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Tort Liability in the Age of the Helicopter Parent

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ABSTRACT

Discussions of parental liability by courts and legal scholars are often tinged with fear: fear that government interference will chill parental autonomy; fear that parents will be held liable for their children's every misdeed; and, recently, fear that a new generation of so-called "helicopter parents" who hover over their children's every move will establish unrealistically high legal standards for parenting. However, in the context of common law suits against parents, these fears are misguided. To the contrary, courts have consistently shielded wealthier parents—those most likely to be defendants in civil suits—from exposure to liability for conduct related to their parenting practices.

This Article critically examines the common law of parental (non-) liability, both historically and in light of current cultural trends. Parental liability takes two forms: liability for parents' harm to *their children, and liability of parents for harms caused to others* by *their children. Individually these subjects have received remarkably little scholarly attention; together they have received none. Yet both types of parental liability are central to ongoing cultural debates about parenting, as well as to current controversies about the role of courts in establishing legal duty. A thorough reconsideration of parental liability is particularly timely in light of the new* Restatement (Third) of Torts, *which speaks directly to issues that are central to both forms of parental liability.*

This Article concludes that courts should hold parents to a standard of reasonable care. The American common law's squeamishness about parental liability is understandable, but unnecessary. Just as helicopter parents overreact to unsubstantiated fears of stranger abduction based on anecdotes and media hype, limits on common law parental liability are overreactions to unsubstantiated fears of collusion, government interference and biased juries. To be sure, aspects of parental liability

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raise significant concerns, but courts can and should address them narrowly using established tort law principles, without imposing blanket no-duty rules. Juries, in short, should be allowed to judge parents.

INTRODUCTION

The concept of common law parental liability is fraught, and its actual existence is exceedingly unusual. This lack of liability is not due to a belief that parents are irrelevant to the safety and conduct of children. To the contrary, legal scholars, legal decisions and politicians recognize the enormous value of parenting to the development of productive, functional adult citizens.[1] Neither is it because American parents are above reproach. Public figures consistently bemoan the impact on children of poor parenting, and legislators in almost every state have passed statutes imposing at least a symbolic form of strict liability on parents for certain forms of children's misconduct.[2] The cruel underside of parental conduct—even in highly educated, "traditional" two-parent families—was spotlighted last autumn with the widespread dissemination of a video depicting a Texas family law judge mercilessly beating his teenaged daughter with a belt while her mother looked on.[3] However loosely we define adequate parenting, not all parents are meeting that standard. Yet for over a century, since the first civil lawsuits against parents were filed, common law courts have resisted exposing parents to civil liability. While aspects of this rule have eased over time, it remains the rare case that survives summary judgment or a motion to strike. These liability limitations apply not only in tort suits by injured children against their parents, but also in so-called negligent supervision suits, where third parties seek to hold parents liable for children's tortious misconduct.

The proffered justifications for this anti-liability attitude have varied superficially since the origin of these doctrines at the end of the nineteenth century, but their gravamen is the same: Fear. Fear of intruding on family privacy; fear of allowing the government to set a parenting standard, thereby usurping parental authority; fear that parents and children will

1. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (stating that "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 164 (1st ed. 1827) ("Without some preparation made in youth for the sequel of life, children of all conditions would probably become idle and vicious when they grow up . . . ."); *see also* Katherine Brandon, *A Town Hall on Fatherhood*, WHITE HOUSE BLOG (June 19, 2009, 7:39 PM), http://www.whitehouse.gov/blog/A-Town-Hall-on-Fatherhood (observing that "[t]he message was clear—fathers can make a world of difference in the lives of [their] children").

2. *See* Lisa Gentile, *Parental Civil Liability for the Torts of Minors*, 16 J. CONTEMP. LEGAL ISSUES 125 app. at 128–32 (2007) (listing parental liability statutes and observing that every state except New Hampshire has one). Two states—Hawaii and Louisiana—enacted statutes holding parents strictly liable for children's torts. *Id.*

3. *See* Melissa Bell, *Texas Judge William Adams Suspended After Video Surfaces of Him Beating His Daughter*, WASH. POST (Nov. 23, 2011, 8:36 AM), http://www.washingtonpost.com/blogs/blogpost/post/texas-judge-william-adams-suspended-after-video-surfaces-of-him-beating-his-daughter/2011/11/23/gIQACIYEoN_blog.html.

collude for insurance proceeds; fear of juries; and fear that parents will be held liable merely for having a poorly behaved child.[4] Recent scholarship and cultural commentary has put a new face on these concerns by claiming that the current generation of so-called "helicopter parents," who hover over-protectively around their children, will establish an unrealistic and even harmful standard of parental over-care.[5] The result of these collective apprehensions, both historically and today, is a sharp divide between the common law's robust enforcement of parental rights, and its entrenched reluctance to enforce parental responsibilities.[6]

Such fears, which have justified minimizing parental liability for over a century, are hardly irrational. The idea of jurors making post-hoc assessments of one's parenting decisions is legitimately daunting. Moreover, overregulation of the family is a genuine risk: Scholars have correctly criticized the invasive, disempowering scrutiny of parenting practices imposed on families that are dependent on public support or

4. *See, e.g.*, Crotta v. Home Depot, Inc., 732 A.2d 767, 773 (Conn. 1999) (given families' "different cultural, educational and financial conditions," the court refused to allow juries, "ignorant of a case's peculiar familial distinctions . . . to second-guess a parent's management of family affairs"); Luster v. Luster, 13 N.E.2d 438, 440 (Mass. 1938) (holding immunity necessary to prevent "intrusions, not always disinterested, into the intimacies of family life"); Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974) (rejecting parental liability because "it would be the rare parent who could not conceivably be called to account in the courts for his conduct toward his child"); Linder v. Bidner, 270 N.Y.S.2d 427, 430 (N.Y. Sup. Ct. 1966). ("There is no general responsibility for the rearing of incorrigible children." (internal quotation marks omitted)).

5. *See, e.g.*, LENORE SKENAZY, FREE RANGE KIDS 50–57 (2009) (describing peer pressure to conform to dominant parenting standards); Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1222 (2011) (defining and decrying hyper-intensive parenting practices); David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?* 2012 UTAH L. REV. 947 (2012); Margaret K. Nelson, *Helicopter Moms, Heading for a Crash*, WASH. POST (July 4, 2010), http://www.washingtonpost.com/wpdyn/content/article/2010/07/02/AR2010070202445.html ("Professional women bring considerable skills to raising children, and because they do it so conscientiously, they may set trends for other parents.").

6. Corporal punishment by parents remains legal in every state and is used in some form by approximately 90% of parents. Deana Pollard, *Banning Corporal Punishment*, 77 TUL. L. REV. 575, 576–77 (2003). In addition, parents may still bring a cause of action against third parties who interfere with parental custody over their children, *see, e.g.*, Stone v. Wall, 734 So. 2d 1038, 1044 (Fla. 1999) (father had cause of action against maternal aunt and grandmother for custodial interference), and parents still retain rights of control over their children's labor, *see* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 852–53 (2004) (describing federal and state laws allowing parents to approve children's farm labor for less than minimum wage at ages as young as 12). Professor Wigmore first lamented the rights/responsibility divide almost eighty years ago. *See* John H. Wigmore, Comment, *Torts—Parent's Liability for Child's Torts*, 19 ILL. L. REV. 202, 203 (1924–1925):

> As between parent and child, there may be four principal legal relations of right-duty, viz., (a) the parent's right to control the child; i.e., to beat him, and to make him work for the parent; (b) the parent's duty to support the child during minority . . . ; (c) the parent's duty to bequeath to the child a fair portion of the family estate . . . [;] and (d) the parent's duty to compensate third persons injured by the child's misconduct. The first of these—the selfish, profitable one—is recognized, to the parent's benefit, in our law; the second, third and fourth—the humane complements of the first—are not recognized.

otherwise fail to conform to idealized traditional norms.[7] Nevertheless, the problem of overregulation of some parents is not solved by exempting other parents from legal constraints. Similar restrictions on suits between spouses have been rejected as vestiges of an unjust past. There can be, and should be, a middle ground.

Until very recently, parental liability has been overlooked in legal scholarship. As Jill Elaine Hasday observed, parental liability is not part of the family law canon—the set of legal narratives that defines American families and their relationship to the state.[8] Tort scholars, too, have paid scant attention to parental liability.[9] Unlike inter-spousal immunity, which has been rendered infamous (and largely obsolete) under feminist critiques, the doctrines of parental immunity and negligent parental supervision have largely flown below the legal and cultural radar.[10] Very recently commentators have begun to criticize the parental immunity doctrine, not for being unnecessary or unjust, but for being insufficiently protective of

7. *See, e.g.*, Bernstein & Triger, *supra* note 5, at 1268 (describing prejudice against African-American parenting practices dating from post-emancipation era to current day); Elaine M. Chiu, *The Culture Difference in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1820 (2008) (noting the predominantly Anglo-American culture of decision makers in the child welfare system is "an important factor" in the quality of those decisions); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 329–47 (2002) (arguing that beginning in the last quarter of the nineteenth century, states authorized extensive regulation of families deemed non-conforming) [hereinafter Hasday, *Parenthood Divided*]; Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NATIONAL PUBLIC RADIO (Oct. 25, 2011), http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system (describing removal by child welfare services of Native American grandchildren from home without investigation and unlawful placement of those children in non-Native family).

8. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 852–53 (2004) (noting that the treatment of children as property—including in parental immunity cases—has been overlooked by family law scholars) [hereinafter Hasday, *Canon of Family Law*].

9. The primary scholarly analysis of the parental immunity doctrine is Gail Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 494–98 (1982); *see also* Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161 (1991); Irene Hansen Saba, *Parental Immunity from Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829 (2006). Scholarly commentary on parents' liability for their children's torts consists primarily of descriptive notes and comments framed against a background of school shootings. *See, e.g.*, Valerie D. Barton, Comment, *Reconciling the Burden: Parental Liability for the Tortious Acts of Minors*, 51 EMORY L.J. 877 (2002); Andrew C. Gratz, Symposium Comment, *Increasing the Price of Parenthood: When Should Parents Be Held Civilly Liable for the Torts of Their Children?*, 39 HOUS. L. REV. 169 (2002) (focusing on Texas); Jeffrey L. Skaare, Note, *The Development and Current Status of Parental Liability for the Torts of Minors*, 76 N.D. L. REV. 89 (2000); Elena R. Laskin, Note, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195 (2000); *see also* Rhonda V. Magee Andrews, *The Justice of Parental Accountability: Hypothetical Disinterested Citizens and Real Victims' Voices in the Debate Over Expanded Parental Liability*, 75 TEMP. L. REV. 375 (2002) (examining theories of justice as applied to school shooting cases to argue for increased liability).

10. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (critiquing inter-spousal immunity).

parental rights.[11] This Article takes a contrary stance, urging a focus on parental responsibility rather than rights, and arguing that—fear aside—there is no evidence that parents require a carve-out from traditional common law rules.

The publication of the new *Restatement (Third) of Torts*, which confronts many of the negligence issues central to parental liability questions, provides a timely occasion on which to reevaluate parental liability. The general duty provisions of the *Restatement (Third)*, published in 2010, as well as the soon-to-be-published provision addressing affirmative duties, involve subtle but significant attempts by the American Law Institute's reporters to recalibrate the balance of decision making power between judges and juries on the basis that judges have gradually usurped the role of fact finders.[12] Parental liability cases provide a quintessential example of such usurpation.

In Parts I and II, this Article critiques both forms of common law parental liability from the nineteenth century to the present day. Part I traces the evolution of parental immunity as a legal limit on parental duty. Part II examines limits on parents' duty to prevent children from injuring others. Part III analyzes both forms of parental liability in light of the new *Restatement (Third) of Torts* and argues that its provisions support the imposition of a standard of reasonable care on parents. As this Part also shows, the duty problems in parental liability cases transcend this area of the law, creating judicial distortions in negligence law more broadly. Part IV responds to the fears that fuel parental liability limits, including privacy, collusion, and the fear that helicopter parents will create irrationally high standards for parental conduct.

Parental liability, like parenting itself, is legitimately frightening. Nevertheless, parenthood entails responsibility as well as rights, and parents, like all other tortfeasors, should be held to a standard of reasonable care. This Article does not propose an expansion of tort law that would create new and parent-specific causes of action in tort. It does not propose, for example, that children be able to sue their parents for their failure to help make a child's high school resume sufficiently glittering for college entrance.[13] But just as parents may overreact to media hype and

11. *See, e.g.*, Berstein & Triger, *supra* note 5, at 1250; Pimentel, *supra* note 5, at 956 (arguing that case upholding parental immunity "may prove to be the last gasp of the policy of protecting that erstwhile sacred right of parents to decide how to raise their own children").

12. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. b (2010); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 37–44 (Proposed Final Draft No. 1, 2005).

13. *See* Benjamin Shmueli, *Love and the Law, Children Against Mothers and Fathers, Or: What's Love Got to Do With It?*, 17 DUKE J. GENDER L. & POL'Y 131 (2010) (proposing new judicial structure based on Israeli law wherein children could obtain relief for emotional non-support from parents).

overprotecting their children, courts and scholars who support limits on parental liability are overreacting to exaggerated fears of judicial excess, fears that have not materialized in the many states that are moving to eliminate special treatment for parents in tort. In appropriate cases, juries should be allowed to judge parents.

I. PARENTAL IMMUNITY: THE "DARK SIDE" OF FAMILY PRIVACY[14]

The parental immunity doctrine, which bars children's tort suits against their parents, is a classic example of the state allocating benefits and burdens among family members in a way that regulates family life in a particular—and conservative—manner in the guise of non-interference and respect for family privacy.[15] Like its cousin inter-spousal immunity, parent–child immunity supports and perpetuates a power structure rooted in pre-nineteenth-century concepts of a hierarchical, nuclear family—a structure that continues to be understood as ideal and normal.[16] The modern iteration of the privacy rationale for parental immunity, which tracks twentieth-century Supreme Court language protective of parental discretion and autonomy, continues to resonate with courts.

Despite its long history, as Jill Elaine Hasday observes, parental immunity is not part of the family law canon.[17] Hasday attributes this omission to a tendency of family law scholarship to overstate the extent to which legal treatment of children as parental property is wrongly viewed as a relic of the distant past.[18] But the story of parental immunity—like that of inter-spousal immunity—should be represented in family law and tort law. Both historically and today, the parental immunity doctrine demonstrates the power and resilience of judicial discourse in shaping status relationships within families. It also illustrates the way in which constitutional rhetoric (if not constitutional reasoning) permeates the common law. Subpart A traces parental immunity from its ignominious origins in 1891 through to its modern form. Subpart B shows how feminist criticism of inter-spousal immunity effectively nullified that doctrine, while

14. *See* Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1247 (1999) (observing risks to children of policies of non-interference in families).

15. William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1030 (1930) ("Here is waged a battle between conflicting conceptions of the family, between individual and relational rights and duties.").

16. *See* Siegel, *supra* note 10, at 2166–67 (arguing that family privacy "supplied grounds on which to justify interspousal tort immunity—grounds that were seemingly independent of the increasingly discredited language of marital hierarchy").

17. Hasday, *Canon of Family Law*, *supra* note 8, at 852.

18. *See id.* at 848–49 (arguing that one inaccurate story "in the family law canon is that common law property norms no longer shape the law of parenthood").

parental liability—overlooked by activists and scholars—has remained a potent force.

A. Parental Immunity: A Tradition of Non-Interference in (Some) Families

The physical sanctity of the home is an ancient concept, but judicial use of privacy—a theory of non-interference by the state in family affairs—emerged as a common law limit on tort liability during the nineteenth century. Before then, patriarchy prevented intra-family suits: Most American household members were subject to the unquestionable patriarchal authority of fathers, who wielded immense physical and legal power. This power included a father's right to physically discipline his wife and children;[19] his right of full control over his wife's property and legal identity;[20] his right to apprentice his children out and keep the earnings or use their services at home;[21] his sole right of custody over his children;[22] and his right to recover in tort for loss of services if someone injured or seduced one of his children.[23] Under patriarchy, neither women nor children were in a position to bring tort lawsuits against all-powerful fathers.[24] Patriarchy slowly disintegrated during the nineteenth century, and women became seen as ascendant in the domestic sphere.[25] Despite (and in part because of) these changes, the power asymmetry between men and

19. On the right of fathers to discipline their children, see, e.g., TAPPING REEVE, THE LAW OF BARON AND FEMME 287 (2d ed. 1846) ("The parent is bound to correct a child, so as to prevent him from becoming the victim of vicious habits, and thereby proving a nuisance to the community."); 2 KENT, *supra* note 1, at 170 (noting that fathers are entitled to impose "moderate correction, under the exercise of a sound discretion"). On the right of men to chastise their wives, see Siegel, *supra* note 10, at 2122–29 (tracing tradition and criticism of marital chastisement).

20. *See* Hoeper v. Tax Comm'n, 284 U.S. 206, 219 (1931) (Holmes, J., dissenting) (stating that after marriage "that husband and wife are one, and that one the husband").

21. *See* Lee Teitelbaum, *The Legal History of the Family*, 85 MICH. L. REV. 1052 (1987) (reviewing MICHAEL GROSSBERG, NINETEENTH-CENTURY AMERICA (1985)); *see also* Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 396–99 (1996) (describing colonial practice of apprenticing children).

22. *See* 2 KENT, *supra* note 1, at 171 (noting that if a father died without assigning a guardian, a child's mother would act as guardian until the child reached fourteen, at which point the child would choose his or her own guardian).

23. *See* THOMAS M. COOLEY, COOLEY ON TORTS 269 nn.1–4 (2d ed. 1888) (citing cases) (hereinafter COOLEY ON TORTS); *see also* Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2758 (2011) (Thomas, J., dissenting) (explaining parents' ability to "bring tort suits against those who knowingly enticed a minor away from them").

24. Leslie Bender, *Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 8 (1988).

25. *See* STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS 55–60 (1988) (describing redefinition of women's roles). Many Americans, particularly slaves, were shut off from this evolution by legal restrictions on their rights or by poverty. *Id.* at 67–70; *see also* STEPHANIE COONTZ, THE SOCIAL ORIGINS OF PRIVATE LIFE 151 (1988) (observing that legal and cultural reforms "had little meaning for lower-class women").

other household members persisted.[26] Parental immunity, like inter-spousal immunity before it, is an outgrowth of this patriarchal regime.

Unlike inter-spousal immunity, parental immunity is a uniquely American phenomenon.[27] The doctrine, which first appeared in 1891, is typically attributed to the first three cases holding that parents are immune from tort suits by their children.[28] Commentators have referred to these cases as the "great trilogy," but there is nothing Tolkienesque about them.[29] They are short, devoid of citations, and poorly reasoned.[30] Yet parental immunity swayed courts nationwide: The prospect of children suing their parents caused widespread, visceral discomfort.[31]

Although sometimes depicted as having appeared out of thin air, the doctrine's appearance was the product of multiple related historical developments in the second half of the nineteenth century. American and British courts began recognizing tort immunity between spouses in the mid-nineteenth century, as the gradual demise of coverture raised the possibility of women suing their husbands.[32] Moreover, toward the end of the nineteenth century courts began, albeit incrementally and in a haphazard way, to recognize an incipient affirmative right to privacy in tort law.[33] The first parental immunity case appeared the year following publication of Louis Brandeis's and Samuel Warren's path-marking article, *The Right to Privacy*, which ushered in dignitary privacy as a touchstone of

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26. Fathers still retained a right to corporally punish their children. *See* TIFFANY'S PERSONS & DOMESTIC RELATIONS 264–66 (1909). In addition, they retained a presumptive right to custody (except sometimes for very young children) and a right to their children's earnings. *See id.* at 267–71 (custody); *id.* at 276–79 (stating that a mother was entitled to her child's earnings only on death or desertion of the father). Though middle- and upper-class women had improved legal rights and access to education, these reforms "were linked to a stricter definition of all women as wives and mothers. As with slavery, the softening was also a tightening." COONTZ, *supra* note 25, at 151.

27. See Hollister, *supra* note 9, at 489 (arguing parent–child immunity was created by American courts in the late nineteenth and early twentieth centuries, but has antecedents in Roman law).

28. *See* Hewellette v. George, 9 So. 885 (Miss. 1891); McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903); Roller v. Roller, 79 P. 788 (Wash. 1905).

29. *See, e.g.*, Rooney & Rooney, *supra* note 9, at 1163; Carolyn L. Andrews, Comment, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113, 114 (1989).

30. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 895G cmt. a (1979) (rejecting early justifications for parental immunity); Hollister, *supra* note 9, at 496–507 (1982); McCurdy, *supra* note 15, at 1030.

31. *See* RESTATEMENT (SECOND) OF TORTS § 895G cmt. a (1979) (stating that complete parental immunity was accepted by almost all American jurisdictions until the 1960s).

32. *See* Siegel, *supra* note 10, at 2168.

33. In addition to the intra-family immunity cases—which recognized privacy in the negative—a few nineteenth-century decisions appeared to recognize an affirmative right to privacy. *See, e.g.*, De May v. Roberts, 9 N.W. 146, 147 (Mich. 1881) (granting damages for violation of plaintiff's "legal right to the privacy of her apartment" during childbirth); Newell v. Whitcher, 53 Vt. 589, 591 (1880) (holding that houseguest's privacy was invaded by homeowner).

modern tort law.[34] From the first, family privacy has been the primary justification for parental immunity.[35]

Courts treated parental immunity as a natural extension of inter-spousal immunity.[36] Yet whereas under coverture a woman's legal identity merged with that of her husband upon marriage, children were always independent legal beings under the common law. Unlike women, children could enforce their property and contract rights, including against parents;[37] they could be independently liable in contract or tort; and there was never a testimonial privilege between parents and children analogous to that between spouses.[38] Therefore, while marital unity had formally prevented married women from bringing suit against their husbands,[39] it was assumed by scholars and treaty writers prior to 1891 that the common law *would* allow tort suits by children against their parents, at least in cases of extreme violence.[40] Prior to 1891, however, there were no actual examples of

34. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Intra-family immunity suits were both symptoms and harbingers of privacy's emergence as a paradigm of modern legal thought in the closing decades of the nineteenth century. In addition to the changes in family life during the nineteenth century, judges may have been influenced by broader privacy-related developments, including the rise of the yellow press, popular resistance to government efforts to collect and/or publicize sensitive personal information, and the impact on conceptions of privacy of mass immigration. *See* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 128 (2007) (stating that between 1850 and 1890, the number of newspapers increased from 100 to 900, and the number of readers grew from approximately 800,000 to more than 8 million); *see generally* DAVID R. SPENCER, THE YELLOW JOURNALISM (2007); *see also* PRISCILLA M. REGAN, LEGISLATING PRIVACY 46–47 (1995) (describing increasing tension regarding census information during the nineteenth century and outrage in 1890 over census questions about diseases, handicaps, and home mortgages). Indeed, Brandeis's and Warren's article was prompted at least in part by Warren's frustration with media gossip about his marital life. *See* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 966 (1964).

35. At first privacy was one element in a laundry list of justifications for parent–child immunity. The list also included a fear that the injured child might die and the tortfeasor parent would then inherit the child's damages award; that the award would deplete the family treasury to the detriment of other family members; and the possibility of insurance fraud. Over time, courts dropped these justifications as illogical or unpersuasive. *See* Hollister, *supra* note 9, at 494–98 (critiquing various justifications for immunity and observing that courts eventually settled on their most persuasive rationale, the need for domestic tranquility and parental authority).

36. *See, e.g.*, Roller v. Roller, 79 P. 788, 788–89 (Wash. 1905); RESTATEMENT (SECOND) § 895G cmt. c (courts imposing parental immunity "relied heavily upon the analogy of husband and wife").

37. *See, e.g.*, McCurdy, *supra* note 15, at 1057–58 (citing cases and explaining that the parent "may voluntarily relinquish his right to services and earnings, even to the point of promising the child wages, and such relinquishment or promise has legal effect"); *see also* Hollister, *supra* note 9, at 495, 497 (stating that in contrast to married women, "[c]hildren had separate legal identities and could both sue and be sued").

38. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122 (5th ed. 1984).

39. *See* COOLEY ON TORTS, *supra* note 23, at 267 (stating that a woman has no cause of action for a tort to her person or reputation, but "must rely upon the criminal laws for her protection, or seek relief in separation or in proceedings for a divorce").

40. *See* COOLEY ON TORTS, *supra* note 23, at 171; TAPPING REEVE, THE LAW OF BARON AND FEMME 287 (2d ed. 1846) (arguing that a parent "may so chastise his child, as to be liable in an action by the child against him for a battery"); McCurdy, *supra* note 15, at 1062 (analyzing cases and

children litigating against their parents in tort.[41] Aided by this lack of precedent, courts brushed away the distinction between women and children and ruled that suits by children were against the natural order.[42]

1. Early Parental Immunity: Family Harmony Above All

Early decisions implementing parental immunity adhered closely to the language and reasoning of inter-spousal immunity—language that idealized the sanctity and harmony of the home.[43] The plaintiff in *Hewellette v. George* brought suit against her mother for wrongfully committing her to an insane asylum. While acknowledging that the plaintiff had suffered compensable damages, the court rejected her cause of action:

> 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.[44]

In a similar vein, in *Roller v. Roller*, the Supreme Court of Washington rejected a battery suit by a fifteen-year-old girl against her father, who had already been criminally convicted of raping her, in the name of "preserving harmony in the domestic relations," and "the privacy and mutual confidence which should obtain in the household."[45] Conceding that the rape might already have destroyed harmony in the plaintiff's case, the court nevertheless denied her claim, "for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case,

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concluding that "[i]t seems to be assumed that a parent is subject to some civil liability"); *see also* Hartfield v. Roper, 21 Wend. 615 (N.Y. Sup. Ct. 1839) (holding that two-year-old left unattended in street injured by horse-drawn sleigh could not obtain damages from driver, but stating in dictum that child should seek damages from neglectful parents); Lander v. Seaver, 32 Vt. 114 (1859) (admitting cause of action against teacher for excessive punishment by analogy to right of action of child against parent).

41. *See, e.g.*, Matarese v. Matarese, 131 A. 198 (R.I. 1925) (contrasting absence of tort claims by children prior to 1891 with criminal prosecutions against parents); Wick v. Wick, 212 N.W. 787, 787 (Wis. 1963) (observing that "[n]o case involving this question appears to have come before any appellate court in England or America prior to 1891").

42. *See, e.g.*, Small v. Morrison, 118 S.E. 12, 16 (N.C. 1923) (finding parental immunity "unmistakably and indelibly carved upon the tablets of Mount Sinai").

43. Siegel, *supra* note 10, at 2165–68.

44. Hewellette v. George, 9 So. 885, 887 (Miss. 1891). The unprecedented holding was particularly strange given that the minor plaintiff was married (though separated from her husband). Though acknowledging that a suit might be possible if the parent–child relationship were dissolved upon marriage, the court found that "[o]n this very delicate and difficult point in the case the evidence is most unsatisfactory." *Id.*

45. Roller v. Roller, 79 P. 788, 788–89 (Wash. 1905).

would allow an action to be brought for any other tort."[46] Other courts followed *Hewellette* and *Roller*, revolting at the idea of "intrusions, not always disinterested, into the intimacies of family life."[47] As one court later phrased it, "the 'sanctity' [of the home] also includes the 'secrecy' of the home."[48]

Throughout the first half of the twentieth century, courts invoked familial love and intimacy to authorize conduct by parents toward their children that would be plainly unlawful outside of the domestic setting. As in the inter-spousal context, courts employed "tropes of interiority"—metaphorical descriptions of the home as a physical refuge—to give depth to their descriptions of intra-familial love.[49] This is perhaps best exemplified by the Wisconsin Supreme Court's panegyric to family life in 1927:

> The family is a social unit. The members thereof are of the same blood. They are bound together by the strongest natural ties. Naturally, mutual love and affection obtain between the members thereof. There is a mutual interest in one another's welfare. The family fireside is a place of repose and happiness. . . . To question the authority of the parent or to encourage the disobedience of the child is to impair the peace and happiness of the family and undermine the wholesome influence of the home. To permit a child to maintain an action in tort against the parent is to introduce discord and contention where the laws of nature have established peace and obedience.[50]

The *Wick* court's poetic vision is particularly ironic given that Wisconsin had decided only the previous year to *allow* inter-spousal tort suits.[51] The court conceded that the discrepancy, "(made necessary by statute) mars somewhat the symmetry and beauty of the family conception," but refused to adjust its view of parental duty in view of the

46. *Id.* at 789.

47. Luster v. Luster, 13 N.E.2d 438, 440 (Mass. 1938). The *Luster* court also repeated the concern that such suits "would almost inevitably tend to the destruction of the peace and unity of family life and to the impairment of parental authority and discipline." *Id.*; *see also* York Trust Co. v. Blum, 22 Pa. D & C 313, 314 (Pa. Com. Pl. 1934) (holding it "better that an occasional wrong should go unrequited than that the family life should be subjected to the disrupting effects of such suits").

48. Streenz v. Streenz, 471 P.2d 282, 286 (Ariz. 1970) (McFarland, J., dissenting).

49. Siegel, *supra* note 10, at 2120.

50. Wick v. Wick, 212 N.W. 787, 787 (Wis. 1927), *abrogated by* Goller v. White 122 N.W.2d 193 (Wis. 1963).

51. Wait v. Pierce, 209 N.W. 475, 480–481 (Wis. 1926) (holding a wife may bring action against her husband).

change.[52] Indeed, parent–child immunity developed later than inter-spousal immunity, but it has had greater staying power.

2. Modern Parental Immunity: The Zone of Parental Autonomy

Since the 1950s, the harsh total bar of the early parental immunity cases has gradually given way to a narrowed—but doctrinally strengthened—form of tort protection for parents. A handful of states never recognized parent–child immunity,[53] and eleven states have abrogated it entirely,[54] but most states have retained the doctrine in a modified form that shields parents from liability for a wide range of conduct considered "inherent to the parent–child relationship."[55] Courts have defined such conduct to exclude intra-family suits arising out of car accidents;[56] employment-related accidents;[57] and willful or malicious torts.[58]

These exceptions have not rendered parent–child immunity a marginal doctrine on its way to extinction.[59] To the contrary, over half of states retain a broad zone of parental immunity for parental acts that are deemed to be (in courts' view) inherent in parental discipline or control. For example, courts have routinely applied the immunity where parents have negligently allowed children to drown, burn, or get run over by a car.[60]

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52. *Wick*, 212 N.W. at 788.

53. The District of Columbia, Hawaii, Nevada, North Dakota, Utah and Vermont do not recognize immunity. *See* VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE & SCHWARTZ'S TORTS 631 (12th ed. 2010); Herzfeld v. Herzfeld, 781 So. 2d 1070 (Fla. 2001) (collecting cases). South Dakota appears not to have considered this question, but a federal district court applying South Dakota law has applied immunity. *See* Brunner v. Hutchinson Div., Lear-Siegler, 770 F. Supp. 517 (D.S.D. 1991).

54. At least eleven jurisdictions have abolished parental immunity. *See, e.g.*, Broadbent v. Broadbent, 907 P.2d 43 (Ariz. 1995); Gibson v. Gibson, 479 P.2d 648 (Cal. 1971) (eliminating doctrine as a "legal anachronism, riddled with exceptions"); Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980).

55. Cates v. Cates, 619 N.E.2d 715, 729 (Ill. 1993).

56. *See, e.g.*, Allstate Ins. Co. v. Kim, 829 A.2d 611 (Md. 2003) (implementing statute abrogating immunity for suits arising out of car accidents, and noting that only eight states continued to apply the immunity in the context of motor vehicle torts in 1984); Unah v. Martin, 676 P.2d 1366 (Okla. 1984); Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994). This is a huge exception to parental immunity, and highlights inconsistencies in the doctrine. After all, driving one's children around is not only "inherent" to the parent–child relationship, during some years it practically defines it.

57. *See, e.g.*, Chase v. New Haven Waste Material Corp., 150 A. 107, 108 (Conn. 1930).

58. *See, e.g.*, Newman v. Cole, 872 So. 2d 138, 140 (Ala. 2003) (abrogating parental immunity in wrongful death suit, but imposing heightened "clear and convincing" standard of proof); Henderson v. Wooley, 644 A.2d 1303, 1307 (Conn. 1994) (responding to certified question from federal court) (abrogating immunity for child sexual abuse); Herzfeld v. Herzfeld, 781 So. 2d 1070, 1072 (Fla. 2001) (same).

59. *See also* Frye v. Frye, 505 A.2d 826 (Md. 1986), *superseded by statute as recognized in* Allstate Ins. Co. v. Kim, 829 A.2d 611 (Md. 2003).

60. *See* Zellmer v. Zellmer, 188 P.3d 497 (Wash. 2008) (upholding parental immunity in drowning death that appeared accidental); Talerico v. Foremost Ins. Co., 712 P.2d 294 (Wash. 1986)

The theme of parental authority—which crept into the immunity rationale over time, distinguishing parental immunity from inter-spousal immunity—increasingly echoed twentieth-century Supreme Court language extolling the centrality of parental autonomy to family and political life. Beginning in 1925 with *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, and continuing through Justice Thomas's recent dissent in *Brown v. Entertainment Merchants' Association*, the Court has stressed the fundamental importance of parental authority.[61] The Court's holdings have never been as broad as its rhetoric, but the concept of parental discretion—now associated with a constitutional privacy interest—has permeated modern parental immunity law. The leading case defining modern parental immunity, *Goller v. White*, relied on this Supreme Court privacy discourse to redefine the scope of parental immunity.[62]

Inspired by *Goller*, other courts have similarly ruled that the doctrine is rooted in "the need to avoid judicial intervention into the core of parenthood and parental discipline."[63] A Texas court explained this reinvigorated immunity doctrine in 1992 in a case arising from the drowning death of a child in its mother's care: "The discharge of parental responsibilities, such as the provision of a home, food, and schooling, entails countless matters of personal, private choice. In the absence of culpability beyond ordinary negligence, those choices are not subject to review in court."[64] To this strengthened judicial immunity discourse, courts have gradually added an element of cultural relativism, arguing that courts and juries cannot fairly assess parental actions "[c]onsidering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail" among families.[65]

(upholding immunity in death of three-year-old left unattended by backyard fire). The idea that driving one's children around is outside the boundaries of the parent–child relationship is simply laughable.

61. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (rejecting state law mandating public education contrary to parents' wishes on the ground that "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); Parham v. J.R., 442 U.S. 584, 602 (1979) (stating that "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children"); Brown v. Entm't Merch. Ass'n., 131 S. Ct. 2729, 2752 (2011) (Thomas, J., dissenting) (arguing that "[t]he historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children").

62. Goller v. White, 122 N.W.2d 193 (Wis. 1963).

63. Hush v. Devilbiss Co., 259 N.W.2d 170, 173 (Mich. Ct. App. 1977) (immunity protected grandmother who was supervising child who was severely burned in vaporizer spill).

64. Shoemake v. Fogel, Ltd., 826 S.W.2d 933, 936 (Tex. 1992).

65. Holodook v. Spencer, 324 N.E.2d 338, 346 (N.Y. 1974); *see also* Crotta v. Home Depot, Inc., 732 A.2d 767, 773 (Conn. 1999) (Given families' "different cultural, educational and financial conditions," the court refused to allow juries "ignorant of a case's peculiar familial distinctions . . . to second-guess a parent's management of family affairs." (quoting Dubay v. Irish, 542 A.2d 711 (Conn. 1988) (internal quotation marks omitted)).

The modern version of parental immunity nevertheless retains traces of the idealized image of parental love that was central in *Wick* and other earlier cases. In its landmark decision barring children's claims against parents, the New York Court of Appeals referred back to the concept, originating at least as far back as Blackstone, that parental affection should displace any legal compulsion: "The mutual obligations of the parent–child relation derive their strength and vitality from such forces as natural instinct, love and morality, and not from the essentially negative compulsions of the law's directives and sanctions."[66] For these reasons—150 years after a New York court found it "absurd" that a parent would not bear legal responsibility for a young child left unattended on a public highway—the Court of Appeals held that New York did not recognize a cause of action against a parent for her child's injury.[67] *Holodook* remains the law in New York today.

3. Modern Expansion of Parental Immunity to Others In Loco Parentis

Parental immunity thus remains influential in cases alleging a wide range of parental negligence. In fact, its scope has expanded in key respects. At the time of the publication of the second *Restatement* in the 1960s, parent–child immunity had not frequently been extended to protect individuals *in loco parentis*.[68] But that trend has since reversed course.[69] Reasoning that to allow juries to "supplant their own views for the parent's individual child-rearing philosophy" would "accord[] too little respect for family autonomy and parental discretion," the Washington Supreme Court recently held that immunity could bar suits against step-parents who have assumed the obligations of parenthood.[70] Other courts have ruled similarly.[71]

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66. *Holodook*, 324 N.E.2d at 346.

67. *See id.* at 346.

68. See RESTATEMENT (SECOND) OF TORTS § 895G cmt. i (1963) (noting lack of application to those other than parents). *But see, e.g.*, Trudell v. Leatherby, 300 P. 7 (Cal. 1931) (immunity applied to step-parent *in loco parentis*).

69. *See, e.g.*, Mitchell v. Davis, 598 So. 2d 801 (Ala. 1992) (foster parents entitled to limited immunity from claims of "simple negligence" because *in loco parentis*); Lyles v. Jackson, 223 S.E.2d 873 (Va. 1976) (step-parent immune if *in loco parentis*); Zellmer v. Zellmer, 188 P.3d 497 (Wash. 2008) (same); Langley v. Langley, No. 10-03-00383-CV, 2004 WL 2804828 (Tex. App. Nov. 24, 2004) (stepmother entitled to immunity). *But see* Warren v. Warren, 650 A.2d 252 (Md. 1994) (refusing to extend immunity to step-parents); Rayburn v. Moore, 241 So. 2d 675 (Miss. 1970) (same).

70. *Zellmer*, 188 P.3d at 503. The court in *Zellmer* remanded for a factual determination of whether the defendant stepfather had acted *in loco parentis*. Ultimately the civil case ended when the stepfather was prosecuted and convicted of murder for intentionally drowning the three-year-old plaintiff in his backyard pool shortly after obtaining life insurance coverage for her. *See* Jennifer Sullivan, *Kent Man Convicted of Killing 3-Year-Old Stepdaughter*, SEATTLE TIMES (Apr. 28, 2010), http://seattletimes.com/html/localnews/2011728076_zellmer29m.html.

71. *See, e.g.*, *Langley*, 2004 WL 2804828 at *1; *Lyles*, 223 S.E.2d at 798.

Given its shaky historical underpinnings and harsh consequences, the expansion of immunity to cover additional parental figures is troubling. Children are vastly more likely to be abused or neglected by step-parents than by natural parents.[72] The early parental immunity cases, many of which involved abusive step-parents, bear this out.[73] Step-parents and foster parents may assume a parenting role for complex reasons that do not make a child's wellbeing a top priority. Although the Washington Supreme Court required a factual finding that a step-parent was acting *in loco parentis*, such a finding—which might take into account financial support, child minding, and visits with teachers—will inevitably be incapable of assessing the psychological commitment of a newcomer parent. The expansion of the immunity to cover other parental figures, while it might reflect societal changes in our understanding of parenthood, in fact heightens the likelihood that a child will suffer un-redressed harm.

4. Impact of Immunity on Comparative Negligence

The impact of parental immunity also extends beyond intra-family disputes. Despite some early cases to the contrary, courts generally did not impute parents' contributory negligence to an injured child so as to defeat the child's claim against a third party.[74] But in modern comparative fault regimes, where a parent's liability and the liability of a third party combine to injure a child, most courts hold that parental immunity prohibits contribution actions against parents. In *Crotta v. Home Depot*, for example, a child sued for severe brain injuries sustained when he fell or jumped out of the back of a shopping cart.[75] The defendants, Home Depot and the shopping cart manufacturer, sought to implead the father, who had placed his child in the back of the cart and supervised him while in the store.[76] The court held that the parental immunity doctrine, which protected the father from suit by his son, also barred contribution claims by the defendants, who would have to bear any liability for the boy's injury alone.[77] In these

72. Martin Daly & Margo Wilson, THE TRUTH ABOUT CINDERELLA 28 (1999) (stating that young children are one hundred times more likely to be abused or killed by non-genetic parents); Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1207–08 (1997) (noting particular danger of substitute fathers).

73. *See* Tresman v. Tresman, 61 N.E. 961 (Ind. Ct. App. 1901); McKelvey v. Mckelvey, 77 S.W. 664 (Tenn. 1903).

74. *See, e.g.*, Daley v. Norwich & Worcester R.R. Co., 26 Conn. 591, 597 (1858) (parents' negligence, if any, does not defeat three-year-old's action for injuries from train, although it "might be a defence to an action by the father . . . for loss of service"); Holodook v. Spencer, 324 N.E.2d 338, 345 (N.Y. 1974) (describing statute nullifying early cases that imputed parental negligence to children injured by third parties).

75. *See* Crotta v. Home Depot, Inc., 732 A.2d 767 (Conn. 1999).

76. *Id.* at 769–70.

77. *See id.* at 772.

cases, too, family privacy is the dominant theme, overriding the interest in fair allocation of responsibility among joint tortfeasors.[78] As a result, parents are subject to a drastically lowered standard of care with respect to their children, while other parties must satisfy traditional tort law norms for injuries arising out of a single incident.[79]

B. Feminism and Intra-family Immunity: Complicating the Role of Women

Parental immunity and inter-spousal immunity came into being during the same period, and they were based on identical legal justifications.[80] But they have met different fates: Inter-spousal immunity is now generally obsolete, while parental immunity remains a robust, if modified, doctrine.[81] In addition, critiques of inter-spousal immunity have become part of the scholarly canons of family and privacy law, while parental immunity has been largely overlooked. To some extent, this is because feminist activists and scholars—who have been the primary critics of family privacy—have understandably focused on remedying harm and inequality to women. Recent critical gender theory complicates assumptions inherent in these feminist critiques by demonstrating that men can be victims, not merely

78. *See id.* at 773 ("Courts should not unnecessarily involve themselves in the day-to-day exercise of parental discretion regarding the upbringing and care of children. To do so would undermine parental authority in the very personal endeavor of child rearing and inject the machinery of the state into an area where its presence might be the occasion for family discord.").

79. *See also, e.g.*, Brunner v. Hutchinson Div., Lear-Siegler, 770 F. Supp. 517 (D.S.D. 1991) (in light of South Dakota's immunity rule, auger manufacturer could not seek contribution in suit by two-and-a-half-year-old for traumatic arm amputation); Shoemake v. Fogel, 826 S.W.2d 933 (Tex. 1992) (apartment complex owners could not seek contribution from mother in case arising from drowning death of child); Jenkins v. Snohomish Cty. Pub. Util. Dist. No. 1, 713 P.2d 79, 83 (Wash. 1986) (holding that public utility could not seek contribution or indemnity from parents for injury of seven-year-old who climbed utility fence and was electrocuted, requiring amputation of arm); Almli v. Santora, 397 N.W.2d 216 (Mich. App. 1986) (no contribution in suit arising from child's sledding accident even in suit brought by parents in their own capacity); Parsons v. Wham-O, Inc. 541 N.Y.S.2d 44 (N.Y. App. Div. 1989) (manufacturer of water slide could not seek contribution); Kelchner v. John Deere Co., 540 N.Y.S.2d 390 (N.Y. App. Div. 1989) (manufacturer of tractor mower not entitled to contribution from mother for negligent supervision of four-year-old).

80. *See* KEETON ET AL., *supra* note 38, § 122 ("Although it would appear that no shadow of a difference in principle or policy is to be discovered, the retreat from the common law as to parent and child has lagged behind that as to husband and wife . . . .").

81. *See* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989) (noting the overwhelming trend of abrogation). *Compare, e.g.*, Freehe v. Freehe, 500 P.2d 771 (Wash. 1972) (eliminating inter-spousal immunity) *with* Zellmer v. Zellmer, 188 P.3d 497, 503 (Wash. 2008) (retaining parental immunity in cases of negligence because "[s]ubjecting parents to liability for negligent supervision inevitably allows judges and juries to supplant their own views for the parent's individual child-rearing philosophy"); *see also* Bozman v. Bozman, 830 A.2d 450, 464–65 (Md. 2003) (agreeing with the vast majority of courts that inter-spousal immunity is "a vestige of the past, being unsound in the circumstances of modern life, has outlived its usefulness, if ever it had any").

beneficiaries, of misogynistic gender norms.[82] Parental immunity cases present the opposite phenomenon: They demonstrate that women, like men, reap and will exploit the benefits of judicial non-interference in family life to the extent that status allows. Yet the story of women as aggressors—as abusers or neglecters within the family—has been omitted from privacy critiques and from the dominant narrative of intra-family immunity.

Catharine MacKinnon led feminists' attack on family privacy as a tool for preserving men's dominance over and violence against women in the home; in her view, privacy is a "sword in men's hand," while it is "presented as a shield in women's."[83] MacKinnon and others also criticize privacy for perpetuating class injustices.[84] Neither of these foundational privacy critiques, however, addresses the impact of family privacy on children.[85] Another strain of privacy theory takes the opposite stance, criticizing excessive state scrutiny of certain parents, particularly single mothers, as a harmful violation of family privacy.[86] Martha Fineman, for example, would grant privacy to a "caretaker-dependent relationship," in order to provide autonomy to single parents without pressure to conform to a state-sanctioned parenting model.[87] Implicit in such critiques is the view

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82. Analyzing male-on-male prison rape, for example, Kim Shayo Buchanan fills a gap in feminist theory by describing the extent to which men who fail to conform to idealized versions of masculinity are victims of discriminatory and violent conduct that parallels the experience of women. Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender, and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 23–46 (2010) (critiquing racial and gender constructs in male-on-male violence in prisons and in the context of Title VII suits).

83. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989) (urging women to "explode the private"); Anita L. Allen, *Privacy at Home: The Twofold Problem*, *in* REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 193 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY (1989); Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847 (2000).

84. *See* MACKINNON, *supra* note 83, at 191 ("Women with privileges, including class privileges, get rights."); Allen, *supra* note 83, at 197 ("[I]n the United States domestic privacy is a virtual commodity purchased by the middle class and the well-to-do.").

85. Psychoanalyst Alice Miller argues that "the feminist movement . . . comes up against its ideological limits" when confronting child abuse, because "[i]t sees the problem as being rooted exclusively in the patriarchy, in the male exertion of power. The simplification leaves many questions unasked. Perhaps it is too early to ask these questions since they would threaten the image of the idealized mother." ALICE MILLER, BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES 76–77 (Leila Vennewitz trans., 1990).

86. *See, e.g.*, Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 22–24 (2009) (observing that parents may feel more committed to their responsibility if they are granted autonomy in child rearing decisions); *see generally* Hasday, *Parenthood Divided*, *supra* note 7, at 328–56 (describing interventionist legal regime for poor and working-class families); Clare Huntington, *Rights Myopia in Child Welfare*, 53 U.C.L.A. L. REV. 637 (2006) (arguing that rights-based approach to welfare determinations harms both parents and children).

87. *See* Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH L. REV. 1207, 1221 (1999); *see also* Huntington, *supra* note 86, at 646 (noting that scholars supporting parental rights assert that protection from state intervention "safeguards cultural and moral diversity in matters of childrearing by ensuring the state does not impose a uniform view of parenting").

that mothers' interests and children's interests align. There appears to be a consistent, though tacit, assumption that women (but not necessarily men) are by nature decent and non-violent, if not universally maternal.[88] Women's violence is either due to individual deviance ("bad mothers"), or to overwhelming situational stress.[89]

Reva Siegel's canonical feminist critique of inter-spousal immunity, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, adheres to this gendered-centered critical perspective on domestic violence.[90] In *"The Rule of Love,"* Siegel persuasively attacks courts' invocation of family privacy to preserve male hegemony by barring women from using their post-coverture legal powers to sue their husbands in tort for harms arising from physical abuse.[91] Siegel demonstrates that courts purported to respect the new legal rights of women and to pity their physical abuse, yet barred their suits nevertheless "based upon public policy" because "[to hear tort claims between spouses] would tend to invade the holy sanctity of the home and shatter the sacred relations between husband and wife."[92] To Siegel, violence against women is the central harm of intra-family immunity. In *"The Rule of Love,"* women are the victims—of male violence, male judges, and patriarchal privacy discourse.[93]

The parental immunity cases undermine this rigid gender dichotomy. The judicial privacy discourse Siegel identifies is a precise analog to the discourse in early parent–child cases, and the two immunities emerged during the same period and were often discussed in tandem. However, in

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88. *See* CHERYL L. MEYER & MICHELLE OBERMAN, MOTHERS WHO KILL THEIR CHILDREN 103 (2001) (examining "the underpinnings of how seemingly loving and caring mothers kill their children through neglect").

89. Meyer and Oberman categorize some forms of filicide as "neglect-commission," a term that removes the intention and agency from the acts of women who, for example, smothered their children, asphyxiated them by putting tissue in their mouths, or left them strapped in their car seats overnight while partying in a motel. *See id.* at 103–16.

90. *See generally* Siegel, *supra* note 10.

91. *See id.* at 2164–68.

92. *Id.* at 2167 (alteration in original) (quoting Fiedeer v. Fiedeer, 140 P. 1022, 1023 (Okla. 1914)). *See also, e.g.*, Abbott v. Abbott, 67 Me. 304, 308 (1877) (without immunity "[t]he private matters of the whole period of married existence might be exposed by [such] suits"); Longendyke v. Longendyke, 44 Barb. 366, 368 (N.Y. Sup. Ct. 1863) (lawsuit by wife would "sow the seeds of perpetual domestic discord and broil"); *id.* (suit would be "destructive of that conjugal union and tranquility, which it has always been the object of the law to guard and protect"); Thompson v. Thompson, 218 U.S. 611, 618 (1910) (rejecting woman's suit against her husband for assault and battery as a "revolutionary" idea that would "thus emphasiz[e] and publish[] differences which otherwise might not be serious"); Drake v. Drake, 177 N.W. 624, 625 (Minn. 1920) (suit against husband would disrupt "the welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements, is so essential to society").

93. Siegel, *supra* note 10, at 2180–81 (noting that nineteenth-century judges were "far more likely to appreciate the benefits of the tort immunity rule (to propertied husbands) than to register its costs (to battered wives)").

parental immunity cases women play a quite different role. From the first parental immunity case in 1891, women—like men—used privacy as a sword. *Hewellette v. George*, the grandparent of parent–child immunity cases, involved an appeal from a jury verdict in favor of a daughter who sued her mother for falsely imprisoning her in an insane asylum.[94] And in *McKelvey v. McKelvey*, the next case to impose immunity, the plaintiff sued her father and stepmother for "cruel and inhumane treatment" by the stepmother, which occurred with the father's passive consent.[95] Since that time, parental immunity has protected parents of both genders from acts that would be tortious, or criminal, if perpetrated by others.[96] Women are victims, but also beneficiaries, of family privacy.

The absence of children from feminist critiques has had practical implications. Feminist criticisms and the women's rights movement more broadly have fueled inter-spousal immunity's demise.[97] In contrast, parental immunity (un-criticized, but suffering the same infirmities) has settled more deeply into the common law. Yet feminists' privacy concerns are magnified in the case of children, the most vulnerable family members. As child advocacy scholar Barbara Bennett Woodhouse observes, even a redefined family privacy (one that seems to exclude men) "invites us to sweep under the rug the hardest cases—those in which the individual interests of family members are in conflict."[98]

This Article does not adopt MacKinnon's view that families must entirely "explode" the private in order to obviate abuse against children. Yet courts should be wary of granting special no-duty benefits to individuals based on familial status. Although courts are motivated by a desire to refrain from family interference, granting such protections

94. *See* Hewellette v. George, 9 So. 885 (Miss. 1891). In *Hewellette*, the legal argument protected the plaintiff's mother, but the mother herself had died prior to the court's decision, so the suit was against her estate.

95. *See* McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903).

96. *See, e.g.*, Newman v. Cole, 872 So. 2d 138 (Ala. 2003) (abrogating immunity to allow wrongful death suit to proceed against father and stepmother where father held sixteen-year-old down in choke hold while stepmother sprayed face with garden hose); Treschman v. Treschman, 61 N.E. 961, 962 (Ind. Ct. App. 1901) (recognizing immunity where stepmother knocked daughter unconscious against a brick wall, but holding that it did not apply to the plaintiff's stepmother after her divorce from the plaintiff's father); Dix v. Martin, 157 S.W. 133, 135 (Mo. Ct. App. 1913) (adoptive mother tied eight-year-old girl's hands and feet, then beat her with buggy whip); Gillett v. Gillett, 335 P.2d 736 (Cal. Ct. App. 1959) (girl's spleen and kidney removed because of internal bleeding after beating by stepmother; court refused to apply immunity); Kelly v. Kelly, 155 S.E. 888 (S.C. 1930) (car accident).

97. *See* Carl Tobias, *The Imminent Demise of Interspousal Immunity*, 60 MONT. L. REV. 101, 102 (1999) (tying the abrogation and abolition of inter-spousal immunity to women's rights movements).

98. *See* Woodhouse, *supra* note 14, at 1257; *see also* Suzanne Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 596–97 (2006) (agreeing in theory with impulse to detach privacy from its gendered origins and protect caregiver–child relationships, but questioning whether this reconstructed privacy theory is sufficiently protective of children).

exemplifies precisely such interference.[99] When a family member affirmatively requests state intervention in a way that the law would allow in the absence of a family relationship, then whether that involves responding to a domestic violence call or allowing a lawsuit, the state should not withhold intervention in the absence of a careful balancing of the rights and interests at stake. Abstract privacy theory—whether by scholars, by law enforcement, or by courts—frequently overlooks this step. Close analysis of intra-family lawsuits demonstrates that parents should not be immunized from liability for harm to their children, but should be held to the same standard of reasonable care as other alleged tortfeasors.

II. NEGLIGENT SUPERVISION: A LIMITED PARENTAL DUTY OF CONTROL

Among the few scholars who have addressed parental immunity, none have simultaneously analyzed the other primary form of common law parental liability—liability of parents for harms committed by their children against others. The two forms of liability are treated, by scholars and by courts, as wholly distinct. The inquiry is identical in many senses: How far should reasonable parental responsibility to supervise children extend? Yet the justifications for minimizing parents' liability are premised on sharply contradictory narratives. As discussed above, the parental immunity doctrine is premised on a view that parents exercise authority and control over their children. Under this view, which echoes patriarchal concepts of children as parental property and constitutional assertions of parental rights, children are cocooned with the family unit, protected by their parents' superior intellect and judgment.[100] However, cases in which third parties seek to hold parents liable for harms that result from their negligent supervision of their children evoke a strikingly different parent–child paradigm, according to which parents have very limited control over their children. "That is my child and I know best how to handle her!" in parent–child suits becomes "I have no idea what my child is doing and I cannot control her!" when children harm others.

Like parental immunity, negligent supervision has been overlooked in family and tort law scholarship. From a family law perspective, this may be attributable to the doctrinal nature of negligent supervision analysis. The parental immunity doctrine involves notions of duty in tort law, but it is

99. Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1341–43 (2008) (critiquing criminal laws based on family status, including parental liability laws).

100. *See* Parham v. J.R., 442 U.S. 584, 602 (1979) (holding that "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions").

predominantly a question of public policy. Negligent supervision doctrine, in contrast, is inextricably linked to case-specific findings of duty, foreseeability, and proximate cause—tort concepts that may appear subsidiary to family law scholars' agendas. Yet tort scholars, too, have paid scant attention to negligent parental supervision.

This neglect is unwarranted. First, as with suits by children against their own parents, negligent supervision suits are commonplace and affect large numbers of families and victims.[101] More broadly, negligent supervision implicates important questions of negligence law, including the scope of affirmative duties and the relationship between judge and jury. Subpart A traces the nineteenth-century roots of common law claims of negligent supervision. Subpart B demonstrates how courts, bolstered by the first two *Restatements of Torts*, have used concepts of foreseeability in duty to prevent juries from assessing parental supervision.

A. History of Negligent Supervision: Limited Duty

The common law has long recognized that parents and children are in a special relationship that entails affirmative parental responsibilities.[102] Yet negligent supervision cases, like parent–child cases, evince longstanding judicial reluctance to allow juries to evaluate parents' failure to meet those responsibilities. Negligent supervision cases implicate difficult questions about the scope of affirmative duties to third parties.[103] They also implicate difficult cultural questions about whether nurture or nature determines children's behavioral propensities.[104] The common law has never followed the example of other nations (and two states) that impose strict liability on parents for children's tortious conduct.[105] In the United States, children are treated as independent agents.

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101. *See, e.g.*, Buono v. Scalia, 817 A.2d 400 (N.J. Super. Ct. App. Div. 2003) (suit by third-party against parent for negligent supervision); Zellmer v. Zellmer, 188 P.3d 497 (Wash. 2008) (suit by child against parent for negligent supervision).

102. *See, e.g.*, RESTATEMENT OF TORTS § 316 (1934) ("Duty of Parent to Control Conduct of Child").

103. RESTATEMENT (SECOND) OF TORTS § 315 (1963) (stating that in the absence of a special relationship, "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another"); Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 VAND. L. REV. 63, 75 (1988) (explaining "the no-duty rule"); Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999) (describing controversy surrounding the perceived expansion of liability to passive defendants such as gun manufacturers that have enabled others to commit tortious harms).

104. *See generally* JUDITH RICH HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO (1998) (arguing that nurture plays a smaller role than is assumed by mainstream literature).

105. One notable exception is the "family purpose doctrine," which exposes parents (as car owners) to liability for harm caused by other family members using the car for non-business purposes.

The limited nature of parental liability likely stems in part from tort law's strong resistance to liability in the absence of fault.[106] But it also reflects different standards of parenting that prevailed until well into the nineteenth century, according to which parenting happened in the interstices of productive household labor.[107] The common practice in England and colonial United States of apprenticing children out meant that children were routinely living out of the house under the supervision of other adults before age ten.[108] Moreover, due to continuing high birth rates and declining child mortality rates, parents had many children to contend with.[109] In this context, it is not surprising that from a very young age, children were viewed as autonomous actors in society, responsible—albeit sometimes under a modified standard—for their own actions. With the advent of adolescence as a transitional life stage, parenting practices began to change. However, even once nineteenth-century prescriptive literature proclaimed an ideal of mother-centered, emotive parenting, most Americans could not afford to pursue that ideal.[110] The modern common law framework for parental liability for negligent supervision was established under nineteenth-century, authoritarian parenting traditions.

In the absence of strict liability, fathers in the nineteenth century (all the early cases were against fathers as head of household) were subject to liability for their children's torts only in rare situations where the harm

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See DAN B. DOBBS, THE LAW OF TORTS § 340, at 935 (2001) (explaining that "the doctrine represents a social policy generated in response to the problem presented by massive use of the automobile").

Alone among the states, Hawaii and Louisiana hold parents strictly liable for their children's torts. *See* LA. CIV. CODE ANN. art. 2318 (2009) ("The father and the mother are responsible for the damage occasioned by their minor child, who resides with them or who has been placed by them under the care of other persons, reserving to them recourse against those persons."); HAW. REV. STAT § 577-3 (1984) (parents jointly and severally liable for tortious acts committed by their children).

Other nations have taken a different approach to parental liability questions. In France, for example, parents are "strictly and automatically liable" for harm caused by the acts of minor dependent children; the acts or omissions of the parents are irrelevant. L. Francoz-Terminal, F. Lafay, O. Moreteau & C. Pellerin-Rutigliano, *Children as Tortfeasors Under French Law*, *in* CHILDREN IN TORT LAW, PART I: CHILDREN AS TORTFEASORS 169, 193–94 (Miquel Martin-Casals ed., 2006) [hereinafter CHILDREN IN TORT LAW]. In other nations, parents are presumptively liable for harmful acts committed by their children, but parents may rebut that presumption by proving they acted reasonably. Pieter de Tavernier, *Children as Tortfeasors Under Belgian Law*, *in* CHILDREN IN TORT LAW, *supra*, at 63, 85; Jiří Hrádek, *Children as Tortfeasors Under Czech Law*, *in* CHILDREN IN TORT LAW, *supra*, at 111, 128; Gerhard Wagner, *Children as Tortfeasors Under German Law*, *in* CHILDREN IN TORT LAW, *supra*, at 217, 235.

106. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 928 (1981) (stating that "fault liability emerged out of a world-view dominated largely by no-liability thinking").

107. MINTZ & KELLOGG, *supra* note 25, at 45.

108. *Id.* at 16.

109. Birth rates went down gradually over the nineteenth century. *See id.* at 51 (stating that at the outset of the nineteenth century most women had seven or eight children; by mid-century, that number had reduced to five or six; and by the turn of the twentieth century the norm was three to four).

110. *See id.*

could be traced to a father's independently negligent act.[111] Thus, fathers could be liable for directing, authorizing, or ratifying a child's tortious conduct, or if the child committed the tort while in the father's employ.[112] Fathers were also held liable for negligently entrusting a child with a gun or other dangerous instrumentality.[113] These forms of liability were not peculiar to the parent–child relationship; they were applications of more general principles of agency and negligent entrustment.[114] For example, in *Beedy v. Reding*, the court affirmed a jury verdict against a father based on an inference that he must have been aware that his sons used his sleigh to haul off a neighbor's wood on three occasions.[115] Similarly, in *Hoverson v. Noker*, a father was held liable when his children repeatedly yelled and shot guns toward passersby:

> If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which, in its nature, was likely to result in damage to those passing, and when an injury did happen from that cause he was not only morally but legally responsible for the damage done.[116]

By failing to take action, the fathers in *Beedy* and *Hoverson* were deemed to have ratified or authorized their sons' unlawful conduct. In contrast, a court held a father not liable as a matter of law for his children's shooting of a neighbor's mules, on the ground that the father had not "counseled or abetted" his sons or "concealed the offense."[117]

None of the early cases premised liability on the father's *ex ante* failure to instruct his children in proper conduct. Parental liability involved a duty to exert immediate, physical control over one's child in situations as they

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111. *See* Chandler v. Deaton, 37 Tex. 406, 407 (1873) (finding "no presumption growing out of the domestic relation of parent and child, which would hold the father responsible for a crime or a tort committed by his minor child, unless it be shown that the father is himself in some way implicated as principal or accessory").

112. *See, e.g.*, Teagarden v. McLaughlin, 86 Ind. 476 (1882) (holding that father could not use independent contractor defense when he paid son to clear plaintiff's land and son negligently set fire while performing the work); Altoonian v. Muldonian, 177 N.E. 830 (Mass. 1931) (holding storeowner father liable for harm caused by son making deliveries by bicycle).

113. *See, e.g.*, Meers v. McDowell, 62 S.W. 1013 (Ky. 1901); Johnson v. Glidden, 76 N.W. 933 (N.D. 1898).

114. Adults other than parents were held liable for entrusting children with firearms or ammunition. *See, e.g.*, Binford v. Johnston, 82 Ind. 426 (1882) (shop owner).

115. Beedy v. Reding, 16 Me. 362 (1839).

116. Hoverson v. Noker, 19 N.W. 382, 382 (Wis. 1884).

117. Chandler v. Deaton, 37 Tex. 406, 407 (1883). The court was not even certain that concealment would be sufficient for liability. *Id.* The question whether the father negligently entrusted firearms to his children was not before the court.

arose. In all other situations, children bore sole liability for their torts.[118] Published in 1934, § 316 of the first *Restatement* reflects this early but limited recognition of parental liability. The title of the *Restatement* provision—"Duty of Parent to Control Conduct of Child"—somewhat oversells the narrow duty it imposes:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.[119]

The commentary to § 316 denoted fathers "head[s] of the family group," extending a supervisory duty to mothers only "in so far as [their] position as mother[s] gives [them] an ability to control" their children.[120] The provision's comments emphasize early courts' holdings that the duty to control does not hinge upon the quality of a parent's child rearing practices:

> The duty of a parent is only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of so doing. The parent is not under a duty so to discipline his child as to make it amenable to parental control when its exercise becomes necessary to the safety of others.[121]

Thus, the *Restatement* reflects the very limited view of parental responsibility—primarily paternal responsibility—from early case law. Although the lines between different forms of parental liability frequently blur, courts now delineate four categories of parental liability: (1) principal/agent liability, where a parent mandates, encourages or ratifies a child's tortious conduct; (2) respondeat superior liability, where the child is employed by the parent; (3) negligent entrustment, where a parent entrusts a child with a dangerous instrumentality; and (4) negligent supervision under § 316, where a parent's failure to control a child's conduct exposes

118. *See, e.g.*, Lessoff v. Gordon, 124 S.W. 182 (Tex. 1909) (holding a father not liable for son's independent decision to attempt to recapture escaped cow).

119. RESTATEMENT OF TORTS § 316 (1934).

120. *Id.* § 316 cmt. a.

121. *Id.* § 316 cmt. b.

third parties to an unreasonable risk of harm.[122] However, § 316's narrow definition of parental duty confined liability primarily to the types of situations in the first three categories, in accordance with nineteenth-century beliefs about the limited role of parents in controlling a child's conduct.

B. Modern Limits on Duty: The Dangerous Propensity Requirement

In the early common law, children were typically solely responsible for their tortious conduct. To a great extent, this allocation of responsibility toward children, even very young children, and away from parents, continues today.[123] Common law liability for negligent supervision has remained essentially the same since the time of the first *Restatement.* In 1965, the second *Restatement* republished § 316 verbatim. Thus, over the past seventy-five years, courts have leaned strongly toward finding no liability as a matter of law based on their interpretation of the *Restatement*'s formulation of parental duty to control.[124]

Foreseeability has provided the primary mechanism for determining (and narrowing) the contours of parental duty for negligent supervision. Perhaps because of § 316's awkward language, courts developed this foreseeability standard based not on the language of the provision itself, but on a sentence in the Reporter's Notes to the *Restatement (Second)*, stating that "[t]here must . . . be some specific propensity of the child, of which the parent has notice."[125] Many courts have interpreted this sentence literally, holding that a child's misconduct is not foreseeable—and therefore parents

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122. *See* Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L. J. 886 (1934).

123. A few recent cases reaffirm the traditional view that even very young children are capable of committing intentional torts. *See* Weisbart v. Flohr, 67 Cal. Rptr. 114 (Cal. Ct. App. 1968) (seven-year-old had intent to shoot five-year-old in the eye with arrow); Bailey v. C.S., 12 S.W.3d 159 (Tex. App. 2000) (four-year-old could be liable for crushing babysitter's larynx).

In negligence, children are held to the standard of others of like age, intelligence and maturity, or to the adult standard if they engage in a dangerous adult activity. *See, e.g.*, Midwestern Indemnity Co. v. Wiser, 760 N.E.2d 62 (Ohio App. 2001) (child with attention deficit hyperactivity disorder not held to same standard as average eight-year-old). A minority of states impose age-based presumptions: Children older than fourteen are presumptively capable of negligence; there is a rebuttable presumption that children between seven and fourteen lack the capacity to commit negligence; and children under seven are incapable of negligence. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10(c) cmt b. (2010). The *Restatement (Third)* would eliminate negligence liability for children under five. *Id.* § 10(b) cmt. d. There are no known examples of children under the age of eleven being held to an adult standard of care. *Id.*

124. *See* Crisafulli v. Bass Auction Co., 38 P.3d 842, 846 (Mont. 2001) (adopting § 316 in case where boy/employee rode bicycle into spectator at auction, but noting that it imposes liability in "limited and exceptional circumstances").

125. *See* RESTATEMENT (SECOND) OF TORTS § 316 reporter's note (1965). The Reporters also restated the maxim that "[t]here is no 'general responsibility for the rearing of incorrigible children.'" *Id.*

have no duty to supervise as a matter of law—until a child has displayed a "dangerous propensity" for that particular type of misconduct.[126]

The "dangerous propensity" standard has fueled a steady stream of judicial no-duty determinations. At its extremes, it has yielded ridiculous results. For example, in *Fuller v. Studer*, the court found no parental duty where a three-year-old girl climbed onto a snowmobile that her father had left running and pulled the throttle, causing it to run over an embankment and land on another child.[127] The court ruled as a matter of law that the father had no duty to third parties to prevent his daughter from driving away on the snowmobile because plaintiffs had failed to show that the girl had a known propensity to climb or play upon a snowmobile.[128] The court did not allow a jury to consider whether parents might expect a typical three-year-old to be intrigued by or climb upon a motorized vehicle.

Courts requiring proof of a child's dangerous propensity have also required a precise correlation between past misconduct and the child's current misconduct to trigger parental duty based on dangerous propensity. In *Saenz v. Andrus*, a boy threw a butcher knife left on a counter at another child while they were at the boy's home unattended after school. In rejecting liability for the mother, the court found that the son's known proclivity for throwing pocket knives at walls was—as a matter of law—irrelevant to the question of whether it was foreseeable that he might throw a butcher knife at or near another child.[129] Analogously, in *Manuel v. Koonce*, a sixteen-year-old hosted an alcohol-infused party when his parents went away for a weekend, resulting in a fatal drunk-driving accident.[130] Based on the parents' testimony that their son had never consumed alcohol at their home before, the court ruled that the parents had no duty to anticipate the debauchery, despite the boy's previous conviction after a jury trial for an alcohol-related offense for which he was still on probation at the time of the party, as well as testimony that he routinely came home drunk.[131] Other courts have made similarly tortured no-duty determinations on the grounds that, in the absence of a specific propensity, a child's conduct was not foreseeable and the parent thus had no duty to

126. See Fuller v. Studer, 833 P.2d 109 (Idaho 1992); Saenz v. Andrus, 393 S.E.2d 724 (Ga. App. 1990).

127. *See Fuller*, 833 P.2d at 114 n.3 (Bistline, J., dissenting) (quoting affidavit stating that "[t]he kids were standing around in various places. I don't know if we said anything to them about staying away from the machine. Both of our backs were to my snowmobile when Barbara, aged 3 at that time, somehow climbed onto my machine.").

128. *See id.* at 113 (finding no disputed issue of material fact where "[b]oth affiants stated that they were unaware of any propensity of Barbara to climb upon and play on a snowmobile.").

129. Saenz v. Andrus, 393 S.E.2d at 726 (Ga. App. 1990).

130. *See* Manuel v. Koonce, 425 S.E.2d 921 (Ga. App. 1992).

131. *Id.* at 923, 926 (McMurray, J., dissenting).

exercise control.[132] Furthermore, privilege issues have complicated plaintiffs' proof of propensity by prohibiting introduction of juvenile convictions to demonstrate propensity.[133]

Another limitation of the dangerous propensity test is that it focuses solely on the behavioral propensities of the parent's child as an individual, although—predictably—children act differently among peers. The parents in *Koonce* gave their son permission to have a slumber party while they were away, but the court's analysis of the son's behavior did not consider the possibility that it might be affected by teen group dynamics.[134] Similarly, in *Kitchens v. Harris*, the defendant's mother informed the plaintiff's parents that she would be home during a birthday party for her fourteen-year-old daughter.[135] As it turns out, the birthday girl's parents left the house during the party.[136] While they were gone, the girls took out the family's ATV, and the plaintiff was severely injured when one of the girls drove it into a tree.[137] The court found no parental duty because of a lack of evidence that the daughter had a propensity to use the ATV without permission, or to allow others to do so.[138] The court did not consider the impact of the other girls on the duty to supervise, either by considering their behavioral propensities or by considering how the girls' behavior and judgment might alter within a group.[139] A finding of no duty based on a

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132. *See, e.g*, Nearor v. Davis, 694 N.E.2d 120 (Ohio 1997) (child's use of loaded revolver left under mattress to shoot friend not foreseeable despite previous arrest, school disciplinary infractions for drugs, history of lying to parents, and prior theft of parent's car keys to drive without a license); Polizzoti v. Gomes, 2006 Mass. App. Div. 40 (Mass. Dist. Ct. 2006) (two traffic citations not sufficient to show minor's dangerous propensity for negligent motorcycle driving); Jackson v. Wimbley, 463 S.E.2d 48 (Ga. App. 1995) (no liability without known proclivity of four-year-old child to play with fire); National Dairy Prods. Corp. v. Freschi, 393 S.W.2d 48 (Mo. App. 1965) (three-year-old lacked dangerous propensity to get in trucks and pull parking brakes); Gissen v. Goodwill, 80 So. 2d 701 (1955) (eight-year-old's propensity for striking or knocking down furniture not sufficient to render slamming of door foreseeable). In *Haefele v. Phillips*, No. 90AP-1331, 1991 WL 64896, at *2 (Ohio Ct. App. Apr. 23, 1991), the court stated:

> [W]e find a complete lack of evidence that Matthew's prior behavior would have given defendant reasonable cause to believe that Matthew would viciously stab another child with a knife. Construing the affidavits most strongly in their favor, plaintiffs can, at best, establish that Matthew drank beer . . . struck his mother and threatened his father on one occasion, and had a deep and consuming interest in 'marine gear' such that he possessed several combat knives. . . . [T]his is not the quality of notice required to establish foreseeability sufficient to hold a parent liable for the acts of a child.

133. *See, e.g.*, Parmett v. Superior Ct., 262 Cal. Rptr. 387 (Cal. Ct. App. 1989) (plaintiff may not obtain information or testimony about sealed juvenile court proceedings to show dangerous propensity).

134. *See* Manuel v. Koonce, 425 S.E.2d 921, 922 (Ga. Ct. App. 1992).

135. *See* Kitchens v. Harris, 701 S.E.2d 207, 209 (Ga. Ct. App. 2010).

136. *Id.* at 208.

137. *Id.*

138. *Id.* at 209 (finding that in the absence of a propensity of the girl "for the specific dangerous activity, [the mother] was not required to keep a constant watch to guard against possible harm").

139. *Id.*

lack of a child's dangerous propensity "is the most common conclusion to this sort of claim."[140]

C. *Modern Limits on Duty: No Opportunity to Control*

Finally, many courts hold, based on the *Restatement*, that parents have no duty under § 316 because even if they know of their child's dangerous propensities, they had no "opportunity for exercising such control" at the time of the misconduct.[141] In some cases these decisions define control in a very narrow, physical sense: If the parent is not present, there is no duty, regardless of whether the parent's actions might have created the risk of harm.[142] Adhering to the narrow view of parental liability in early case law, the few courts upholding a finding of liability typically do so on the basis that the parent either ratified or encouraged the child's pattern of tortious behavior.[143]

Frequently these no-duty determinations reflect an instrumentalist unwillingness to impose liability on parents for acts of teenagers who commit serious crimes. In *Barth v. Massa*, a fifteen-year-old boy shot a police officer with a stolen gun during a nighttime burglary.[144] The appellate court overturned a jury verdict against the boy's parents, finding they had no duty because they had no opportunity to prevent the burglary.[145] The evidence included testimony of multiple incidents in the months before the burglary of the boy shooting at other children in the neighborhood with BB or pellet guns.[146] The police contacted the parents regarding the incidents, but the parents did not take away the boy's guns or follow the suggestions of the police for counseling.[147] The jury also heard

140. Dinsmore-Poff v. Alvord, 972 P.2d 978, 981 n.13 (Alaska 1999).

141. RESTATEMENT (SECOND) OF TORTS § 316(b) (1965).

142. *See also, e.g.*, Propst v. Farnsworth, No. 1 CA-CV 09-0355, 2010 WL 3596740, at *3 (Ariz. Ct. App. Sept. 16, 2010) (father who told six-year-old child to microwave his own dinner and then left house had no opportunity to control child when he spilled extremely hot food on infant cousin). Courts may properly find no negligence as a matter of law if there is no feasible means for parents to take precautions. *See, e.g.*, Cooper v. Meyer, 365 N.E.2d 201 (Ill. App. Ct. 1977) (no liability for son's attack on person who arrived unexpectedly at house while father was out) (cited approvingly in RESTATEMENT (THIRD) OF TORTS § 41 reporters' note (Final Draft No. 1, 2005)).

143. *See, e.g.*, Johnson v. Glidden, 76 N.W. 933 (S.D. 1898) (liability appropriate where father gave son gun and consented to son's negligent use of it); Condel v. Savo, 39 A.2d 51 (Pa. 1944) (parents knew their child assaulted smaller children and resisted admonitions of other adults about his conduct); Norton v. Payne, 281 P. 991 (Wash. 1929) (parents encouraged son to strike other children with sticks); Sun Mountain Prods., Inc. v. Pierre, 929 P.2d 494 (Wash. Ct. App. 1997) (evidence showed father was aware of, but did not take action regarding, stockpile of stolen car stereo goods in son's room).

144. *See* Barth v. Massa, 558 N.E.2d 528 (Ill. App. Ct. 1990).

145. *Id.* at 534.

146. *Id.* at 531.

147. *Id.* at 531–32.

evidence that the boy's father had secretly removed guns from his son's room following the boy's arrest.[148] The court ruled that this evidence was not sufficient to demonstrate that the defendant parents had any knowledge of or opportunity to prevent their son's crime.[149] Other decisions follow this general approach, finding even the most minimal efforts by parents to deal with a child's dangerous propensity sufficient to support a no-duty determination.[150] Courts appear to use fact-intensive no-duty findings in these cases to minimize parental liability for children with chronic behavioral problems who commit serious crimes.

However, of the few cases that do find a parental duty, some raise instrumentalist concerns that tip the other way, reflecting current societal fears and mores. For example, in *Nieuwendorp v. American Family Insurance Company*, the Supreme Court of Wisconsin upheld a jury verdict holding parents liable for their fourth grade son's assault on a teacher when the parents had failed to warn his school that they had taken the boy off medication for attention deficit hyperactivity disorder.[151] The court clarified that the decision not to give the child medication was not itself negligent; it was the manner in which the parents implemented their decision, and their failure to inform the school, that exposed others to an unreasonable risk of harm.[152] But the line between nonfeasance and misfeasance easily blurs if, for example, parents fail to have their child evaluated despite clear signs of mental illness that could have been mitigated or resolved through medication; or if parents fail to supervise the child to ensure that he regularly takes such medication.[153]

Failure to warn cases have also arisen in the slightly different context where parents do not inform others of their child's past sexual misconduct.[154] In these latter cases, courts have found liability only where the history of sexual misconduct was clear and where the victim was

148. *Id.* at 532.

149. *Id.* at 534–35.

150. *See* Dinsmore-Poff v. Alvord, 972 P.2d 978, 983 (Alaska 1999) (case law does not support "searching inquiry into alternate disciplinary regimes" where older children commit serious crimes); *see also* KEETON ET AL., *supra* note 38, § 124, at 915 ("[I]t would be extending the hardships of harassed and exasperated parents too far to hold them liable for general incorrigibility, a bad education and upbringing, or the fact that the child turns out to have a nasty disposition.").

151. *See* Nieuwendorp v. Am. Family Ins. Co., 529 N.W.2d 594 (Wis. 1995).

152. *Id.* at 596.

153. *See, e.g.*, L.C. v. Cent. Penn. Youth Ballet, No. 1:09-cv-2076, 2010 WL 2650640, at *5 (M.D. Pa. Jul. 2, 2010) (denying motion to dismiss negligent supervision claim where parents knew that son needed medication to control his behavior and failed to provide it to him, and son sexually assaulted plaintiff at dance school).

154. *See* Doe v. Kahrs, 662 N.E.2d 101 (Ohio Ct. App. 1995) (holding parents subject to liability for negligent supervision although they were not home at the time when they were aware that one of their sons had previous history of inappropriate sexual misconduct); Isbell v. Ryan, 983 S.W.2d 335 (Tex. App. 1998) (finding mother could be liable for failure to inform her ex-husband's wife that son might pose a danger to stepmother's daughter based on history of son's sexual molestation of cousin).

immediately foreseeable—for example, where the victim was playing unsupervised at the perpetrator's house.[155] But one can envision a troubling expansion of such holdings, requiring parents to warn schools, church groups, and the neighborhood in general of their child's potential sexual deviance. Finally, some (but by no means all) courts have recently expanded liability for negligent supervision by imposing a duty of supervision on parents of adult children with mental disabilities who continue to reside with their parents.[156] Foreseeability allows courts to restrict parents' duty to supervise, but it also provides a mechanism for expanding its scope.

D. Giving Foreseeability to the Jury

Section 316 has not provided courts with a consistent, workable standard by which to evaluate parental actions. Courts have used the "dangerous propensity" requirement to calibrate parents' duty based on judges' assessments of the merits of individual cases rather than allowing a jury to assess breach and proximate cause. In addition, courts' no-duty findings frequently, though tacitly, reflect instrumentalist policy concerns about the impact of imposing parental liability. The dangerous propensity requirement does not differentiate between parents' duty to closely supervise young children—like a three-year-old near a snowmobile, or an eight-year-old who is throwing furniture in a hotel—and the different considerations inherent to parents' supervisory relationship with teens. In addition, by focusing on the individual child's behaviors in isolation, the dangerous propensity requirement fails to account for foreseeable changes in children's judgment and behavior in group situations. Finally, courts

155. *See, e.g.*, Gritzner v. Michael R., 611 N.W.2d 906, 912 (Wis. 2000) (recognizing negligent supervision claim arising out of sexual assault on four-year-old plaintiff by ten-year-old neighbor with history of sexually inappropriate conduct but denying claim for negligent failure to warn on public policy grounds).

156. *See, e.g.*, Silberstein v. Cordie, 474 N.W.2d 850, 856 (Minn. Ct. App. 1991) (denying summary judgment against parents of twenty-seven-year-old man with child-like mental abilities); Mayeux v. Madden, 520 So. 2d 1005 (La. Ct. App. 1987) (holding parents could be liable for failure to control adult son with schizophrenia who was living with them, but granting summary judgment because son had not displayed propensity for violence); R.H. v. Mischenko, No. L-2373-06, 2011 WL 2320844 (N.J. Sup. Ct. June 3, 2011) (finding no duty to supervise adult, heroin-addicted daughter to prevent assaults on daughter's four-year-old therapy client because violence was not foreseeable); Frederic v. Willoughby, No. 2007-P-0084, 2008 WL 2582593, at *3 (Ohio Ct. App. June 27, 2008) (finding a genuine issue of fact as to parents' failure to control adult son who sexually assaulted neighbor). *But see, e.g.*, Kaminski v. Town of Fairfield, 578 A.2d 1048 (Conn. 1990) (parents of adult son with schizophrenia owed no duty to control). Recently a wrongful death suit based on a failure to warn was filed against the parents and grandmother of an adult law firm partner who pleaded guilty to murdering a colleague's ex-wife. *See* John Council, *Family Responsibilities? Wrongful Death Suit Filed Against Criminal Defendant's Parents, Grandmother*, TEXAS LAWYER (Jan. 23, 2012), http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202539298845&slreturn=1.

sometimes seem to require that the parents *actually* know of their child's dangerous propensity, rather than triggering parental duty when they *should* know. Therefore, parents' denial about their child's drinking problem, for example, might insulate them from liability.

Under § 316 courts also shoehorn proximate cause into no-duty analyses. Frequently courts do this in situations where older children have committed serious or criminal acts; courts are hesitant to ascribe liability for such conduct to parents. In some cases a court's no-duty determination is in fact a finding of no breach or no proximate cause as a matter of law. In other instances, however, a reasonable jury could find those elements; the court's no-duty determination is influenced—though quietly—by public policy concerns or, simply, antipathy to parental negligent supervision as a cause of action. In the negligent supervision half of the parental liability universe, as in the parental immunity half, the common law has taken a dim view of parental liability. As the next Parts demonstrate, courts should refrain from calibrating duty precisely to individual cases and instead impose on parents a consistent standard of reasonable care in negligent supervision cases.

III. THE *RESTATEMENT (THIRD) OF TORTS*: ALLOWING JURIES TO JUDGE PARENTS

The question whether to impose—or withhold—negligence liability is essentially one of policy.[157] In the realm of parental liability, these policy determinations are fraught with competing visions of which entities deserve protection as families, how the members of those families should be ordered, and the relation of the family to the state.[158]

Yet parental liability is also deeply affected by broader trends in negligence law, particularly those trends that have to do with the allocation of decisional power between the judge and the fact finder. On this front, too, a battle is waged, and until now, judges have won: Judges have aggressively shaped and narrowed the legal duties of parents with respect to their children.[159]

The publication by the American Law Institute of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*—of which the first volume was published in 2010 and the second in 2013—makes now a

157. *See* KEETON ET AL., *supra* note 38, § 53 (describing duty as "only an expression . . . of policy which lead[s] the law to say that the plaintiff is entitled to protection").

158. *See* McCurdy, *supra* note 15, at 1030 ("Here is waged a battle between conflicting conceptions of the family, between individual and relational rights and duties.").

159. Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 793 (2001) ("Duty is, in other words, a two-sided coin that can reinforce status quo limitations or serve dynamically expansive purposes.").

particularly appropriate time to reconsider parental liability. While in theory Restatements merely "restate" prevailing law, their actual role has not been so limited: The prominent scholars and practitioners who draft the Restatements often use the provisions in an attempt to influence or alter common law norms.[160] The *Restatement (Third)* is no exception. The *Restatement (Third)*'s broader theory of duty in negligence, as well as its specific approach to affirmative parental duty, reemphasizes the standard of reasonable care and the centrality of the jury to negligence determinations. If accepted by courts, these revisions, which seek to constrict judges' increasing reliance on duty to decide cases as a matter of law, will deeply influence the terms by which future parental-liability debates will be decided. And those terms should be the traditional standard of reasonable care.

A. Renewed Commitment to the Standard of Reasonable Care

The *Restatement (Third)*'s approach to duty in negligence represents a deceptively understated counterattack against the growing tendency of judges to use duty to retain decisional power—precisely the kind of judicial power retention that is at the heart of both forms of parental liability.[161] Section 7 states that when an actor's conduct creates a risk of physical harm, the actor "ordinarily has a duty to exercise reasonable care."[162] This statement is so obvious that the drafters considered omitting it entirely.[163] Section 7(b), however, provides that courts should depart from this duty of ordinary care only in "exceptional" cases, when "countervailing principle or policy warrants denying or limiting liability in a particular class of cases."[164] Section 7(b)'s use of the word "exceptional" underscores a

160. *See* Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 27 (1929).

161. *See* W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 741 (describing *Restatement (Third)*'s duty provisions as "subtly revolutionary").

162. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (2010).

163. *See* John C. P. Goldberg, *Introduction: The* Restatement (Third) of Torts: General Principles *and the John W. Wade Conference*, 54 VAND. L. REV. 639, 654 (2001) ("An actor has a legal obligation, in the conduct of the actor's own affairs, to act reasonably to avoid causing legally cognizable harm to another." (quoting RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 101 (Preliminary Draft No. 2, 2000))); *see also* John C. P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001) (criticizing the proposed *Restatement*'s omission of duty).

164. RESTATEMENT (THIRD): LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(b) (2010); *id.* § 7 cmt. a ("When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability. On the other hand, when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty. No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.").

renewed commitment to the strong norm of reasonable care. Moreover, § 7(b) indicates that courts should only adjust duty based on policy decisions across "a class of cases" rather than as part of an individualized duty analysis. Section 7 must also be read in conjunction with § 8, which states emphatically that analyses of breach and proximate cause are within the province of the jury rather than the court.[165] The combined effect of these provisions—as the Reporters acknowledge—is to drastically restrict the role of a court in making duty determinations based on fact-specific grounds.[166]

Section 7 reflects the Reporters' concern that courts, led by California, have increasingly used legal duty analysis to constrict or expand defendants' negligence duties in individual cases based on unstated and perhaps inappropriate considerations.[167] While the principles it articulates appear grounded in tradition, some scholars have argued that the *Restatement (Third)* manipulates, rather than restates, the law of duty in negligence.[168] The long-term impact of § 7 is yet to be determined.

Its influence on parental liability cases is also unclear. For over a century courts have granted parents immunity from liability on the ground that the parent–child relationship (like the relationship of spouses, and the relationship between a charity and its beneficiaries) is "exceptional" and warrants establishment of a lower standard of care. In theory, therefore, this provision is consistent with courts' across-the-board approach to parental immunity. Nevertheless, as discussed further in Part IV, suits against parents do not qualify as "exceptional" simply because the defendants (or the third-party defendants who are subject to contribution claims) are parents of the plaintiff. The evolution of parental liability, now riddled with exceptions, bears this out. Moreover, among the many states that have completely abolished parental immunity, there has been no judicial,

165. *See id.* § 8(b).

166. *See id.* § 7 reporters' note.

167. *See id.* § 7 reporters' note, cmt. j (observing that "[t]he California Supreme Court has been in the vanguard in suggesting that foreseeability has an important role to play in determining whether a duty exists"); *see also* Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 (2006) (critiquing California's overuse of foreseeability). The California cases most associated with California's foreseeability standard include *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (holding that notary public owed affirmative duty to beneficiary of negligently prepared will); *Rowland v. Christian*, 443 P.2d 561, 567 (Cal. 1968) (relaxing the distinctions of duty of care for landowners and replacing them with a single duty of reasonable care); and *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (finding that psychotherapists had duty to warn former girlfriend of patient's intent to harm her).

168. *See* John C. P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The* Restatement (Third)*'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1212 (2009) (stating that "[i]t is in our view inappropriate for a 'restatement' of the law to discard basic tort concepts rather than, for example, to acknowledge them and criticize them in commentary"); *see generally* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008) (analyzing relationship of duty debate to California tort law).

scholarly, or public outcry. In accordance with the *Restatement (Third)*, parents should be held to a standard of reasonable care.

B. Giving Foreseeability Back to Juries

The most controversial aspect of the *Restatement (Third)*'s attempt to constrain increasing judicial power in negligence is its forthright rejection of foreseeability as an element of a judge's evaluation of legal duty.[169] Over the past few decades, duty has evolved into a more individualized, less predictable inquiry. In the landmark California cases that ignited the foreseeability fire, courts used foreseeability to expand defendants' duties beyond common law norms. Nevertheless, foreseeability not only spread beyond California, it also oozed out of difficult or unusual cases into routine judicial duty determinations, so that "foreseeability now threatens to swallow the duty calculus whole."[170] Unquestionably foreseeability is deeply entrenched in the modern judicial landscape. In one estimate currently "forty-seven states plainly do give foreseeability a significant role in duty analysis."[171]

The *Restatement (Third)* seeks to reverse that trend, placing foreseeability within the jury's purview:

> Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.[172]

The Reporters injected this provision into the commentary on § 7 at almost the last moment, based on a law review article arguing that judges' expanding, indiscriminate use of foreseeability usurps the jury's traditional

169. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2010) ("In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk . . . . The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus . . . courts should leave such determinations to juries unless no reasonable person could differ on the matter.").

170. W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 922 (2005).

171. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1260 (2009).

172. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2010).

province.[173] Thus, the *Restatement (Third)* has answered the Palsgrafian question, and the scales have tipped against Justice Cardozo.[174]

Although the Reporters rooted their rejection of foreseeability in traditional tort law, some scholars have argued that rejecting foreseeability is counter to common judicial practice as well as common sense.[175] Other scholars agree with the principle of the *Restatement (Third)*, but argue that courts must inevitably make case-specific duty determinations in some instances.[176] It remains to be seen whether courts will embrace the *Restatement (Third)*'s streamlined, foreseeability-free view of duty, although there are early indications that they will.[177] Certainly it is attractive. In addition to confronting systemic problems associated with foreseeability, the *Restatement (Third)*'s approach at least gives the illusion of simplicity.

For parents as defendants, the price of such simplicity—and of the resulting increased jury participation—may be increased exposure to liability. In negligent supervision suits, courts have used foreseeability in duty to narrow parents' duties to supervise their children. Removing foreseeability from that duty analysis will result in more suits surviving dispositive motions and either proceeding to trial or, more likely, settling on more favorable terms than the current framework allows. Notwithstanding the *Restatement (Third)*'s commitment to reinvigorating the role of juries in tort suits, however, courts will retain their traditional prerogative to rule as a matter of law in favor of defendant parents if no

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173. *See id.* § 7 reporters' note, cmt. j (explaining the influence of Cardi's article *Purging Foreseeability*, *supra* note 161, on the decision to explicitly remove foreseeability from duty determinations); *see* Cardi, *Purging Foreseeability*, *supra* note 161, at 743 (arguing that "[i]n many courts the foreseeability lens seems to expand, contract or change focus at the will of the judge"); *see also* Twerski, *The Cleaver, the Violin and the Scalpel: Duty and the Restatement of Torts*, 60 HASTINGS L.J. 1, 22–23 (2008) (agreeing with Cardi and Green that foreseeability "is the exact type of factor that belongs in the domain of the jury").

174. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation . . . .").

175. Zipursky, *supra* note 171, at 1258 (2009) (challenging the *Restatement (Third)*'s approach on the ground that "almost every jurisdiction does treat foreseeability as a significant factor (and frequently the most significant factor) in analyzing whether the duty element is met in a negligence claim"); *see also id.* at n.47 (listing cases); Rabin, *supra* note 159, at 792 (2001) (observing ability of judges to manipulate cases by treating questions of proximate cause or other factual questions as duty questions).

176. *See* Twerski, *supra* note 173, at 8–10.

177. *See* A.W. v. Lancaster Sch. Dist. 0001, 784 N.W.2d 907, 913–14 (Neb. 2010) (abrogating past framework and adopting approach of *Restatement (Third)*); Gritzner v. Michael R., 611 N.W.2d 906 (Wis. 2000) (applying standard of reasonable care and considering public policy in determining not to impose duty to warn of child's potential for sexual misconduct); Gipson v. Kasey, 150 P.3d 228 (Ariz. 2007) (same); Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009); Behrendt v. Gulf Underwriters Ins. Co., 768 N.W.2d 568 (Wis. 2009). *But see, e.g.*, Smith v. Freund, 192 Cal. App. 4th 466 (2011) (finding no duty of parents to control adult son based on lack of foreseeability of son's shooting rampage).

reasonable jury could find liability.[178] In addition, consistent with the *Restatement (Third)*, courts may still modify duty in parent–child cases where "exceptional" concerns of principle and policy so require.[179]

C. *The End of § 316: A Revised Approach to Parental Duty*

Section 316 has dominated judicial analysis of negligent supervision cases against parents since its publication in the first *Restatement of Torts* in 1938. The original § 316 has never been modified. Yet not only have prevailing parenting norms shifted over the past century, incorporating society's increasing unwillingness to take risk, the common law has also become more comfortable with imposing—and enforcing—affirmative tort duties in other contexts.[180] In addition, the rejection of foreseeability in duty has far-reaching implications for all affirmative duty cases. It is hardly surprising, therefore, that the forthcoming volume of the *Restatement (Third)*, which contains the provision addressing affirmative duties, represents a rather significant shift from the views of previous *Restatements*.

The *Restatement (Second)* addressed affirmative duties in a series of provisions, establishing a unique analytical framework for each.[181] The *Restatement (Third)* substantially revises this section, consolidating affirmative duties into a single provision, the proposed § 41. Titled "Duty to Third Persons Based on Special Relationship With Person Posing Risks," § 41 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 in the duty provided in subsection (a) include:
>
> (1) a parent with dependent children,
>
> (2) a custodian with those in its custody,

178. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. i (2010) (stating that when no reasonable jury could find negligence, "courts take the question away from the jury and determine that the party was or was not negligent as a matter of law"); Broadbent v. Broadbent, 907 P.2d 43, 50 (Ariz. 1995) (noting that "trial courts should feel free to dismiss frivolous cases on the ground that the parent has acted as a reasonable and prudent parent in a similar situation would").

179. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmts. c–g (2010). As an example of a suit that might raise public policy concerns, imagine a suit alleging that parents' failure to apply sunblock to the plaintiff when she was young, and her consequent severe sunburns caused her early and aggressive skin cancer.

180. See Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949) for a detailed description of other tort areas in which an affirmative duty has been imposed.

181. *See* RESTATEMENT (SECOND) OF TORTS §§ 314–320 (1979).

(3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and
(4) a mental-health professional with patients.[182]

The proposed provision is consistent with the *Restatement (Third)*'s overarching goal of clarifying and simplifying the law of negligence, and of making the duty of reasonable care "a more explicit norm."[183] Section 316 of the prior *Restatements* was verbally and analytically awkward, leading many courts to apply the shorthand "dangerous propensity" standard.[184] In contrast, § 41 is straightforward and familiar. Under the *Restatement (Third)*, the standard for affirmative duties mirrors the normal duty standard: reasonableness under the circumstances. Section 41 is also consistent with the *Restatement (Third)*'s controversial "purge" of foreseeability from duty.[185]

Eliminating foreseeability would represent a substantial shift in the framework of negligent supervision liability. Foreseeability is essential to the determination of parental duty under § 316, pursuant to which duty exists only when a parent "knows or has reason to know that he has the ability to control his child," and that the parent "knows or should know of the necessity and opportunity for exercising such control."[186] The same thing is true for courts that apply the simplified "dangerous propensity" standard. In negligent supervision cases, foreseeability has become "duty's 'unified theory.'"[187] Section 41 clears the foreseeability slate. Parents' duty—reasonableness under the circumstances—is already established. Courts should only engage in foreseeability analysis in the narrow slice of cases where they find that no reasonable jury could find breach or proximate cause.[188] Juries, rather than judges, should become arbiters of reasonable parental supervision under § 41.

There are difficult cases where a jury's allocation of parental responsibility would contravene important public policies—for example, as discussed below, courts should be cautious about allowing liability based

182. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 41 (Proposed Final Draft No. 1, 2005). The duty of mental-health professionals to their patients is new to this Restatement, reflecting changes in the law since *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

183. Ellen Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 985 (2003).

184. *See* Crisafulli v. Bass, 38 P.3d 842, 847 (Mont. 2001) (Rice, J., concurring in part and dissenting in part) (resisting adoption of § 316 in part because the provision is "indiscernible").

185. *See* Cardi, *supra* note 161, at 739.

186. RESTATEMENT (SECOND) OF TORTS § 316(a)–(b) (1965).

187. Cardi, *supra* note 170, at 922 (quoting BRIAN GREENE, THE ELEGANT UNIVERSE 424 (1999)).

188. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 41 cmt. c (Proposed Final Draft No. 1, 2005); *id.* reporters' note, cmt. d ("There must be a reasonably foreseeable risk of harm before parents can be found negligent in failing to control their child.").

on a failure of a parent to medicate her child or based on a parent's failure to broadly warn others about a child's sexual propensities.[189] Under § 41 and § 7, however, courts must consider these questions directly, in terms of public policy, rather than squeezing them into a case-specific foreseeability/duty analysis.

For example, in *Gritzner v. Michael R.*, a four-year-old and her parents brought suit against the mother of a ten-year-old boy and the mother's boyfriend alleging that the boy molested the girl while she was playing at his home under the boyfriend's supervision.[190] The defendants knew that the boy had the propensity to sexually molest other children. Despite this, the court ruled that public policy prevented the imposition of a legal duty on the boyfriend to warn the girl's parents of the danger because:

> [t]he practical effect would be to require any adult who cared for a child who had previously engaged in any conduct that could be characterized as an "inappropriate sexual act" to stigmatize this child in all of his or her relations with other children. We are greatly hesitant to impose such a limitless duty to warn.[191]

In contrast to this difficult case, § 41 should render many negligent supervision cases relatively straightforward. In particular, as the draft commentary indicates, parental duty to supervise is at its zenith when children are young.[192] Negligent supervision in this context tends to be immediate and physical because the child is with the parent or another responsible adult. Moreover, parents should expect unpredictable changes in behavior in young children. Therefore, duty limitations should not prevent juries from evaluating parental conduct in cases alleging that a young child started a fire, or climbed into a parked truck and pulled the parking break, or knocked someone over with an overstuffed Costco shopping cart, or climbed on an idling snowmobile.[193] In some of these

189. *See* Part IV.F at 585.

190. *See* Gritzner v. Michael R., 611 N.W.2d 906 (Wis. 2000) (rejecting claim of failure to warn in case arising from child's sexual assault on public policy grounds, but sustaining a cause of action for negligent supervision).

191. *Id.* at 916.

192. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 41 cmt. d (Proposed Final Draft No. 1, 2005) (stating that "courts recognize that the process of gaining independence is an important consideration in determining what constitutes ordinary care"); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 10 cmt. d (2010) (stating that in cases alleging misconduct by children under the age of five, questions of responsibility should focus on the conduct of parents or other adults, but noting that once children enter school parental control diminishes).

193. *See* Fuller v. Studer, 833 P.2d 109, 114 n.3 (Idaho 1992) (snowmobile); Jackson v. Wimbley, 463 S.E.2d 48, 48–49 (Ga. Ct. App. 1995) (no liability for four-year-old starting fire without known proclivity of child to play with fire); Nat'l Dairy Products Corp. v. Freschi, 393 S.W.2d 48, 57 (Mo. Ct. App. 1965) (three-year-old lacked dangerous propensity to get in trucks and pull parking

situations, a jury may find no liability on the ground that the parent acted reasonably, but the court should not presage such a determination in the form of a legal duty analysis.

Jury resolution is also important because courts sometimes evaluate parental liability based on the parents'—inevitably biased—view of their children's behavioral propensities. Under the § 316 standard, some courts incorrectly focus solely on the foreseeability of misconduct by the parents' child based on the child's typical at-home behavior.[194] But questions of negligent supervision become more complex and fact-intensive when children are gathered in groups.[195] Parents who are supervising children in such situations must be prepared to react to a wider range of potential misconduct, particularly when they do not know all of the children individually—and it is also reasonable to expect that children will act differently among their peers than they do at home.

Section 41 is simple and reasonable—and a bit intimidating because it will expand the circumstances under which suits against parents might reach a jury. Nevertheless, courts should adopt it. The current law of negligent supervision epitomizes the duty concerns the drafters of the *Restatement (Third)* seek to ameliorate. The *Restatement (Third)*'s approach should lead to clearer, fairer adjudication of negligent supervision disputes. It will also encourage courts to confront directly some of the important public policy questions that currently run silently through judicial duty analyses in suits against parents arising out of harms caused by their children to third parties.

IV. HOLDING PARENTS TO A STANDARD OF REASONABLE CARE

Holding parents to a consistent standard of reasonable care with respect to their children would alleviate the policy and the doctrinal harms of the current approach to both forms of parental liability: parent's liability to their own children, and their liability to third parties for their children's misconduct. As a matter of family law policy, the current common law standards applied to parents represent clashing views of childhood and the role of parents: In parent-child suits, parents are protected based on idealized visions of parental authority, yet when parents are subject to

brakes); Paulson v. Huang, No. 60027-3-I, 2008 WL 3824773, at *3 (Wash. Ct. App. Aug. 18, 2008) (no proof of dangerous proclivity of seven-year-old to negligently handle shopping carts).

194. *See, e.g.*, Kitchens v. Harris, 701 S.E.2d 207, 209 (Ga. Ct. App. 2010); Manuel v. Koonce, 425 S.E.2d 921, 922–23 (Ga. App. 1992) (party with alcohol not foreseeable when parents allowed unsupervised slumber party of sixteen-year-old boys while away for the weekend).

195. *See* Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1111–13 (discussing developmental science research explaining heightened susceptibility of adolescents to peer influence).

lawsuits for failing to exercise that authority, courts preserve parents out of a sense that they have no real control over their offspring.

Furthermore, current standards are inconsistent with prevailing legal norms related to the regulation of families. The standard of reasonable care, which does not demand perfection, strikes a familiar and proper balance between the benefits and burdens of parenthood. As a matter of tort doctrine, imposing a standard of reasonable care on parents would contribute toward greater consistency and equity in negligence law by alleviating the problems associated with judges using duty to advance unarticulated or unjustified policy goals. Nevertheless, many of the original justifications for parental immunity remain entrenched in modern case law. In essence, these justifications are based on valid fears about granting juries, judges, or anyone, the power to evaluate parents. While recognizing the legitimacy of these concerns, this Part addresses each and concludes that, taken either collectively or individually, they do not justify existing limitations on parental liability.

A. Fear of a "Helicopter Parent" Standard of Care

According to cultural commentators and recent scholarship, many middle- and upper-class parents with one or two children have become suffocating scaremongers whose personal identities are largely dependent on ensuring the minute-by-minute safety and optimal educational development of their children.[196] Scholars argue that this mainstream, middle-class, predominantly white value system will permeate (or has permeated) legal norms, thus forcing all families to conform to risk-averse, expensive, and time-consuming supervision of children in order to escape criminal or civil sanction.[197] Related to this is a measured but distinct idealization of "the old days," generally meaning the 1970s, when parents "may" have allowed "the youngest of schoolchildren" the independence to "climb trees, ride [their] bike[s] in the neighborhood, stay home alone for an hour or two, and walk [themselves] to school."[198] Scholars have argued that the narrowing of the parental immunity doctrine "is an important

196. *See* Bernstein & Triger, *supra* note 5, at 1266 (describing overparenting as a "culture, race, ethnicity, and class specific practice of parenting").

197. *See* LISA ARONSON FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 63 (2005) (explaining that "cultural norms shape how we evaluate abuse and risk").

198. *See* Pimentel, *supra* note 5, at 979; *see also* Ilya Somin, *When Ordinary Parenting Practices Can Land You in Court*, THE VOLOKH CONSPIRACY (Feb. 18, 2012, 5:39 PM), http://www.volokh.com/2012/02/18/when-ordinary-parenting-practices-can-land-you-in-court/ (criticizing "growing legal and social bias" against young babysitters and corresponding increase in babysitting costs).

enabling structure for the incorporation of the practices of Intensive Parenting."[199]

Unquestionably, social norms concerning children and acceptance of risk change over time. In colonial America, children were left largely unattended while parents labored and were fostered out as apprentices at ages as young as seven.[200] One result of this was likely early self-reliance, but it was also rather common for children to come to serious physical harm. In the nineteenth century, some children worked both on farms and in urban factories.[201] However, hovering parents are hardly a new phenomenon. Even in the nineteenth century, child-centered, intensive parenting was becoming the middle-class norm in both urban and agricultural areas. Mothers were charged with providing constant and appropriately educational stimulation for children, as well as creating "an idyllic childhood rich with wonderful experiences that would create fond memories and produce healthy minds and bodies."[202] Voluminous advice literature assisted women in these endeavors.[203] And these parental efforts were not limited to the very young: Douglas Macarthur's mother accompanied him to West Point in 1899, staying at a nearby hotel "where for four years she could see the lamp in her son's window and tell whether he was doing his homework."[204] There were helicopter mothers long before there were helicopters.

Moreover, even the most vehement anti-helicopter parents (themselves generally members of the middle-class parenting culture they criticize) subscribe to increased safety norms over time. As Lenore Skenazy, leader of the "Free Range Kids" movement, puts it, Free Rangers "believe in safety . . . helmets, car seats, safety belts."[205] And, statistically speaking,

199. Bernstein & Triger, *supra* note 5, at 1251.

200. *See* Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 396–99 (1996) (describing colonial practice of apprenticing children).

201. *See* Hasday, *Canon of Family Law*, *supra* note 8, at 852–53 (describing federal and state laws allowing parents to approve children's farm labor for less than minimum wage at ages as young as twelve).

202. *See* JAMES M. VOLO & DOROTHY DENNEEN VOLO, FAMILY LIFE IN NINETEENTH CENTURY AMERICA 203 (2007).

203. *See id.* at 202.

204. Gerald Clarke, *Glorious Commander*, TIME, Sept. 11, 1978, at 89 (reviewing WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR, 1880–1964 (1978)).

205. FREE RANGE KIDS FAQ PAGE, http://freerangekids.com/faq/ (last visited January 9, 2013); *see also* Bridget Kevane, *Guilty as Charged*, BRAIN, CHILD: THE MAGAZINE FOR THINKING MOTHERS, Summer 2009, *available at* http://www.brainchildmag.com/essays/summer2009_kevane.asp (describing in detail decision to drop children off at the mall with a cell phone, strict instructions, and with children's father five minutes away).

such safety norms have dramatically improved safety outcomes for children.[206]

The fact that norms evolve, and that middle-class parents have led the way by minimizing risks and maximizing educational opportunities, does not alone justify granting parents immunity from liability. Indeed, it is ironic to argue that parents must be sheltered from other parents who believe too firmly in over-sheltering. The same acts and omissions involved in parenting cases—drowning accidents, children getting hit by cars, drunk-driving deaths, children falling out of windows or shopping carts—are routinely litigated against other supervisory figures including schools, colleges, daycares, babysitting agencies, product manufacturers, and businesses. Those other parties cannot raise the "helicopter parent" defense. The effect of limitations on parental liability is to give children's primary caretakers—those who get the benefit and services of children—the lowest standard of care.

The impact on others of shielding parents from liability is starkly evident in joint liability cases, discussed above. When a child is injured and brings suit against a product manufacturer—for example, the maker of a tractor mower, of a shopping cart, or of lead paint—it is nonsensical to prohibit a jury from assigning some portion of responsibility to the parent who was allegedly supervising the child. Yet courts often bar contribution suits against parents, although those parents' negligent supervision might arguably have been the primary cause of the child's injury. In several New York cases involving children's alleged injury from lead paint, courts simply brushed aside parental immunity and allowed the claims.[207] Bernstein and Triger, concerned about over-parenting, take this as an ominous sign that "courts are increasingly willing to consider imposing liability on parents who do not comply with existing monitoring norms."[208] But if a parent is aware of a risk to her child and has been informed about how to mitigate and eliminate that risk, but negligently fails to take action, it is fair that the parent should bear part of the legal responsibility for the harm she caused. Parents, like other parties, should conform to norms of reasonableness.[209]

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206. These raised safety norms have dramatically reduced the chances of child injury and death. *See* BRYAN CAPLAN, SELFISH REASONS TO HAVE MORE KIDS 96 (2011) (stating that accidental death rates for children of all ages have sharply declined and children under age fifteen are four times safer than they were in the 1950s).

207. *See, e.g.*, Cooper v. Cnty. of Rensselaer, 697 N.Y.S.2d 486, 491–92 (N.Y. Sup. Ct. 1999) (holding that negligent parental supervision is only "generally" not actionable and making an exception in case where child alleged lead paint injuries).

208. Bernstein & Triger, *supra* note 5, at 1256.

209. Increasingly, children who commit crimes are not granted the liberal protection of a liability carve-out based on their youth, but are held to established, if modified, cultural norms. *See* Maureen O'Hagan, *Father Says Son Who Took Gun to School "Made a Bad Mistake,"* SEATTLE TIMES (Feb. 23,

The early application of immunity in a lawsuit also poses risks: Courts—themselves prey to the cultural biases of judges—may not be consistently reasonable in their determination that the immunity should apply. In *Zellmer v. Zellmer*, the defendant-stepfather was granted immunity (conditioned on a factual finding that he was acting *in loco parentis*) for the drowning death of a three-year-old.[210] The court's holding necessarily implied that the defendant's conduct constituted "ordinary negligence," as to which immunity applied.[211] But even at the summary judgment stage, there was evidence that pointed to willful misconduct, including testimony that the girl would not have gone outside on a cold December night alone, dressed only in a light shirt, when she was home sick from daycare; and evidence that the defendant had taken out a life insurance policy on the girl immediately upon marrying her mother three months earlier.[212] Ultimately the defendant was criminally prosecuted and convicted of murdering the three-year-old girl.[213] The civil court's immunity determination not only usurped the jury's province to assess the quality of a defendant's conduct; it was also incorrect.

Fears of over-judgmental, culturally prejudiced juries are understandable, but do not justify a common law carve-out for parents in tort. Courts can address concerns about the standard of care in the context of individual suits, using basic tools of the trade: admitting expert and lay testimony on the standard of reasonable care within a community, giving jury instructions making explicit that parents are not insurers of or for their children, and defining a reasonable standard of care. Several states that have abolished parental immunity have replaced it with a "reasonable parent" standard, a semantic device that reinforces the nature of parents' roles.[214] As they always have, courts may direct verdicts if no reasonable juror could find liability, and may use remittitur or remand for a new trial if the jury's damages award is excessive or seems based on prejudice or passion. Notably, there has been no scholarly analysis in states that have abolished parental immunity arguing that ensuing cases were unduly prejudicial toward parents or held parents up to an idealized standard of care.

2012), http://seattletimes.com/html/localnews/2017582563_bremerton24m.html (discussing three criminal charges and overnight juvenile imprisonment of nine-year-old who brought a gun to school that critically injured a classmate when it discharged in his backpack).

210. Zellmer v. Zellmer, 188 P.3d 497, 507 (Wash. 2008).

211. *Id.* at 507.

212. *Id.* at 499–500.

213. *See* Sullivan, *supra* note 70.

214. *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914 (1971) (adopting "reasonable parent" standard in parent-child negligence suits); Comment, *The Reasonable Parent Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795 (1977).

B. Fear that Civil Parental Liability Sanctions Undue State Interference in the Family

A related concern animating limits on parental liability is the fear of undue government interference in the family, or—as one court put it—"interject[ing] the court into family affairs as some overarching nanny."[215] Here too, while the fear is legitimate, allowing juries to adjudicate civil tort suits against parents is a relatively minimal intrusion into family life in comparison with other longstanding forms of family regulation: Both social and legal norms have always recognized limits on parental authority that go far beyond allowing parents to be defendants in civil tort suits.[216] The Supreme Court has recognized the significance of parents' rights to make decisions regarding their children's upbringing, education, and religious practices.[217] But the constitutional recognition of family privacy has always been limited by reasonable governmental regulation, including laws requiring education, prohibiting child labor, and governing custody disputes.[218] Notwithstanding its rhetoric, the Court's holdings regarding parental rights have always been rather muted and pragmatic. As the Court stated in *Meyer v. Nebraska*, "the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally."[219]

Parental immunity took root at the turn of the twentieth century, a time period marked by an explosion of interest in privacy and the founding of formal studies of child development.[220] It was also marked by an equally intense interest in child welfare, backed up by a range of legal procedures that demolished the privacy of families considered to be deviant, which at that time (as often is true now) meant families living in urban poverty. The New York Society for the Prevention of Cruelty to Children, founded in

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215. Jeudy v. Jeudy, No. 122624, 2002 WL 1011513, at *2 (Conn. Super. Ct. Apr. 25, 2002).

216. *See* Daniel Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1135 (2002) ("In contemporary American society, we accept greater government intervention in spousal relationships as well as in child rearing."); Jane C. Murphy, *Rules, Responsibility, and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1165–72 (1999) (describing increasingly aggressive laws to reduce domestic violence and child abuse).

217. Meyer v. Nebraska, 262 U.S. 390 (1923).

218. *See id.*; Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (upholding right of parents to send children to private school but stating that "[n]o question is raised concerning the power of the state reasonably to regulate all schools"); Wisconsin v. Yoder, 406 U.S. 205, 219 (1972) (Amish parents could home school children); *see also* Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (plurality) (state statute allowing judge to grant non-parents visitation rights unconstitutional as applied).

219. *Meyer*, 262 U.S. at 401.

220. *See* JUDITH RICH HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO 7 (1998) ("As an academic specialty, the study of how immature humans develop into adults had a rather late beginning—around 1890. The early developmentalists were interested in children but didn't pay much attention to their parents.").

1874, set out to "rescue" children living in slums from "the human brutes who happened to possess the custody or control of them."[221]

Propelled by the influential Society, New York passed laws authorizing "intense scrutiny of family life, the frequent arrest and incarceration of parents found wanting, and the systematic institutionalization of their children."[222] By the end of 1884, fifty-six cruelty societies existed nationwide.[223] In 1903, Colorado became the first state to criminalize the vague offense of contributing to the delinquency of a minor.[224] Thus, parents who were poor or otherwise considered socially deviant risked having children forcibly taken away or risked criminal sanctions for their children's poor behavior. At the same time, middle- and upper-class parents were literally immune from civil liability for even obvious and severe physical abuse.

As evidenced by parental immunity cases, the privacy–class divide remains today. Wealth buys parents both physical privacy—their disciplinary tactics and parenting mistakes are hidden within private homes[225]—and legal privacy. Just as nineteenth-century judges were "far more likely to appreciate the benefits of the tort immunity rule (to propertied husbands) than to register its costs (to battered wives),"[226] judges empathize with the supervisory challenges facing parents rather than the un-redressed harms to children.[227] In contrast, Hasday points out, government programs intended to support poor families are "driven by suspicion of parental judgment, and an eagerness to scrutinize parental conduct and constrain parental behavior."[228] Moreover, legislatures have passed a wide range of statutes intended to incentivize parents to assume responsibility and punish those who do not. These statutes, which impose civil or criminal sanctions on parents for children's willful and malicious

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221. *Protection for Children*, N.Y. TIMES, Dec. 17, 1874.

222. *See* Hasday, *Parenthood Divided*, *supra* note 7, at 306.

223. *Id.* at 342.

224. *See* Arnold Binder & Gilbert Geis, *Sins of Their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 305 (1991). As of 1991, forty-two states and the District of Columbia retained statutes criminalizing the offense of contributing to the delinquency of a minor. *See id.*

225. Homeless parents, or parents without childcare who must bring their children with them everywhere, are naturally subject to much more frequent critical scrutiny. Marie Ashe and Naomi Cahn give an example of a woman who waited hours with her children at a District of Columbia courthouse to seek a protective order against her husband. Late in the day, her children were misbehaving, and she took off her shoe and threatened them with it. Her lawyer subsequently reported her to local child abuse authorities. *See* Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 97–99 (1993).

226. Siegel, *supra* note 10, at 2180–81.

227. Holodook v. Spencer, 324 N.E.2d 338, 343 (N.Y. 1974) (finding no duty for negligent supervision because "it would be the rare parent who could not conceivably be called to account in the courts for his conduct toward his child").

228. Hasday, *Parenthood Divided*, *supra* note 7, at 369.

acts, vandalism, truancy, and for contributing to children's delinquency, indicate that parental responsibility—and liability—is a social norm.[229] Unfortunately, many of those limits fall disproportionately on poorer families.[230] Similarly, poor and fragmented families are vastly more likely to have their children removed and placed in the foster care system—a modern, more humane version of the institutions supported by the child cruelty societies—or their parental rights terminated.[231] And among parents who do neglect their children, working-class or unemployed parents are far more likely to be prosecuted than middle- or upper-class parents.[232] Thus, to the extent that there is a social norm of noninterference in the family, it is not enforced uniformly or fairly. The parental immunity doctrine thus illustrates the stark contrast between the broad privacy rights accorded middle- and upper-class parents (those most likely to be defendants in civil lawsuits) and the long tradition of interference in families that are poor or otherwise deviate from prevailing social norms. In this context, privacy is "a virtual commodity purchased by the middle class and the well-to-do."[233]

Indeed, the common law of parental liability itself demonstrates the increasing acceptance of state regulation of families. At first the immunity covered all parental conduct, and paralleled an immunity that applied between spouses. Now inter-spousal immunity has been almost entirely abolished and there are significant limitations on parental immunity. In addition, the common law recognizes that parents owe an affirmative duty to control their children from harming others.[234]

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229. *See* Gentile, *supra* note 2, at 128 (listing parental liability statutes and observing that every state except New Hampshire has one). Two states—Hawaii and Louisiana—enacted statutes holding parents strictly liable for children's torts. *Id.* at 129.

230. *See generally* Hasday, *Parenthood Divided*, *supra* note 7 (describing state and private policing of poor parents); Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. Rev. 1327, 1341–43 (2008) (critiquing criminal laws based on family status, including parental liability laws); Leslie Joan Harris, *An Empirical Study of Parental Liability Laws: Sending Messages, But What Kind and to Whom?*, 2006 UTAH L. REV. 5, 6–7 (2006) (criticizing parental responsibility ordinances on the ground that they are rarely enforced and their expressive function encourages overly aggressive policing of teens); Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343 (1996) (describing civil forfeiture of homes where parents did not take sufficient steps to prevent children's drug dealing); S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123 (1991) (addressing constitutional concerns with imposing criminal liability on parents for children's misconduct); Elena R. Laskin, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195 (2000).

231. *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

232. *See* Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 809 (2006).

233. Allen, *supra* note 83, at 197.

234. *See* RESTATEMENT OF TORTS § 316 (1934); RESTATEMENT (SECOND) OF TORTS § 316 (1965); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 41 (Proposed Final Draft No. 1, 2005).

C. Belief that Criminal Law Is Sufficient to Protect Children and Third Parties

From the first cases, courts have justified parental immunity on the ground that criminal law or child welfare services are sufficient to remedy any problems that children might suffer. Implicit in this view are the assumptions that negligent or abusive conduct toward children is deviant and unusual, and that the criminal law or state social services can and will intervene in those few cases where it would be necessary to punish the parent or remove the child from parental custody. This view categorizes tort law as an unnecessary luxury for children, just as nineteenth-century courts considered tort suits by women as an unnecessary way to address "trivial family disagreements."[235] But criminal law, like tort law, favors wealthier parents.[236] Because their neighborhoods are not targeted for social support, they are not subject to the accompanying scrutiny of their family arrangements, and their large houses afford more privacy from neighbors. Were it not for the irrefutable video footage of Judge Adams beating his daughter, what are the chances that he would have been held accountable?[237] Moreover, just as feminist scholars do not see divorce or criminal prosecution of wife beaters as a viable replacement for civil tort relief, the presence of other criminal and family law vehicles for addressing violence to children does not render the benefits of civil damages suits obsolete. Indeed, options for neglected children are even bleaker than those for women: Short of emancipation or foster care, children are physically and functionally unable to leave their families.

The same logic applies with greater force in negligent supervision actions against parents. Where an unsupervised teen holds a party that results in a drunk-driving death, the family of the person who has died would not be made whole in the (unlikely) event that the teen, his drunk-driving friend, or the absent parents were criminally sanctioned. Finally,

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235. *See* Siegel, *supra* note 10, at 2166 (quoting Drake v. Drake, 177 N.W. 624, 625 (Minn. 1920)).

236. *See* Collins, *supra* note 232, at 848 (noting distinctions based on class in likelihood of criminal prosecution of parents for the death of their children); Siegel, *supra* note 10, at 2162–63 (observing that "it was married men of the middle and upper classes who might face tort claims for wife beating—precisely those men who were unlikely to face criminal prosecution for wife beating during the . . . nineteenth century"). *See also* Dunlap v. Dunlap, 150 A. 905, 910 (N.H. 1930) ("To the claim that [criminal proceedings] give [a child] sufficient remedy, it may be shortly answered that it would not be so considered as to any other wrong or a wrong to any other individual, or a wrong to this one done by any other party.").

237. The judge continues to maintain his innocence of wrongdoing: "In my mind I have not done anything wrong other than discipline my child when she was caught [illegally downloading content from the Internet]." *Hillary Adams, Daughter Allegedly Beaten By Judge, Asks People to Help Her Father*, HUFFINGTON POST (Nov. 2, 2011), http://www.huffingtonpost.com/2011/11/02/hillary-adams-judge-beats daughter_n_1072350.html. State and federal prosecutors have declined to press charges. *Id.*

state criminal abuse and neglect statutes that give power to local police, child welfare services officials, and prosecutors are subject to greater potential for over-enforcement based on a range of political or personal motivations.[238] At the very least, such actors are no more immune to public cultural pressure than jurors in civil suits. Granting increased criminal enforcement power to state officials might shield the wealthy parents who are very rarely selected for prosecution under such statutes, but it is a blunt and harsh instrument for regulating parental conduct.

D. Fear of Collusion and Rising Insurance Costs

Beginning with *Hewellette v. George* in 1891, courts justified both parental immunity and inter-spousal immunity based on a threat of collusion between family members at the "tactical[] disadvantage[] [of] insurance companies."[239] The shadow of collusion was given substance by the rather unusual procedural postures of some cases. In a case alleging injury by a parent who had died, the surviving parent might wear multiple hats, as a representative of the child plaintiff, as a plaintiff himself (for loss of services), and—representing the estate—as a defendant.[240] Up through the 1960s, this argument, vigorously made by insurance companies, upheld parental immunity in all contexts, particularly including the most common, which were car accidents.

Automobile guest statutes, which created a statutory immunity from claims against drivers by passengers, including but not limited to family members, were motivated by nearly identical concerns of collusion, rising insurance costs, and runaway litigation.[241] The courts also pointed to moral considerations, including the "injustice of permitting an ungrateful guest to repay his host with a lawsuit and the desirability of encouraging aid to

238. *See* Pimentel, *supra* note 5, at 980 (describing prosecutor's justification for child neglect of university professor for leaving her children, the oldest of whom was twelve, unattended at the mall, as a belief that people with "major educations" should not get special treatment).

239. Varholla v. Varholla, 383 N.E.2d 888, 889 (Ohio 1978), *overruled by* Shearer v. Shearer, 18 Ohio St. 3d 94 (1985); Hewellette v. George, 9 So. 885, 886 (1891) (listing collusion among other concerns), *abrogated by* Glaskox *ex rel* Denton v. Glaskox, 614 So. 2d 906 (Miss. 1992).

240. *See, e.g.*, Karam v. Allstate Ins. Co., 436 N.E.2d 1014, 1018–19 (Ohio 1982), *overruled by* Dorsey v. State Farm Mut. Auto. Ins. Co., 457 N.E.2d 1169 (Ohio 1984) ("[w]e cannot logically accept as meritorious the collusion argument to support a doctrine of interspousal immunity and yet find the same argument insubstantial in child–parent litigation.").

241. *See* Chas. Caflin Allen, *Why Do Courts Coddle Automobile Indemnity Companies?*, 61 AM. L. REV. 77 (1927); Cases Noted, *Applicability of Automobile Guest Statutes to Minors*, 52 COLUM. L. REV. 543, 544 (1952) (listing justifications for guest statutes); *see, e.g.*, Howland v. Ryan, 172 F.2d 784, 785 (8th Cir. 1949) (upholding constitutionality of automobile guest statute that denied recovery to guests "related by blood or marriage within the third degree of consanguinity or affinity to [the] owner or operator" of the vehicle, even in situations where the driver's misconduct was willful or wanton, on the ground that such family members assumed the risk by accepting gratuitous rides and to prevent fraud and collusion).

travelers in distress."[242] However, when a driver's negligence injured a *paying* passenger in an automobile "not only did courts impose liability, but they frequently imposed a higher standard of care."[243] The result was an immense difference in the standard of care applied to the same driver depending on her relationship with her passenger. In a related context, charities such as hospitals and churches were also granted "no-duty" immunity when they were acting on charitable impulses, presumably based on the belief that it would be ungrateful to repay charity with a lawsuit.[244]

Notwithstanding the prevalence of all of these limitations on duty and/or liability through many decades of the twentieth century, courts have largely relinquished the pattern of granting certain defendants a lower standard of care based on policy perceptions related to fraud and collusion. Automobile guest statutes have been abolished or severely restricted, and the charitable and inter-spousal immunity doctrines have fallen into disrepute.[245] Moreover, most states relinquished parental immunity in the context of car accidents—the most common form of such suits—precisely on the ground that the suits were primarily aimed at the insurance companies, not at the parents. Finally, courts have acknowledged that they possess independent tools in aid of their jurisdiction that can prohibit collusion in individual cases. Thus, courts have forthrightly abandoned the "collusion" justification for parental immunity.[246]

Notably, however, insurance companies have adopted other mechanisms for limiting coverage among family members. For example, limitations on coverage for intentional acts will prevent third parties from obtaining insurance proceeds from parents whose child commits an intentional tort. If parents are held liable for negligently supervising their child, however, insurance will generally cover liability for that independent negligence. Nonetheless, in the immunity context, insurance policies frequently bar coverage for injury to a fellow family member, including in automobile accident cases, and courts have often upheld such coverage restrictions.[247] In the context of inter-spousal tort immunity, one scholar has

242. Cases Noted, *supra* note 241, at 544.

243. Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 VAND. L. REV. 63, 86 (1988).

244. *See id.* at 67–73.

245. *See* Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 401 (1991) (noting that "almost all states have either abandoned or substantially constricted the doctrine" of charitable immunity).

246. *See, e.g.*, Hebel v. Hebel 435 P.2d 8 (Alaska 1967); Gibson v. Gibson, 479 P.2d 648 (Cal. 1971); Turner v. Turner, 304 N.W.2d 786 (Iowa 1981); Black v. Solmitz, 409 A.2d 634 (Me. 1979); France v. A.P.A. Transport Corp., 267 A.2d 490 (N.J. 1970); Plumley v. Klein, 199 N.W.2d 169 (Mich. 1972); Guess v. Gulf Ins. Co., 627 P.2d 869 (N.M. 1981).

247. *See, e.g.*, Vierkant *ex rel* Johnson v. AMCO Ins. Co., 543 N.W.2d 117 (Minn. Ct. App. 1996) ("household exclusion [which, for example, might exclude coverage for bodily injury to insured and residents of household] prominently placed within a homeowner's insurance contract does not

denoted such insurance restrictions a "*de facto* . . . immunity."[248] The public policy behind such insurance clauses is questionable, but that question cannot be debated until there exists a possibility of an initial lawsuit.

E. Fear of Imposing Liability on Parents of Troubled Children

This Article argues that, in general, parents should be treated just as all other tortfeasors in civil suits. Nevertheless, as discussed above in Part II.B, parents may be subject to lawsuits on the basis of tortious or criminal actions by their behaviorally troubled children—children whose problems are beyond the ability of any reasonable parent to control. How does "reasonable" parental supervision take into account the practical reality that some children are far more difficult to parent than others? A prison or a school for troubled youth anticipates and presumably obtains payment for the additional costs it incurs related to supervising its charges. And employers can often reduce their liability by firing employees. But to some degree, parents simply get what they get in terms of children. [249]

In many cases, a reasonableness standard will require added burdens on the part of parents with higher-need children. For example, children with Attention Deficit Hyperactivity Disorder (ADHD) might have impulse control issues that make them more likely to dash across a street without looking for oncoming traffic. Parents of such children must exercise more care than parents of more docile offspring. As children age, a parent might have a duty to prevent a troubled child from gaining access to weapons, or a car, or from staying home unsupervised for the weekend. Under current restrictions on negligent supervision claims, parents have no duty to prevent a child's misconduct unless they have clear notice of precisely the type of misconduct at issue. Juries, however, are unlikely to restrain themselves in such an artificial manner: If a child has been shooting at

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create an unconscionable contract of adhesion"); *see generally* Martin J. McMahon, Annotation, *Validity, Under Insurance Statutes, of Coverage Exclusion for Injury to or Death of Insured's Family or Household Members*, 52 A.L.R. 4th 18 (1987).

248. *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 (2002) (emphasis omitted) (critiquing insurance limitations from feminist perspective but not addressing impact on children).

249. *See* Crisafulli v. Bass, 38 P.3d 842, 847 (Rice, J., concurring in part and dissenting in part) ("From my observation of many others, and from my own endeavors, including 19 years of trying every approach to child rearing from Spock's loving flexibility to Dobson's loving discipline, I am convinced that controlling one's child is a notion far too elusive to support the imposition of parental liability. Even parents who actively and responsibly supervise their children can find it difficult, if not impossible, to control their children.").

people with a BB gun, the jury might well find that parents should have closely monitored his access to that or any other form of firearm.[250]

Courts appear justifiably concerned about the broader impact of imposing civil liability on parents of seriously troubled teens. Society greatly benefits when parents provide housing, support, and medical care to troubled children, even when it is sometimes an incredibly difficult and occasionally thankless task. Imposing liability on parents who fail to exercise reasonable care in such circumstances might reduce families' incentive to allow a troubled child to continue to live, un-emancipated, at home.[251] Imposition of such liability is even more troubling when parents continue to provide housing and care for troubled adult children.[252] Moreover, it is plausible that juries—if given the opportunity—might find that parents' supervisory duty requires that they obtain medication for their child's mental illness or behavioral disorder. In *Neiuwendorp v. American Family Insurance Co.*, the court was careful to state that the parents had violated a duty to warn the school that it had stopped the child's ADHD medication (after which the child hurt his teacher), not a duty to give the child medication in the first instance.[253] However, that distinction could collapse if medical evidence demonstrates that counseling or medication—whether ADHD medication or anti-depressant medication—renders otherwise volatile children safe to themselves and others.[254]

These questions are difficult. But they do not justify a blanket constriction on parental duties. Not all negligent supervision cases involve intractably ill teens. Moreover, judges are no better equipped than jurors to evaluate these fact-dependent questions and to assess the reasonableness of parents' responses to such problems. On balance, therefore, it seems preferable to allow courts to address and juries to debate these issues in

250. *See* Manuel v. Koonce, 425 S.E.2d 921 (Ga. Ct. App. 1992).

251. Almost every state has a so-called "safe haven" law that allows parents to abandon their infants at a designated location without legal recrimination. *See generally* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006). In 2008, Nebraska passed a safe haven law that did not limit the age of the abandoned child; during the four-month existence of the law, thirty-six children had been abandoned, twenty-seven of whom were older children or teens. *See* Note, Diane K. Donnelly, *Nebraska's Youth Need Help—But Was a Safe Haven Law the Best Way?*, 64 U. MIAMI L. REV. 771, 776–77 (2010).

252. Many states legally require parents to continue to provide support for a disabled child who reaches adulthood if the onset of the disability precedes adulthood. *See* Sande L. Buhai, *Parental Support of Adult Children With Disabilities*, 91 MINN. L. REV. 710, 723–25 (2007) (describing state laws).

253. *See* Nieuwendorp v. Am. Fam. Ins. Co., 529 N.W.2d 594 (Wis. 1995).

254. *See* Praveen Madhiraju, Comment, *RIP Ritalin in Proportion! The Eighth Circuit's Restriction on a Parent's Right to Have Schools Accommodate the Needs of Their Disabled Children: Debord and Davis*, 95 NW. U. L. REV. 1661, 1664–68 (2001) (describing ADHD and ameliorative effect of mediation).

individual cases, rather than constricting duty as a blunt instrument to eliminate liability.

F. Fear of a Generalized Duty to Warn

Closely related to the potential for creation of a common law duty to medicate one's child is the troubling potential that courts, through juries, might impose on parents a wide-ranging duty to warn third parties about their child's negative behavioral propensities. As discussed above, there is increasing pressure on courts (as well as on parents, schools, and other supervisors of children) to warn others about potential behavioral problems of certain children, particularly when such problems might involve sexual misconduct or violence.[255] But imposition of a broad duty to warn of a child's sexual tendencies poses serious, potentially devastating, social risks to the child. And juries may find such a duty in a wide array of situations given the number of opportunities for children to be alone together at school, during after-school activities, while visiting each other's houses or during unstructured neighborhood play. The proliferation of product-liability warnings and criminal sex-registry warnings is gradually seeping into a more generalized legal duty to warn of specific and reasonably foreseeable harms.[256] As recent media coverage of a school stabbing incident makes pellucid, parents—and communities in general—now would like to be warned of potential dangers to their children, even when such warnings would (1) do very little practical good; and (2) create outcasts of even young children based on community fears of their misconduct.[257]

As in *Tarasoff*, the public policy problems associated with imposing a duty to warn in this context can be mitigated by requiring the danger to be substantial and the potential victim of the danger to be easily identifiable.[258] In the alternative, courts may refrain from imposing liability based on a failure to warn of a child's behavioral propensities and instead allow a

255. *See supra* Part II.C; *see also* Doe v. Kahrs, 662 N.E.2d 101 (Ohio Ct. App. 1995) (holding parents subject to liability for negligent supervision, although they were not home at the time, when they were aware that one of their sons had previous history of inappropriate sexual misconduct).

256. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (psychotherapists had duty to warn former girlfriend of patient's intent to harm her).

257. *See* Nicole Brodeur, *After School Knife Attack, Law Seems Crazy*, SEATTLE TIMES, Oct. 31, 2011, http://seattletimes.com/html/nicolebrodeur/2016659331_nicole01m.html (complaining that federal privacy law wrongly prevented a high school of warning community that one of its students was suffering serious mental illness: "Peanut allergy? Absolutely. Send a notice to everyone in the class. Mental illness that could lead to threats or violence? No, no. That's something that school officials must keep quiet.").

258. *See, e.g.*, Isbell v. Ryan, 983 S.W.2d 335 (Tex. Ct. App. 1998) (finding mother could be liable for failure to warn her ex-husband's wife that son might pose a danger to stepmother's daughter based on history of son's sexual molestation of cousin).

claim for negligent supervision of that child on the premise that parents who do not wish to reveal potentially troubling traits in their children may opt instead to keep a close eye on them in the presence of other children.[259] Either of these approaches avoids the imposition of a generalized duty of parents to warn of problems with their child, which has troubling implications, while also recognizing the importance of parental oversight of children with behavioral problems that pose serious risks to others who are not in a position to protect themselves.

CONCLUSION

For over a century before the publication of the *Restatement (Third)*, courts have struggled to accommodate conflicting visions of what constitutes a family, how relationships should be ordered within those families, and how the law should conceive of children. Those struggles have not been distinguished by their consistency or by their analytical depth.[260] But two things have remained constant: Judges have exercised their power to determine the contours of parental duty, even if their aggression has taken the outward form of non-interference and they have consistently shielded parents from exposure to liability through immunities and privileges supported by a rotating array of justifications based on fear. In many ways parental liability is based on the received wisdom of an earlier age, when the law was rigidly protective of precise status relationships within the family as the state defined it, and children were considered to be little different than a form of parental property. As we attempt to move beyond this property conception of childhood, the law's respect for parental rights should be matched by an enforceable respect for parental responsibility.

The reconsideration of our broad notions of duty in negligence, associated with the publication of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, is a perfect opportunity for courts to reconsider these longstanding practices and hold parents to a consistent standard of reasonable care with respect to their children. As courts discovered when they abandoned inter-spousal immunity, the aura of impenetrability that surrounds families may be dispelled with fundamental common law tort principles. Moreover, holding parents to a standard of

259. *See, e.g.*, Gritzner v. Michael R., 611 N.W.2d 906, 912–18 (Wis. 2000) (recognizing negligent supervision claim arising out of sexual assault on four-year-old plaintiff by ten-year-old neighbor with history of sexually inappropriate conduct but denying claim for negligent failure to warn on public policy grounds).

260. *See* McCurdy, *supra* note 15, at 1030 ("Few topics in the law of persons and domestic relations . . . display in their treatment greater inconsistency and more unsatisfactory reasoning, and present a more characteristic development in judicial reaction.").

reasonable care with respect to their children will not threaten the core values of intimate relationships. Family members who initiate lawsuits—and not a court—should determine where family boundaries lie, and when they should be breached. Common law courts should trust in negligence law principles, and allow juries to judge parents.