secret location, did not have to reveal location of child to father); Rockweit v. Senecal, 541 N.W.2d 742, 745 (Wis. 1995) (holding, on public policy, rather than no-duty grounds, that family friend was not liable for campfire accident that injured child); RESTATEMENT (SECOND) OF TORTS § 314 illus. 1 (1965). The illustration provides:

> A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.

Id.

37. *See, e.g.*, K.M. *ex rel.* D.M. v. Publix Super Mkts., Inc., 895 So. 2d 1114, 1116 (Fla. Dist. Ct. App. 2005) (declining to hold, in case where employee's child was sexually abused by co-employee who was babysitting child in co-employee's home, that employer had duty to warn employee about co-employee's criminal background). The *K.M.* court acknowledged that Florida recognizes the special relationship exception to the general rule of non-liability for third-party misconduct, stating: "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . (b) a special relation exists between the actor and the other which gives to the other a right to protection." *K.M.*, 895 So. 2d at 1117 (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

duty will be imposed,[38] the words do have meaning in everyday life. In terms of common understanding, it is difficult to think of a more "special" relationship than that between a parent and a minor child. The average person would think it odd not to call that relationship "special" when contrasted with those that the *Restatement* categorizes as such.

This common understanding of the special nature of the parent-minor child relationship is reflected in the law generally,[39] and in tort law in particular, in rules that recognize that the relationship between parent and minor child is significantly different from others. In all states, for example, a parent may maintain a wrongful death action with respect to the tortious loss of a minor child,[40] and in many jurisdictions, a parent may also recover loss-of-consortium damages if the injuries to the child are not fatal.[41] In addition, tort law is considerably more willing to allow parents to recover bystander damages for emotional distress occasioned by witnessing serious injury to one's minor child[42] than in cases not involving a close familial relation.[43] It would be surprising if these parental "rights"

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38. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. h (Proposed Final Draft No. 1, 2005) ("The term 'special relationship' has no independent significance. It merely signifies that courts recognize an affirmative duty arising out of the relationship where otherwise no duty would exist . . . . Whether a relationship is deemed special is a conclusion based on reasons of principle or policy.").

39. "Statutes in every state impose a duty of financial support on parents . . . . In addition, every state has enacted child abuse and neglect laws to protect children when parents fail to meet their responsibilities." Kearney, *supra* note 8, at 412 n.26.

40. *Cf.* DAN B. DOBBS, THE LAW OF TORTS 814 (2000) (stating that all wrongful-death statutes limit beneficiaries in some way, "usually to specified family members such as spouses, children, parents, or heirs").

41. Some, but not all, jurisdictions allow the parents of an injured child to recover for financial losses (principally medical expenses), and occasionally damages for loss of companionship as well. *Compare* Gallimore v. Children's Hosp. Med. Ctr., 617 N.E.2d 1052, 1057 (Ohio 1993) (permitting recovery for loss of filial consortium, including loss of child's services, companionship, comfort, love and solace), *with* Roberts v. Williamson, 111 S.W.3d 113, 117 (Tex. 2003) (rejecting claim for filial consortium). The claim was rejected because:

> Although parents customarily *enjoy* the consortium of their children, . . . parent[s] do not depend on child's companionship, love, support, guidance, and nurture in the same way and to the same degree that a husband depends on his wife, a wife depends on her husband, or a minor or disabled adult child depends on his or her parent.

Id. (citation omitted).

42. *See* Dillon v. Legg, 441 P.2d 912, 925 (Cal. 1968) (granting relief for mother's claim for negligent infliction of emotional distress upon witnessing death of her minor child); *see also* Beck v. State Dep't of Transp. and Pub. Facilities, 837 P.2d 105, 111 (Alaska 1992) (allowing mother to sue for negligent infliction of emotional distress in case involving auto accident); Masaki v. Gen. Motors Corp., 780 P.2d 566, 576 (Haw. 1989) (holding that parents could recover emotional distress damages even though they were not present at scene of accident).

43. Lack of close familial relationship is also important in cases where infliction of emotional distress is intentional or reckless, rather than negligent. *See* Bettis v. Islamic Republic of Iran, 315 F.3d 325, 327 (D.C. Cir. 2003) (holding, in part,

or "privileges" under tort law relating to minor children were not accompanied by corresponding "obligations."

Interestingly, the new *Restatement* says that the relationship of "a parent with dependent children" is sufficiently special to impose on the parent a duty of reasonable care to protect third persons from harm by minor children.[44] If this is true, how could the same relationship not be special with respect to whether the parent has a duty to protect the minor child from harm by third persons? Is not one's child more deserving of protection than a stranger?

The new *Restatement* also recognizes, for the first time expressly, that a school has a duty to protect its students from harm.[45] According to the commentary, one of the reasons for imposing such a duty is that the school "acts partially in the place of parents."[46] If the school—standing *in loco parentis*[47]—has an affirmative duty to students, then one might argue, *a fortiori*, that parents also have an affirmative duty to their minor children.

III. PUBLIC POLICY

When faced with an absence of precedent in dealing with difficult questions, it is appropriate for courts to consider the public policies that have shaped American tort law. In doing so, courts ordinarily should strive to resolve unsettled questions in ways that are consistent with the existing fabric of the law and that reflect the values that have been embraced by prior decisions and legislation.

Among the policy considerations typically deemed relevant to whether a duty to act should be imposed are "the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of

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that nieces and nephews of victim who was kidnapped and tortured by state-sponsored terrorist group could not recover bystander damages on tort of outrage claim because they were not members of victim's immediate family).

44. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §§ 41(a)-(b) (Proposed Final Draft No. 1, 2005). The *Restatement* provides:

> (a) An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
>
> (1) a parent with dependant children . . . .

Id.

45. *See id.* § 40(b)(5) Reporters' Note to cmt. l (stating that *Restatement (Second) of Torts* did not identify student-school relationship as explicitly imposing affirmative duty).

46. *Id.* § 40 cmt. l ("The relationship between a school and its students parallels aspects of several other special relationships—it is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents.").

47. *In loco parentis* means "in the place of a parent . . . taking on all or some of the responsibilities of a parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

imposing a duty to exercise care with resulting liability for breach."[48] These four factors—blameworthiness, deterrence, burden and community consequences—all argue in favor of judicial recognition of an affirmative duty on parents to safeguard minor children from harm inflicted by third parties or caused by other sources independent of the parent.[49] Also relevant to the question of duty, in some cases, is "the availability, cost, and prevalence of insurance for the risk involved."[50] As discussed below, however, the possible unavailability of insurance for injuries to family members offers no compelling reason for courts to decline to impose a tort duty running from parent to minor child. Losses resulting from highly blameworthy conduct should not be spread to innocent policyholders, but should fall on the culpable party.

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48. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

49. For a further discussion of parental liability for nonfeasance, see *supra* note 1 and accompanying text.

50. *Rowland*, 443 P.2d at 564. Courts also indicate that among the numerous factors to be balanced in determining whether a legal duty exists are the "foreseeability of harm to the plaintiff, . . . the closeness of the connection between the defendant's conduct and the injury suffered, . . . [and] the degree of certainty that the plaintiff suffered injury . . . ." Mostert v. CBL & Assocs., 741 P.2d 1090, 1094 (Wyo. 1987) (quoting Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976)). These policy considerations are not discussed separately here. Foreseeability—and the failure to avoid foreseeable harm—can be regarded as merely an aspect of culpability. *See generally* W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739 (2005) (arguing that foreseeability should be purged from duty analysis); W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921 (2005) (arguing that foreseeability is more properly related to the issues of breach and causation). Close connection, or rather the lack thereof, may be more sensitively addressed under the issue of proximate causation, rather than under duty. Certainty of injury is generally only a concern when there is some risk that the plaintiff has not suffered any harm, as in the case of alleged emotional distress unaccompanied by physical injury. None of these points are particularly troubling with respect to whether a parent should have a duty to rescue a minor child from a risk of physical harm of which the parent is or reasonably should be aware.

Another policy consideration concerns victim compensation. The consideration is as follows:

> There is a strong public interest in insuring that accident victims obtain the financial resources needed to overcome the injuries they have sustained. Proponents of this view argue that tort rules should be crafted and applied with an eye toward this goal, even if that means diminished respect for the fault or proportionality principles or other tort policies.

JOHNSON & GUNN, *supra* note 32, at 9. Addressing the issue of child abuse, one author wrote, in terms applicable to the issue under discussion here:

> 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 long-lasting psychological as well as physical scars from abuse.

Kearney, *supra* note 8, at 429.

A. *Moral Blameworthiness*

There is a strong commitment in American society and American law to protecting children from unnecessary harm.[51] That commitment is reflected in many things, including, among others, vaccination laws,[52] abuse-reporting statutes,[53] prohibition of child pornography,[54] participation in the international convention against child abduction[55] and the availability in many cities of shelters for battered women and children.[56]

If one assumes that the duty in question would apply only if: (1) the minor were threatened by *serious* physical harm; (2) would be imposed only if the parent *knew or should have known* of that risk;[57] and (3) would require only the exercise of *reasonable* care, it is difficult to see how parental inaction could be termed as anything other than blameworthy. Any doubt that one might have would be put to rest by a review of the statistics relating to child abuse and neglect.[58] The numbers show, among other things, that "[a]n estimated 906,000 children were determined to be vic-

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51. There is evidence that this has long been the case. *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 189 (1921) ("The individual interest of parents which used to be the one thing regarded [significant by courts] has come to be almost the last thing regarded as compared with the interests of the child and the interests of society.").

52. *See* Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children*, 37 U. MICH. J.L. REFORM 353, 353 (2004) (indicating that all fifty states have enacted compulsory childhood vaccination laws to stop spread of preventable diseases).

53. For a discussion of how abuse-reporting statutes have operated, see *supra* note 4 and accompanying text.

54. *Cf.* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001) ("Child pornography law is the least contested area of First Amendment jurisprudence.").

55. *See* Elizabeth Ising, Note, *Refusing to Debate Wheaties Versus Milchreis:* Blondin v. Dubois *and the Second Circuit's Interpretation of the Hague Abduction Convention's Grave Risk Exception*, 25 N.C. J. INT'L L. & COM. REG. 619, 620 (2000) ("The United States enacted the Hague Abduction Convention with the hopes of '[sparing] children the detrimental emotional effects associated with transnational parental kidnapping.'") (citation omitted).

56. *See* Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 625 n.111 (2000) (indicating that "[i]n the 1980s, Congress finally began to support battered women's shelters through funding by passing the Family Violence Prevention and Services Act of 1984"); Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 248-49 (1994) ("'[S]afe houses, refuges and shelters have become the cornerstone of treatment for battered women who do not wish to return home.' Shelters . . . provide women with immediate safety for themselves and their children.") (citation omitted).

57. *Cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41 cmt. c (Proposed Final Draft No. 1, 2005) ("If the actor neither knows nor should know of a risk of harm, no action is required.").

58. *Cf.* Jonathan J. Hegre, Note, *Minnesota "Nice"? Minnesota Mean: The Minnesota Supreme Court's Refusal to Protect Sexually Abused Children in* H.B. *ex rel.* Clarke v. Whittemore, 15 LAW & INEQ. 435, 438-42 (1997) (discussing nature and effects of child sexual abuse in Minnesota and nationwide).

tims of child abuse or neglect for 2003" and that "[m]ore than 60 percent of child victims were neglected by their parents or other caregivers."[59] During the prior year, an estimated 1400 children died of abuse and neglect.[60]

B. *Preventing Future Harm*

There is a difference between specific deterrence and general deterrence. At the specific or individual level, a rule obliging parents to protect their minor children from harm probably does no good at all. The parent who is unmoved by the bonds of parenthood to render assistance to an endangered minor child probably will not be swayed by a rule creating a threat of tort liability. There may be nothing that can be done to move the irresponsible or unfeeling parent. Yet, at the same time, at a general or societal level, a rule recognizing a duty on the part of parents to protect minor children makes a desirable statement about values. It says that children are important, that parents have responsibilities, that it is right to expect parents to promote the welfare of their children and that the force of the law stands behind these moral imperatives. In that type of environment, people are less likely to tolerate abuse of children—in the home, at the nursery, in school or in the workplace. And in that type of environment, children are less likely to be harmed on aggregate. Moreover, a decision imposing liability on a parent who fails to aid a minor child sends a clear message to other parents that such irresponsibility is inappropriate and will not be tolerated.[61]

A no-duty rule sends the wrong message—a message of indifference or disregard for the welfare of children. There is little chance that a no-duty rule will make life safer for children. Nevertheless, a rule recognizing an affirmative duty running from parent to minor child may make life less dangerous generally for children as a whole. Even if there is no hope of swaying the individual actor (at the specific deterrence level), the choice of the rule best calculated to avoiding harm to all children (in terms of general deterrence) is clear.

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59. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMINISTRATION ON CHILD, YOUTH AND FAMILIES, CHILD MALTREATMENT 2003 xiv (2005), http://www.acf.hhs.gov/programs/cb/pubs/cm03/index.htm.

60. "The National Child Abuse and Neglect Data System (NCANDS) reported an estimated 1,400 child fatalities in 2002." NAT'L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, CHILD ABUSE AND NEGLECT FATALITIES (2004), http://nccanch.acf.hhs.gov/pubs/factsheets/fatality.cfm.

61. *See* Kearney, *supra* note 8, at 434-35 ("Imposing tort liability on adults who fail to use reasonable care to prevent abuse in the home" would "discourage abuse," serve as a "public acknowledgment that the adult was a wrongdoer" and encourage others to take preventative steps, thus, deter "future inaction and help to prevent future abuse.").

C. *Burden on the Defendant*

Whatever burden would be imposed on a parent by a duty to aid a minor child would be insignificant in the eyes of the law. In many cases, the burden would be nothing more than was expected when the relationship commenced—simply part of the bargain of embarking on a parent-child relationship. That type of burden is minimal, and in such cases it would be hard to feel sorry for the parent on grounds that the duty is too great to bear.

A significant exception to this analysis is the case of an abused spouse who is also aware that the abusive spouse is victimizing their minor child. It might be quite difficult for the abused spouse to summon the courage to protect the child. Yet the burden the law would impose is to do only what is reasonable under the circumstances, nothing more. Due allowance for the burden of action can be made in such cases—not by saying there is no duty, but by saying that, in some instances, there is no breach. Spousal abuse, like other forms of physical and psychological violence, is a question of degree. There is no reason to assume that all abused spouses wholly lack the ability on all occasions to do anything to safeguard their minor children from physical harm. To indulge that assumption would result in removing the incentive that tort law can provide for the abused spouse to act responsibly, and that the law should not do. Of course, tort law should require nothing more than is reasonable. In extreme cases, a court may need to rule that there is no breach as a matter of law, but otherwise the question of reasonableness should be left to the jury. The imposition of a duty of reasonable care, even in cases of domestic violence, offers a more appropriate tool for balancing feasibility of action and gravity of need, than a no-duty rule exempting all abused spouses from any obligation to protect their minor children.

Obliging a parent to act to protect a child from physical harm is, in many respects, as minimally intrusive and as precisely focused as a duty could be. The duty would not entail officious intermeddling by a stranger. It would run to the benefit of a very limited and clearly identified class of persons. And it would be triggered only by facts establishing a serious risk of physical harm.

In any event, it might be impossible for the law to say that placing a duty on parents to protect minor children imposes on parents an *undue* burden. Raising a child has costs—both economic costs[62] and opportunity costs. Yet the benefits of the relationship—the joy of being a parent, as well other incidental benefits—usually outweigh those costs. In cases where medical negligence causes unwanted pregnancy, courts have generally denied recovery of child-rearing costs, due primarily to the impossibil-

62. *See* Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167, 214-15 (discussing problems in tracking costs of raising children).

ity of calculating their measure.[63] The courts find that it is impossible to state whether the "parents have sustained a net loss or a net gain."[64] Similarly, how would one know, with respect to the parental-duty issue, whether an undue burden has been imposed or whether the benefits of the relationship still far outweighed the costs? To say that the duty to protect the child would impose undue burdens would be pure speculation.

D. *Consequences to the Community*

The consequences to the community of imposing a legal duty on parents to protect their minor children from serious harm would be salutary. The rule would reinforce widely recognized moral obligations and would be minimally intrusive into the affairs of everyday life. Recognition that parents have a duty to protect minor children from risks of serious physical harm would require no new institutions, no new practices and no particular expenditures for training, education or enforcement. In short, the rule would fit as seamlessly with existing arrangements as is possible.

The consequences to the community would likely be greater respect for the welfare of children and, hopefully, an overall reduction in the costs that attend the victimization of minors. Would parents live in fear of being sued by their children? Certainly not. The law accords parents broad discretion with respect to discipline and other child-rearing issues, and it would be difficult to prove negligent failure to act.[65] Equally important,

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63. Regarding the recoverability of child-rearing costs in unwanted-pregnancy cases, one court recently summarized the state of the law, as follows: four jurisdictions adhere to the full recovery rule; five jurisdictions subscribe to the benefits rule (pursuant to which costs are recoverable to the extent that they exceed the benefits of the parental relationship); and thirty-one jurisdictions subscribe to a no-recovery rule regarding child-rearing expenses, limiting damages to pregnancy and child-bearing expenses. *See* Chaffee v. Seslar, 751 N.E.2d 773, 780 nn.7-9 (Ind. Ct. App. 2001), *rev'd*, 786 N.E.2d 705 (Ind. 2003). In *Chaffee*, the Indiana Supreme Court held that recoverable damages in connection with allegedly negligent sterilization may not include the ordinary costs of raising and educating a normal, healthy child. *Id.* at 709.

64. McKernan v. Aasheim, 687 P.2d 850, 855 (Wash. 1984).

65. *See* RESTATEMENT (SECOND) OF TORTS § 147(1) (1965) (stating that "[a] parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education"); *see also* Broadwell v. Holmes, 871 S.W.2d 471, 476-77 (Tenn. 1994) (restricting parental immunity under state law "to conduct that constitutes the exercise of parental authority, the performance of parental supervision, and the provision of parental care and custody"); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (stating that judicial system will not "disrupt the wide sphere of *reasonable discretion* which is necessary in order for parents to properly exercise their responsibility to provide nurture, care, and discipline for their children") (emphasis added); Plainview Motels, Inc. v. Reynolds, 127 S.W.3d 21, 41-42 (Tex. App. 2003) (stating that "parents have immunity from their child's cause of action for injuries arising out of essentially parental activities involving issues of (1) supervision, (2) discipline, (3) provision of a home, (4) provision of food, (5) schooling, (6) medical care, (7) recreation, and (8) family chores"); Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963) (abolishing parental

no lawyer is likely to represent a child against a parent on a contingent-fee basis if the facts are less than egregious.[66] That reality greatly diminishes the risk of frivolous suits. Indeed, if a meritless claim is brought on behalf of a minor child, perhaps incidental to an unhappy divorce, the usual penalties for frivolous litigation may be employed to address that problem.[67] Consequently, if all that a parent has to fear is the remote possibility of being found to have acted beyond the broad bounds of parental discretion, then it is probably good for the law to create that apprehension.

E. *Availability of Insurance*

Provisions in liability insurance policies sometimes exclude injuries to family members from coverage.[68] Do such provisions undercut judicial recognition of a duty on the part of parents to aid minor children? Probably not. Such exclusions sometimes do not apply, and even if they do, insurance is not the only asset from which a judgment can be collected.[69]

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immunity, except when act involved "an exercise of parental authority . . . [or] ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care"). The law has long recognized the broad discretion of parents. *See* Lander v. Seaver, 32 Vt. 114, 122 (1859) (stating, in dicta, in suit against schoolmaster, that "[t]he parent, unquestionably, is answerable only for malice or wicked motives or an evil heart in punishing his child . . . [and] [t]his great and to some extent irresponsible power of control and correction is invested in the parent by nature and necessity"). The issue of parental discretion also has constitutional dimensions. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing fundamental rights of parents to decide how to educate their child).

66. *Cf.* PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 8-9 (1997) (discussing how plaintiffs' attorneys screen cases).

67. It is possible that one parent might try to retaliate against another parent by filing a bogus failure-to-protect lawsuit on behalf of a child. Those types of abuses can be addressed through the usual means of dealing with meritless claims. It makes no more sense to say that a duty to protect minor children should not be recognized because someone might frivolously allege a violation than to say that private property rights should not be recognized because someone might try to steal the property. The law should be shaped to reflect the highest values of society rather than its worst fears. If courts and legislatures craft sensible rules, abuses of those rules can be handled as they always have been.

68. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 114:24 (3d ed. 1997) (stating that "[t]he policy may exclude coverage with respect to injuries sustained by a relative of the insured and of the named additional insureds"); *see also supra* note 24 and accompanying text (discussing family exclusions in automobile and homeowner insurance policies).

69. *Cf.* Kerney, *supra* note 8, at 454 (suggesting that courts should not insulate from liability those parents who have insurance or assets by creating blanket policy that children cannot recover from parents). Kerney suggests that the assumption that most parents who could be held liable for failure to protect their children do not have assets or insurance to cover the judgment award has been proven erroneous:

> In *Elliott v. Dickerson* and *Richie v. Richie*, the courts allowed daughters to recover from their mothers for failure to protect them from sexual abuse by their father and stepfather, respectively. In both cases, the mothers' homeowners insurance policies provided the means of recovery. . . . Even

Moreover, it is arguable that the unavailability of insurance is irrelevant on other grounds. Whether a device for spreading losses (such as insurance) is available is only significant if the loss is of the kind that should be spread. Losses caused by highly blameworthy conduct are not of that variety.[70] In such instances, the culpable defendant should suffer the loss, not spread it to innocent members of the community.[71] Because the failure of a parent to aid a child in known distress is highly blameworthy, the loss should fall on the parent, and therefore, the possible unavailability of insurance is irrelevant to the duty question.

In some instances, insurance may be available to cover a minor's failure-to-protect claim for negligence. In that case, would there be an undue risk of the parent and child fabricating a cause of action? The risk seems no greater than is true in many other cases involving tort claims by children against parents. The possibility of fraudulent claims has generally been found to be insufficient grounds to immunize parents from suit.[72]

> 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.

Id. (footnotes omitted).

70. *But see* Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 126 (2001) (arguing that mandatory insurance should be used to spread costs of domestic violence and that liability policies should "require that insureds reimburse insurers for payments they make for domestic violence torts").

71. *See* Boyles v. Kerr, 855 S.W.2d 593, 604 (Tex. 1993) (Gonzales, J., concurring) (declining to recognize claim for negligent infliction of emotional distress in case of surreptitious videotaping of sexual relations). Justice Raul Gonzalez justified the court's decision on the premise that the public should not be required to compensate for intentional harm, stating:

> In Texas, a home owners policy covers only accidents or careless conduct and excludes intentional acts. . . . Thus, this case has a lot to do with a search for a "deep pocket" who can pay. If the purpose of awarding damages is to punish the wrongdoer and deter such conduct in the future, then the individuals responsible for these reprehensible actions are the ones who should suffer, not the people of Texas in the form of higher insurance premiums for home owners.

Id. at 604.

For similar reasons, some states hold that insuring punitive damage awards would §frustrate public policy. *See, e.g.*, Peterson v. Superior Court of Ventura County, 642 P.2d 1305, 1310 (Cal. 1982) (noting that insurance policies do not include coverage for punitive damages); Johnson & Johnson v. Aetna Cas. & Sur. Co., 667 A.2d 1087, 1091 (N.J. 1995) (stating that insurance coverage for punitive damages is limited as matter of public policy); Hartford Accident & Indem. Co. v. Hempstead, 397 N.E.2d 737, 744 (N.Y. 1979) (proscribing insurance coverage for punitive damages in civil rights cases in furtherance of public policy). *But see* Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 189 (Tex.§ App. 2004) (declining to hold that insurance coverage for punitive damages violates public policy).

72. *See* Rousey v. Rousey, 528 A.2d 416, 420 (D.C. 1987) (noting that possibility of fraud is not alone sufficient to warrant denial of recovery to minor children). In refusing to adopt parental immunity, the court wrote:

> Although there is a possibility that parent and child may conspire to defraud the insurance carrier or that the parent may fail to cooperate with the carrier as required under the insurance contract, that possibility ex-

The same would seem to be true here. Courts could employ the usual fact-finding mechanisms—including adversarial presentation of the facts and cross examination—to distinguish valid claims from fraudulent ones. And insurance companies who fear the risk of trumped up lawsuits can exclude injuries to family members from coverage.[73]

IV. IMPACT ON CLAIMS AGAINST THIRD PARTIES

Will judicial recognition of an affirmative duty on the part of parents to minor children impair a minor child's claim against a third party? If so, would recognition of that duty then have the perverse effect of placing the child in a less favorable position by reason of substituting a possibly uninsured claim against the parent (due to the family member exclusion)[74] for a portion of the child's claim against a third party, which might have been covered by insurance?

It is clear that the parent's negligence will not be imputed to the child as contributory negligence in an action against a third party.[75] Even if imputed contributory negligence is not a concern, however, recent modifications in the traditional rules of joint and several liability warrant consideration.

Under the traditional rules of joint and several liability, if a third person causes harm to a child and another person with a duty to the child (e.g., the parent) negligently fails to exercise care to render aid causing matters to become worse, the third party will be severally liable for the initial component of damages.[76] The third party and the parent will be jointly and severally liable for the aggravation of the damages.[77] In many

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ists to a certain extent in every case; it hardly justifies a "blanket denial of recovery for all minors."

> We constantly depend on efficient investigations and on juries and trial judges to sift evidence in order to determine the facts and arrive at proper verdicts. As part of the fact-finding process, these triers of fact must "distinguish the frivolous from the substantial and the fraudulent from the meritorious." . . . Experience has shown that the courts are quite adequate for the task.

Id. (citations and footnotes omitted) (quoting Sorensen v. Sorensen, 339 N.E.2d 907, 914-15 (Mass. 1975)).

73. *See* Wriggins, *supra* note 24, at 252 (noting commonality of family member exclusions in insurance policies).

74. For a discussion of family member exclusions from insurance policies, see *supra* note 24 and accompanying text.

75. *See* W. Union Tel. Co. v. Hoffman, 15 S.W. 1048, 1048 (Tex. 1891) (holding that father's negligence barred father's loss of consortium claim, but would not be imputed to child to bar child's personal injury claim); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 5 cmt. b (2000) (stating that "[t]he negligence of a parent is not, on that basis alone, imputed to a child").

76. *See* RESTATEMENT (SECOND) OF TORTS §§ 433A-434 (1965) (setting forth traditional tort liability rules).

77. Similarly, if the third-party tortfeasor does not cause harm prior to the parent's failure to render aid but merely sets the stage for the harm to occur and the harm later occurs because the parent fails to act, the third party and the par-

jurisdictions, however, the traditional rules on joint and several liability have been substantially revised.[78] In some states, liability today for the aggravated damages component of harm might not be joint and several, but rather apportioned severally among the various tortfeasors (the third party and the parent). This may be true even if the parent has not been made a party to the suit[79] or has settled with the child.[80] In the abstract, however, even if one assumes that the parent's liability will not be covered by insurance—which may not be the case[81]—it is impossible to say with any degree of certainty that a child will be substantially disadvantaged by reason of judicial recognition of a claim against the parent.

First, the claim against the third party may not be covered by insurance, in which case an uninsured claim is not being substituted for an insured one.[82] Second, the share of the total fault allocated to the parent

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ent, under traditional rules, would be jointly and severally liable on the ground that their multiple tortious acts caused indivisible harm. *See id.* § 433A (stating that harm may be apportioned among two or more parties only where "there is a reasonable basis for determining the contribution of each cause to a single harm").

78. The once widely endorsed rules on joint and several liability have been greatly altered, usually by legislation. In an effort to make sense of the tangled state of the law, the *Third Restatement* identifies five basic patterns of liability for multiple tortfeasors, and it devotes a separate "track" to each of these five models. The tracks are: (a) joint and several liability, (b) pure several liability, (c) joint and several liability with reallocation of an insolvent defendant's liability, (d) hybrid liability based on threshold percentages of comparative responsibility and (e) hybrid liability based on type of damages. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000) (describing various approaches to issue of joint and several liability).

79. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.003(a)(4) & 33.004 (Vernon 2003) (permitting allocation of fault to designated third party even if party has not been joined); Marler v. Scoggins, 105 S.W.3d 596, 597 (Tenn. Ct. App. 2002) (permitting assignment of fault to unidentified "phantom" driver).

80. *See* Smiley v. Corrigan, 638 N.W.2d 151, 154 (Mich. Ct. App. 2001) (permitting golf instructor to introduce evidence concerning fault attributable to driving range and fellow patron, both of whom had settled with plaintiff).

81. Sometimes a parent's negligent failure to protect a minor child from harm will be covered by insurance. *See* Hansen, *supra* note 31, at 16 (stating, in discussion of two suits where mother and father were held liable based on fathers' sexual abuse of children and mothers' failure to act to prevent abuse, that "both couples have homeowners' insurance policies that, while excluding coverage for intentional wrongdoing, do cover claims for negligence").

82. *Cf.* Cambridge Mut. Fire Ins. Co. v. Perry, 692 A.2d 1388, 1390-91 (Me. 1997) (holding that intentional injury exclusion did not bar insurance coverage where child alleged that defendant mother failed to protect them from sexual abuse by father); Gen. Accident Ins. Co. of Am. v. Allen, 708 A.2d 828, 834-35 (Pa. Super. Ct. 1998) (holding that, where father sexually abused his children, insurance did not cover claim against father, but did cover claims against father's wife for negligent failure to protect children from harm); Carolyn L. Mueller, Comment, *Ohio Homeowners Beware: Your Homeowner's Insurance Premium May Be Subsidizing Child Sexual Abuse*, 20 U. DAYTON L. REV. 341, 346 (1994) (indicating that in majority of states "child sexual abuser's homeowner's insurance company does not have a duty to indemnify the insured").

may be small, so that the substitution is not significant.[83] Third, the nature of the injurious acts may be such that, under state law, the third party is liable for all of the aggravation, even though the parent is liable for a portion of the aggravation.[84] In that case, the child is not worse off. Fourth, if the share of the damages allocated solely to the parent is uncollectible, the court may have power to reallocate that share of liability to the third party tortfeasor, so that there is no net loss.[85] Fifth, the parent may be solvent and the third-party may be judgment proof, in which case the child is in a better position. Finally, recognizing tort liability on the part of parents might spur insurance companies to offer new insurance coverage or interpret existing policies in a manner that would address such losses.[86]

Recognizing a legal duty on the part of parents to aid minor children may indeed affect the apportionment of liability in a personal injury suit brought by the child against a third person. Sometimes the child will be better off, and sometimes the child will be worse off. Much will depend upon the particular facts, as well as upon the rules in the jurisdiction. As a matter of principle, however, considerations relating to allocation of liability offer no persuasive reason for courts to eschew judicial recognition of an affirmative duty owed by parents to minor children.

V. THE SIGNIFICANCE OF CUSTODY

Dicta in a Minnesota case discussing the issue of duty to act states that there is a "special relationship . . . between parents and children."[87] That statement has been widely repeated in later Minnesota decisions, some of which have interpreted it as imposing a duty on *custodial* parents.[88] Other cases, however, make no reference to limiting the special relationship to cases involving custody and speak simply of parents generally.[89] The ques-

83. For example, if the fault of the parent is failure to protect a child from an abusive relative, the lion's share of the fault may be allocated to the abuser.

84. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon 2003) (stating that notwithstanding general rule of several liability, defendant whose acts constitute certain enumerated criminal offenses—including, for example, injury to child—is jointly and severally liable for damages recoverable by claimant).

85. *See, e.g.*, UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 135-36 (1996) (permitting reallocation of uncollectible share of obligation).

86. *See* Am. Law Inst., *supra* note 15, at 432 (recording comments of Mary Coombs, stating "[i]f the Institute suggested that there was tort liability, that might encourage the insurance companies to pay up when a parent lets their child drown").

87. Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979).

88. *See* Lundman v. McKown, 530 N.W.2d 807, 820 (Minn. Ct. App. 1995) (stating that "[a] custodial parent has a special relationship to a dependent and vulnerable child that gives rise to duty to protect the child from harm"); *see also* Sunnarborg v. Howard, 581 N.W.2d 397, 399 (Minn. Ct. App. 1997) (quoting above language from *Lundman*).

89. *See, e.g.*, Johnson v. State, 553 N.W.2d 40, 49 (Minn. 1996) (speaking generally of special parent-child relationship that imposes duty on parent to prevent

tion therefore arises as to whether the affirmative duty owed by parents to minor children is, or should be, limited to custodial parents.[90] The question has broad significance because, as a result of widespread divorce and re-marriage, American families now reflect a variety of custodial arrangements for children.

Some courts have found that lack of custody is a significant factor when the issue concerns whether a parent may be held liable for harm caused to a third party by a child. In that case, "considering the difficulty and emotion that often attend custody arrangements, imposing a duty to supervise upon a non-custodial parent would unnecessarily interject additional tension into the domestic relations arena."[91] Thus, for example, one court held that a divorced father could not be held liable for negligently failing to prevent his son from shooting another child with a BB gun while the son was in the custody of his mother.[92] When, however, the issue concerns whether aid should be provided to prevent serious harm to a minor child rather than whether the child should be controlled to prevent harm to third persons, considerations relating to legal custody seem less probative. The question is not which parent has custody of the child at the time the need arises, but rather which parent has knowledge of the facts establishing the need for action. Surely, a divorced parent who sees a child injured in an accident at a time when the parent does not have legal or physical custody should have a duty to render assistance to the child. It

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harm to child); Gaines-Lambert v. Francisco, No. A03-1489, 2004 WL 1244337, at *3 (Minn. Ct. App. June 8, 2004) (observing that defendant typically has no duty to control third person unless special relationship exists between defendant and third person, such as that between parent and child); Meyer v. Lindala, 675 N.W.2d 635, 639-40 (Minn. Ct. App. 2004) (same).

90. There are strong grounds for arguing that a parent who is a custodian of a minor child has an affirmative duty to protect the child by reason of the custodial relationship. According to the *Third Restatement*, among the special relationships that impose a duty of reasonable care is the relationship of "a custodian with those in its custody, if: a) the custodian is required by law to take custody or voluntarily takes custody of the other; and b) the custodian has a superior ability to protect the other." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 (Proposed Final Draft No. 1, 2005); *see also* Lane v. Kentucky, 956 S.W.2d 874, 877 (Ky. 1997) (Cooper, J., concurring) (stating that "the unique legal duty which a parent has to protect his child from harm arises from the 'special relationship' which exists between any custodian and the person in his custody"). The question is whether the parental relationship imposes an affirmative duty broader or greater than the duty ordinarily imposed on custodians.

91. K.H. v. J.R., 826 A.2d 863, 875 (Pa. 2003) (declining to extend liability against father who had supplied BB gun to son, who injured another child, because child was not under father's supervision at time of shooting). At the time of the incident, the shooter's father had legal custody and shared physical custody of the shooter, had purchased the BB gun and had allowed the shooter to take it to his mother's home. *See id.* at 866 (stating facts). Nevertheless, recovery against the father was denied because the shooter was in the mother's custody at time of the shooting. *See id.* at 875. Note that *K.H.* was not a case of nonfeasance; the father's actions significantly contributed to the risk of harm.

92. *See id.* (declining to extend liability).

should not be an excuse that at the moment of the accident the parent was custodially "off duty." Viewed from the perspective of public policy—blameworthiness, deterrence, burden and community consequences—the desirability of parental action in that situation is just as great regardless of whether the parent officially has custody of the child or not.

Custody may bear upon the determination of what type of action is reasonable. For example, it might be reasonable for a non-custodial parent to defer action to aid an injured child if the custodial parent is already in the process of rendering aid. In other cases, however, it might be reasonable to expect a non-custodial parent to act, as where the non-custodial parent has clear evidence that the custodial parent is physically abusing the child. Parental custody may be a relevant factor in deciding whether a parent has acted reasonably, but it should not be determinative of whether a parent has an affirmative duty to act.

VI. CONCLUSION: A PRECISELY TAILORED SPECIAL RELATIONSHIP

Some commentators have argued that imposing a civil duty on adults generally to report knowledge of child sexual abuse, or take other appropriate action, is or may be warranted.[93] That is a very important issue, but it is different than the one addressed in this Article. The question here is not whether *any* adult (or any adult within a broadly defined class) should have a duty to *any* child to guard against *one* type of harm, but rather whether a very *specific category* of adults (parents) should have a duty to a *very specific* class of children (their own minor children) to exercise reasonable care to prevent *all* forms of serious physical harm. The duty discussed in this Article sweeps more narrowly and precisely (in terms of identifying the obligor and the beneficiary) than would a duty placed on adults generally to report or prevent child abuse. A court could recognize a parental duty to protect minor children without endorsing a broad duty on adults generally to act reasonably to respond to child abuse.

In addition, the duty endorsed here is broader than a "parents-only" obligation to report or prevent abuse of a minor child by a spouse or a third person. Some writers have favored the imposition on parents of that

93. *See* Frankin & Ploeger, *supra* note 12, at 1020-25 (stating reasons why "a civil duty to report child abuse may be warranted"); Kearney, *supra* note 8, at 406-07 (arguing that current tort law fails to protect children adequately and that adults who know or reasonably should know of on-going child abuse should have duty to take affirmative steps to protect child). Other writers have made narrower proposals urging that (only) in certain situations should adults have a duty to report abuse. *See* Hegre, *supra* note 58, at 462-63, 470 (suggesting that imposition of liability for failure to protect minor is dependent on facts of specific case).

type of anti-child-abuse duty,[94] and others have opposed it.[95] The duty proposed in this Article has a broader reach because children can be victimized by many types of harm that might not qualify as child abuse. One example is the drowning of a child who needs to be rescued. If the circumstances are such that the parent knows or should know that the child is faced with a serious risk of physical harm, the parent should be obliged to exercise reasonable care to prevent the harm or remedy the damage.

Courts and legislatures have declined to impose a duty to act for various reasons. Such reasons are that: the individual on whom the duty would be imposed has an overriding interest in freedom from obligation; other incentives are sufficient to produce desired results; tort law's sanctions might be too severe; or it would be difficult to determine which of several potential actors should step forward.[96] These considerations have

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94. *See* Barbara A. Micheels, Comment, *Is Justice Served? The Development of Tort Liability Against the Passive Parent in Incest Cases*, 41 ST. LOUIS U. L.J. 809, 818-20 (1997) (urging uniform recognition in all states of passive-parent liability in incest cases); Nilsen, *supra* note 3, at 293 (arguing that "[c]ourts must act and send a message to parents that they can no longer stand by and allow the other parent to victimize their children").

95. *See* Karen D. McDonald, Note, *Michigan's Efforts to Hold Women Criminally and Civilly Liable for Failure to Protect: Implications for Battered Women*, 44 WAYNE L. REV. 289, 305-06 (1998) (arguing that because of strong link between spousal abuse and child abuse, imposing duty on passive spouse often re-victimizes battered spouse).

96. *See* Franklin & Ploeger, *supra* note 12, at 1001-02 (discussing possible reasons for declining to impose duty to rescue). Franklin and Ploeger suggest seven reasons against imposing such a duty, stating:

> First, the legislatures and courts may have concluded that even where the incentives are inadequate, personal freedom is more important than saving lives by mandating rescue. Second, theory aside, governments may have concluded that there is no need to mandate action—the incentives are working adequately. Third, tort law's sanctions are potentially much more severe than those of the criminal law. Fourth, there is the complication of how to proceed when several people fail to take the required action—a serious concern since lack of action is most likely to occur with groups. . . . Fifth, since tort law necessarily addresses the conduct of plaintiffs as well as that of defendants, how the plaintiff got into the perilous situation may affect the defendant's liability for not rescuing. Sixth, even if a court were otherwise persuaded to impose a duty to rescue, it might find retroactive imposition of such a duty quite unfair. Finally, perhaps a criminal mandate, with its exclusive focus on defendants, will be more effective in obtaining compliance.

Id. (footnotes omitted).

Point five poses no obstacle in cases involving children. If the child has been at fault with respect to the predicament that gives rise to the need for help, the child's recovery against any defendant (parent or non-parent) can be reduced in a state that adheres to comparative negligence or comparative fault. Point six—retroactive application—also presents no problem. The existence of the parental relationship places the parent on notice of the need to do many things for the benefit of the child, thus eliminating any risk of unfair after-the-fact imposition of liability. Finally, as concerns point seven, criminal laws relating to child abuse and neglect have not been fully effective in protecting children from unnecessary harm.

little force when the question is whether a parent has a duty to protect a minor child. Because of the child's vulnerability, the parent's freedom of action should not be given priority. Child abuse and neglect statistics demonstrate that other incentives are not fully able to produce the desired results.[97] As argued above, the burden on the parent would neither be disproportionate to the fault nor, in many cases, unanticipated.[98] Finally, there is little doubt as to which actors should step forward.

The precedent supporting judicial recognition that the parent-minor child relation is a "special relationship" is slender but worthy of respect, particularly in view of the fact that the duty is in accord with public expectations. In light of public policy considerations relating to blameworthiness, deterrence, burden and community consequences, courts should accept the American Law Institute's invitation to find that the parent-minor child form of familial relation offers a strong case for recognition of an affirmative duty to act.

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97. For a discussion of child abuse statistics, see *supra* note 60 and accompanying text.

98. For a discussion of the relatively insignificant burden placed on the parent, see *supra* Part III-C.