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A Matter of Trust: Institutional Employer Liability for Acts of Child Abuse by Employees

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A MATTER OF TRUST: INSTITUTIONAL EMPLOYER LIABILITY FOR ACTS OF CHILD ABUSE BY EMPLOYEES

> Child abuse is not a black problem, a brown problem, or a white problem. Child abusers are found in the ranks of the unemployed, the blue-collar worker, the white-collar worker, and the professional. They are Protestant, Catholic, Jewish, Baptist, and atheist.[1]

Despite public abhorrence of child abuse,[2] a reported 2.5 million children suffered abuse and neglect in 1990.[3] This constitutes a thirty-one percent increase from 1985[4] and is presumably "just a fraction of the actual incidence of child abuse and neglect."[5] The fact that the increase in reported incidents of abuse results partially from greater public awareness and modifications in reporting procedures[6] should not obscure the very real fact that child abuse occurs with alarming and increasing frequency in the United States.[7]

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1. Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, *in* CHILD ABUSE: COMMISSION AND OMISSION 87, 87 (Joanne V. Cook & Roy T. Bowles eds., 1980) (citing Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 20 (1976)).

2. *See* RACHEL CALAM & CRISTINA FRANCHI, CHILD ABUSE AND ITS CONSEQUENCES 3 (1987) (stating that "no one in their right mind would damage a young child").

3. Robert Green, *Oprah Winfrey Urges Passage of Child Abuse Bill*, Reuters, Nov. 12, 1991, *available in* LEXIS, Nexis Library, Wires File; *see also* Karen S. Peterson, *Reports of Child Abuse Accelerate*, USA TODAY, Apr. 3, 1990, at D1 (reporting 2.4 million cases in 1989).

4. Green, *supra* note 3. Some states reported astronomical increases that were well above the national average. For example, Washington reported an 87% increase from 1988 to 1989, and Nevada reported a 61% increase during the same period. Peterson, *supra* note 3, at D1.

5. Spencer Rich, *Child-Abuse Cases Total 2.4 Million; Advisory Board Laws for Funding Increase*, WASH. POST, June 27, 1990, at A6 (quoting the Report of the United States Advisory Board on Child Abuse and Neglect).

6. *Commentary*, UPI, July 11, 1990, *available in* LEXIS, Nexis Library, UPI File (reporting increased awareness of child abuse in society). Reporting procedures have developed over time such that now all states have adopted mandatory reporting statutes. *See* Lorene F. Schaefer, Comment, *Abused Children and State-Created Protection Agencies: A Proposed Section 1983 Standard*, 57 U. CIN. L. REV. 1419, 1419-20 (1989); Robert J. Shoop & Lynn M. Firestone, *Mandatory Reporting of Suspected Child Abuse: Do Teachers Obey the Law?*, 46 Educ. L. Rep. (West) 1115, 1115-17 (1988).

7. Peterson, *supra* note 3 (reporting a 10% increase in child abuse in 1989). Furthermore, greater awareness and modified procedures together cannot be responsible for the reported three percent increase in deaths resulting from child abuse. *Id.*; *see also* Judy Mann, *Justice for Abused Children*, WASH. POST, Jan. 19, 1990, at C3 (reporting that the number of children killed increased 36% between 1985 and 1988 and that more than 1200 children died from abuse and neglect in 1989).

Child abuse occurs in many forms:[8] physical abuse,[9] psychological abuse,[10] and sexual abuse,[11] all of which cause great harm to the victim.[12] The Child Abuse Prevention and Treatment Act,[13] enacted by Congress in 1974, defines child abuse as

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8. Defining "child abuse" is problematic, Richard J. Gelles, *The Social Construction of Child Abuse, in* CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 341, 344, because the definition of the term varies with the person defining it, *see* JEANETTE W. FAIRORTH, CHILD ABUSE AND THE SCHOOL 14-15 (1982) (suggesting that the definition an individual favors reflects professional objectives); *cf.* Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decisionmaking*, 24 AM. CRIM. L. REV. 315, 368 (1987) (listing 11 forms of child abuse). This Note uses the term "child abuse" to refer to all forms of abuse suffered by children. The majority of cases cited in this Note, however, concern the sexual abuse of children.

9. Corporal punishment, defined as nonaccidental physical injury, may be considered child abuse when the punishment is unreasonable, excessive, and creates a substantial risk of serious physical harm to the child. Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 255 (1982); *see* State v. Rogers, 337 N.E.2d 791 (Ohio Ct. App. 1975) (defining corporal to include the entire body, not merely the trunk). To determine the limits of reasonable punishment, courts weigh the following factors: the child's age, the body part struck, the instrument used, and the resulting amount of damage. Brian G. Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 652 n.62 (1977). Educators are permitted to engage in corporal punishment in all states except Maine, Maryland, Massachusetts, and New Jersey. FAIRORTH, *supra* note 8, at 75-76. In the school context, corporal punishment does not constitute cruel and unusual punishment in violation of the Eighth Amendment. Ingraham v. Wright, 430 U.S. 651, 683 (1977) (upholding the constitutionality of corporal punishment in schools).

10. *See, e.g.*, Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989) (holding that plaintiff's claims that pastor mentally manipulated and coerced her to have close contact and sexual relations with him stated a cause of action for intentional infliction of emotional distress), *appeal dismissed*, 817 P.2d 758 (Or. 1991). Defining psychological abuse is very difficult, given the many influences on a child's emotions and mental state. *See* CALAM & FRANCHI, *supra* note 2, at 11 (noting the difficulty in developing adequate definitions for emotional abuse). One senator criticized the Child Abuse Prevention and Treatment Act, *infra* note 13, for failing to define mental injury. H.R. REP. No. 685, 93d Cong., 2d Sess. 11-12, *reprinted in* 1974 U.S.C.C.A.N. 2763, 2771-72 (dissenting views of Sen. Landgrebe).

11. Sexual abuse is the most common form of child abuse and reportedly increased 210% between 1981 and 1986. Mann, *supra* note 7, at C3. In 1989, child protective services received 374,000 reports of sexual abuse. *Id.* A British newspaper reported that about 20% of all child abuse is sexual. *Free Speech 1: Sins of the Fathers Visited on the Children*, THE INDEPENDENT, Apr. 28, 1990, at 14. The term "sexual abuse" encompasses a wide array of behavior, ranging from abuse that does not involve contact (for example, dirty talk or indecent exposure) to various forms of intercourse and exploitation. KATHLEEN C. FALLER, CHILD SEXUAL ABUSE 12-16 (1988) (describing various types of sexual abuse); *see also* Stephen Bittner & Eli H. Newberger, *Child Abuse: Current Issues of Etiology, Diagnosis and Treatment, in* THE RIGHTS OF CHILDREN 64, 86 (James S. Henning ed., 1982) (defining types of sexual contact).

12. CALAM & FRANCHI, *supra* note 2, at 6, 19-21 (listing characteristics of abused children and discussing long-term effects of child abuse, such as neurological dysfunction, learning and intelligence deficiencies, poor language skills, and maladjustment to school); HAROLD P. MARTIN & PATRICIA BEEZLEY, *Behavioral Observations of Abused Children, in* CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 436-38 (discussing characteristics of abused children).

13. Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5107 (1988)).

"physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen *by a person who is responsible for the child's welfare*, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby."[14] As explained in the legislative history, Congress directed this law to parents, guardians, and other caretakers.[15]

Child abuse manifests itself at three levels: the home, the institution, and the public welfare system.[16] The predominant level is in the home, where children are abused by their caretakers.[17] The next level, the institution, encompasses abuse committed by adult employees of institutions such as schools, churches, and hospitals who hold positions that involve authority and responsibility for children.[18] Child abuse at this level arouses less public concern than abuse in the home, even though the abusive practices of these public entities are said to be "endemic" and "visible to all who care to see."[19] The third level is

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14. 42 U.S.C. § 5106g(4) (emphasis added). Statutory definitions vary from state to state. Some states define abusers as those *in loco parentis*, *see infra* note 42, or more broadly as anyone in care or control of the child. *See* State v. Smith, 485 S.W.2d 461, 466-67 (Mo. Ct. App. 1972) (noting that the Missouri statute includes both those in care or control of the child and those standing *in loco parentis*). Some statutes exclude corporal punishment from the provisions defining child abuse. *See* Milton J. Roberts, Annotation, *Validity and Construction of Penal Statute Prohibiting Child Abuse*, 1 A.L.R.4TH 38, 82 (1980) (collecting cases in which courts have held reasonable punishment did not violate state statutes).

15. H.R. REP. NO. 685, *supra* note 10, at 5, *reprinted in* 1974 U.S.C.C.A.N. at 2767. By definition, the term "person who is responsible for the child's welfare" refers to "any employee of a residential facility" and "any staff person providing out-of-home care." 42 U.S.C. § 5106g(5).

16. David G. Gil, *Unraveling Child Abuse*, *in* CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 119, 120-21.

17. *Id.* at 120. Kathleen C. Faller reports that paternal caretakers commit two-thirds of all abuse. *See* FALLER, *supra* note 11, at 45.

18. Mental health professionals are included in this category: A 1989 survey by T.K. Bajt and K.S. Pope revealed that 100 senior clinical psychologists reported 81 instances of child abuse by prior therapists and an additional number of unverifiable cases. GERALD P. KOOCHER & PATRICIA C. KEITH-SPIEGEL, CHILDREN, ETHICS, & THE LAW 76 (1990).

19. Gil, *supra* note 16, at 122. One need only look at a local newspaper or national television show to appreciate the enormity of the problem. *See, e.g.*, Russell Chandler, *Sex Abuse Cases Rock the American Clergy*, L.A. TIMES, Aug. 3, 1990, at A1; George Cornell, *Lawyer Exhorts Churches to Screen Child-Care Workers*, ARIZ. REPUBLIC, Mar. 11, 1989, at C5 (reporting that over 100 claims were filed against churches by abused children); Paul Duggan, *Nurse Indicted in Abuse of Boys at P.G. Center*, WASH. POST, Aug. 21, 1991, at A7; Jim George, *Priest Reveals Long History of Sex Abuse*, ST. PAUL PIONEER PRESS DISPATCH, Nov. 6, 1990, at A1 (reporting 20 years of abuse and six lawsuits on sexual misconduct); Nat Hentoff, *Child Abuse in the Schools*, WASH. POST, Mar. 12, 1988, at A25; *Prime Time Live* (ABC television broadcast, June 20, 1991) (reporting results of undercover investigation of a day care center suspected of abusing and neglecting children).

societal: it involves the public welfare system and its often inadequate attempts to provide certain children with nourishment, shelter, education, medical care, and other basic needs and opportunities.[20] Societal abuse, although arguably the most destructive, receives the least publicity and is less often the focus in discussions of reform.[21]

Sadly, the usual perpetrator of abuse is someone the child knows and trusts;[22] case studies reveal that family members commit the highest percentage of abuse.[23] The percentage of abuse attributable to those outside the family lends itself to error, however, because the outsider may easily avoid detection by abusing in more subtle fashions and by threatening the child.[24] Regardless of the actual figure, the prevalence of child abuse at the institutional level creates a problem for all of society and not just individual families.[25] This

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20. Gil, *supra* note 16, at 122.

21. *Id.*

22. Mann, *supra* note 7, at C3. The most common perpetrators of child sexual abuse are friends or adults known to the child or who share important relationships with the child's family. Bittner & Newberger, *supra* note 11, at 87.

23. Case studies of child abuse typically focus on parents, stepparents, aunts, uncles, grandparents, siblings, cousins, and parents' boyfriends and girlfriends living in the home. FALLER, *supra* note 11, at 45; *see also* CALAM & FRANCHI, *supra* note 2, at 34-39 (describing the setting for a study of families of children who had been physically or emotionally abused); David Finkelhor, *Sexual Abuse of Boys, in* RAPE AND SEXUAL ASSAULT 97, 104-06 (Ann W. Burgess ed., 1985) (reporting that boys are primarily abused by a male parent or relative); Linda Gordon & Paul O'Keefe, *The "Normality" of Incest, in* RAPE AND SEXUAL ASSAULT, *supra*, at 70, 74 (noting that close blood relatives constitute an overwhelming percentage of sexual abusers). The second most common perpetrators of abuse are people who are known to the victim but are not blood relatives. FALLER, *supra* note 11, at 30-31 (presenting results of the author's study); *see also* Ann W. Burgess, *Sexual Victimization of Adolescents, in* RAPE AND SEXUAL ASSAULT, *supra*, at 123, 127-28 (discussing studies on stranger, nonstranger, and incest assaults).

24. A.L. v. Commonwealth, 521 N.E.2d 1017, 1019 (Mass. 1988) (noting that abuser threatened to molest victim's younger brother if victim reported abuse). Sexual abuse of one form or another enables the abuser to avoid immediate detection because outward signs of injury are lacking. *See* Bittner & Newberger, *supra* note 11, at 87 (stating that the injury resulting from sexual abuse is psychological rather than physical); Melissa G. Salten, Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 194 n.21 (1984) (commenting that the physical violence resulting from incest is limited and not prone to detection). A victim of sexual abuse may often manifest his injury through antisocial or delinquent behavior, sleeplessness, difficulty with peers, and problems in school. FALLER, *supra* note 11, at 3, 29.

Other factors contributing to the inaccuracy of the abuse statistics include the fact that adults often do not believe children who report abuse, and that social services agencies, which operate on a perception that parents are the main enemy of children, accuse the parent first and investigate later. *Id.* at 5-7 (citing examples of these different reactions).

25. In general, abused children become abusive and dysfunctional adults. Thomas J. Reidy, *The Aggressive Characteristics of Abused and Neglected Children, in* CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 471. One author suggests that the lack of an integrated approach to child abuse prevention by six separate agents compounds the child abuse

Note addresses the judicial system's response to the institutional level of child abuse. By discussing reported cases on employee child abuse,[26] this Note analyzes the rationales and arguments for and against imposing liability on the institution.[27]

In deciding employee abuse cases, courts may rely on basic tort principles, employment law, statutes, and constitutional doctrines. This Note analyzes these established legal doctrines and explores their applicability in cases of employee abuse. Furthermore, this Note argues that the difficult and complex nature of employee abuse cases does not absolve the courts of their responsibility to protect children[28] from the abuse of those in "positions of trust."[29] One commentator suggested that courts must do "everything possible" to protect children.[30] In response, this Note suggests that negligence theories,[31] employment law concepts,[32] statutory and

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problem. Gelles, *supra* note 8, at 346-47. These agents are: medical, social service, criminal justice, school, neighborhood, and family. *Id.* Each agent has its own definitions and criteria as well as a different impact on the suspected abuser. *Id.* Because all the agents are responsible for identifying, labeling, treating, and preventing child abuse, an integrated approach would provide more effective results. *Id.* at 346-47.

26. Throughout this Note, the terms "employee child abuse" and "employee abuse" refer to abuse performed by an employee of an institution, organization, or business, occurring at the place of employment or during the employee's working hours.

27. This Note addresses only the institution's civil liability and assumes that the employee is guilty of the crime. In order to recover from the institution, the victim must establish the employee's guilt or wrongdoing. Corleto v. Shore Memorial Hosp., 350 A.2d 534, 536 (N.J. Super. Ct. Law Div. 1975). This Note, however, does not address a victim's standing to sue the actual abuser for civil remedies. Grounds for recovery in such cases are generally undisputed and include assault, battery, gross negligence, and intentional infliction of emotional distress. *See generally* TERRENCE F. KIELY, MODERN TORT LIABILITY: RECOVERY IN THE '90S, at 93-96 (1990) (discussing the availability of intentional infliction of emotional distress theory to the parents and loved ones of the child victim of sexual abuse, and listing the elements necessary to sustain a cause of action).

This Note does not address the personal liability of the employee's institutional supervisor. For a collection of cases dealing with this topic, see Annotation, *Personal Liability of Public School Executive or Administrative Officer for Personal Injury or Death of Student*, 35 A.L.R.4TH 272 (1985).

28. *See Child Sexual Abuse & Our Courts*, PR Newswire, July 26, 1990, *available in* LEXIS, Nexis Library, Wires File (quoting Pittsburgh attorney Thomas Mulroy, "[N]o matter how difficult and complicated those case are, the courts must find a way to . . . protect our children."); *see also A.L.*, 521 N.E.2d at 1022-23 (noting that children "cannot easily protect themselves from adult misbehavior"). Courts should be willing to adapt legal doctrines to the needs and circumstances of employee abuse cases, because "[t]he protection of a child is a circumstance which should heighten the standard of care with which a person acts, because a child is generally unable to protect himself or herself." Schaefer, *supra* note 6, at 1439.

29. Erickson v. Christenson, 781 P.2d 383, 385 (Or. Ct. App. 1989) (holding that a pastor stands in a position of trust to parishioners), *appeal dismissed*, 817 P.2d 758 (Or. 1991).

30. *Child Sexual Abuse & Our Courts*, *supra* note 28.

31. See *infra* notes 53-75 and accompanying text for a discussion of ordinary negligence and foreseeability; *infra* notes 242-78 and accompanying text for a discussion of malpractice.

32. See *infra* notes 76-142 and accompanying text for a discussion of negligent hiring and supervision, vicarious liability, and scope of employment.

constitutional law,[33] strict liability,[34] and public policy[35] offer an established framework upon which courts should build diligently to decide employee abuse cases in favor of children.

INSTITUTIONS OWE CHILDREN A DUTY OF CARE

Establishing the existence of a duty owed by institutions to children is necessary to support almost all theories of liability.[36] A victim's cause of action against an institution arises when an institution breaches a duty to the victim. Institutions may owe the children in their care several duties, including a duty of reasonable care,[37]

33. See *infra* notes 143-66 and accompanying text for a discussion of the constitutional right to privacy and the Federal Torts Claims Act.

34. See *infra* notes 201-12 and accompanying text for a discussion of strict liability.

35. *See infra* notes 213-95 and accompanying text. Public policy justifications include the abrogation of former government and charitable immunities, licensure and certification standards, insurance, risk allocation, and fairness concerns.

36. Courts determine the existence of a duty by reviewing administrative, moral, ethical, and economic factors; the consequences of establishing a duty; the interests of justice; the foreseeability of the resulting harm; and the feasibility of preventive measures. KIELY, *supra* note 27, at 291-93; *see also* Nally v. Grace Community Church, 763 P.2d 948, 956 (Cal. 1988) (noting that foreseeability of harm, degree of certainty of injury, nexus of defendant's conduct and injury suffered, moral blame attached to defendant's acts, and policy of preventing future harm figure in the determination of the existence of a duty), *cert. denied*, 490 U.S. 1007 (1989).

37. *See* Phyllis P. v. Superior Court, 228 Cal. Rptr. 776, 778 (Ct. App. 1986) (holding that school breached its duty of reasonable care by failing to notify parent upon school officials' learning of sexual assault of child).

When an individual acts and then realizes the act created an unreasonable risk of causing harm, a duty arises to exercise reasonable care to prevent the harm from actually occurring. RESTATEMENT (SECOND) OF TORTS § 321 (1965); KIELY, *supra* note 27, at 230. In the employee abuse situation, institutional actions that might create an unreasonable risk of harm and potentially subject children to abuse include hiring disturbed employees or pedophiles, failing to monitor employees responsible for taking care of children, and ignoring reports or rumors of employee abuse. A duty arises even though the actor may have no reason to believe a risk exists at the time of the act. *Id.* at 232. When an employer hires an employee who later commits child abuse, if the employer at any time realizes the employee's propensities, the employer has a duty to remedy the prior action and prevent the abuse from occurring. The failure to do so may generate liability. The same analysis applies to the duty to avoid creating any unreasonable risk of harm. *Id.*

Furthermore, undertaking the charge of a helpless individual, such as a child, when one has no duty to do so subjects the actor to liability for any harm caused by the actor's failure to use reasonable care to secure the helpless individual's safety while in the actor's care. RESTATEMENT (SECOND) OF TORTS, *supra*, § 324. In *Phyllis P.*, because the school "covered up" attacks on the plaintiff's daughter and failed to prevent a subsequent rape, it was potentially liable to the plaintiff. *Phyllis P.*, 228 Cal. Rptr. at 778. An institution's good faith is irrelevant. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 35 (1988).

A duty of reasonable care may also arise with respect to an invitee who enters by express or implied invitation if entry is connected to the owner's business or to an activity the owner conducts or permits to be conducted, and the owner or the owner and invitee benefit.

a duty of special care,[38] a public duty,[39] a contractual duty to the child's family,[40] and a statutory duty to report suspected

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BLACK'S LAW DICTIONARY 827 (6th ed. 1979) (citing Madrazo v. Michaels, 274 N.E.2d 635 (Ill. App. Ct. 1971)). The owner must protect an invitee from any known or reasonably discoverable danger and take reasonable measures to make the premises safe. *Id.* Courts often characterize students as invitees. Valerie L. Brown, *College Fraternities and Sororities: Tort Liability and the Regulatory Authority of Public Institutions of Higher Education*, 58 Educ. L. Rep. (West) 1, 6 (1990). In addition, children attending movie theaters, campgrounds, church functions, and day care may be invitees. *See* Community Theatres Co. v. Bentley, 76 S.E.2d 632, 634 (Ga. Ct. App. 1953) (noting that children entering a theater were invitees); *see, e.g.*, Albers v. Church of the Nazarene, 698 F.2d 852, 855 (7th Cir. 1983) (holding that a standard of ordinary negligence applied when a child was injured on a daycare playground); Applebaum v. Nemon, 678 S.W.2d 533, 535-36 (Tex. 1984) (noting that a daycare center has both an implied agreement and duty to render aid to a child who becomes imperiled during the center's custody); Kigin v. Woodmen of the World Ins. Co., 541 N.E.2d 735, 736 (Ill. App. Ct. 1989) (holding that a camp can be liable for the sexual molestation of a camper by one of the counselors); Annotation, *Liability of Youth Camp, Its Agents or Employees, or of Scouting Leader or Organization, for Injury to Child Participant in Program*, 88 A.L.R.3D 1236 (1978).

38. A defendant does not have a duty to protect another from the dangerous propensities of a third person unless a special relationship exists between the defendant and the victim or the dangerous person. DeShaney v. Winnebego County Dep't of Social Servs., 489 U.S. 189, 198-200 (1987); Estate of Baily v. County of York, 768 F.2d 503 (2d Cir. 1985); RESTATEMENT (SECOND) OF TORTS, *supra* note 37, § 315; KIELY, *supra* note 27, at 231. In the institutional setting, the institution may share a special relationship with *both* the abuser and the victim: the abuser is an employee of the institution, and the victim is a dependent in the institution's care. New Jersey v. T.L.O., 469 U.S. 325, 348 (1985); Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 482-83 (D.C. Cir. 1970); Erickson v. Christenson, 781 P.2d 383, 386-87 (Or. Ct. App. 1989) (stating that pastor has a fidutiary duty to parishomers). *But see* Bradshaw v. General Motors Corp., 805 F.2d 110, 111 (3d Cir. 1986) (holding that a company's refusal to rehire a rehabilitated alcoholic employee, in spite of the employer's promises to rehire once the employee is rehabilitated, does not state a claim for intentional infliction of emotional distress).

39. The public duty doctrine, inapplicable in cases of ordinary negligence or discretionary matters, mandates that when the government owes a duty only to the public at large, the injured private individual has no remedy against the government. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 131, at 1049 n.81 (5th ed. 1984). The rationale behind the doctrine is to avoid interfering with government operations and subjecting government to financial burdens; courts balance the injured party's right against taxpayer rights. KIELY, *supra* note 27, at 156. A government entity is not liable to an individual for a negligent or wrongful act or omission unless a special relationship exists and the government owes a duty directly to the injured individual. A.L. v. Commonwealth, 521 N.E.2d 1017, 1026 (Mass. 1988) (Hennessey, C.J., concurring); Stanik v. Bellingham-Watson Dist. Bd. of Health, 737 P.2d 1054 (Wash. Ct. App. 1987); KIELY, *supra* note 27, at 154. A special relationship requires prior contact between the government agent and the injured individual and detrimental reliance on the relationship by the individual. *See, e.g.*, MARSHALL S. SHAPO, THE DUTY TO ACT 79-81 (1977) (discussing government obligations to the public arising from direct contact with government employers and individual dependence on government actions). Child abuse prevention acts and other community services may create the necessary special relationship. *See* Ebarb v. County of Stanislaus, 246 Cal. Rptr. 845, 848-50 (Ct. App. 1988); KIELY, *supra* note 27, at 162.

40. When private institutions are involved, many courts rely on contract principles in reviewing the institution's obligation to the child and the child's family. Marlene F. v.

abuse.[41] As caretakers of children, institutions assume duties similar to those of the child's parents via the concept of *in loco parentis*.[42] Specifically, these duties impose on the institution the responsibility of taking reasonable precautions against foreseeable risks[43] and pre-

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Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278 (Cal. 1989) (discussing dual contractual relationship that arises when both mother and child are patients); Newton v. Kaiser Hosp., 228 Cal. Rptr. 890 (Ct. App. 1986); Andalon v. Superior Court, 208 Cal. Rptr. 899 (Ct. App. 1984). Courts routinely regulate contracts that affect the public and individual welfare or that implicate conformity with a professional code of behavior. *See* HUBER, *supra* note 37, at 25.

41. Many institutional employees that regularly interact with children have a statutory duty to report suspected cases of child abuse, no matter when or where the abuse occurred. *See* Note, *supra* note 9, at 256-59; (discussing state statutory requirements relating who must report and with what level of knowledge); *Dental Coalition Formed to Combat Child Abuse*, PR Newswire, Oct. 15, 1990, *available in* LEXIS, Nexis Library, Wires File (stating that the failure to report suspected cases may result in fines). Although the laws vary from state to state, every state has reporting requirements. Frederick K. Lombard et al., *Identifying the Abused Child: A Study of Reporting Practices of Teachers*, 63 U. DET. L. REV. 657, 658 & nn.6-7 (1986) (citing the reporting statute for each state and the District of Columbia). Some laws impose a duty on every citizen to report; others require only certain professionals to report and request that other citizens voluntarily report. Lombard et al., *supra* at 660-61, 661 n.17; Shoop & Firestone, *supra* note 6, at 1117. Claims of professional privilege, such as the doctor-patient and clergy-penitent privileges, are usually invalid. *See* Mary H. Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 733-34 (1987).

Furthermore, the Child Abuse Prevention and Treatment Act requires states to adopt reporting statutes, grant immunity to reporters, and develop administrative procedures in order to be eligible for federal funds. 42 U.S.C. § 5106a(6) (1988). For a general discussion of reporting standards, see DOUGLAS A. BESHAROV, CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION: POLICY GUIDELINES FOR DECISION MAKING 9 (1988).

Mandatory reporting laws create a duty, and "[n]ot reporting child abuse is a form of abuse." Roy Horowitz & Susan Duff, *Family Clinic: Inappropriate Corporal Punishment*, NEWSDAY, Mar. 17, 1990, pt. II, at 2; *see also* Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 146 (2d Cir. 1981) (failing to comply with statute warrants liability and amounts to deliberate indifference). In many cases, the reporting of the abuse is the child's only hope. The knowing failure to report abuse subjects the institution or individual to criminal and civil penalties. Reports made in good faith remain immune from liability. Note, *supra* note 9, at 262-63. If a required reporter is immune from liability, immunity also extends to the reporter's employer. Cream v. Mitchell, 264 Cal. Rptr. 876, 883 (Ct. App. 1989).

42. KIELY, *supra* note 27, at 222. The institutions are said to be *in loco parentis*, which means that they stand in place of the parent and are charged with the parent's rights, duties, and responsibilities. *See* Cornhusker Christian Children's Home, Inc. v. Department of Social Servs., 416 N.W.2d 551, 560-61 (Neb. 1987) (citing Austin v. Austin, 22 N.W.2d 560, 563 (Neb. 1946) (defining the *in loco parentis* relationship)), *appeal dismissed*, 488 U.S. 919 (1988); BLACK'S LAW DICTIONARY 708 (6th ed. 1990).

Schools have long been the most important nonparental caretakers of children over five years old. In recent years, kindergartens, preschools, and nursery schools have become increasingly prominent caretakers of children aged three to five years, and 90% of 6- through 13-year-olds attend public school. Mary Jo Bane et al., *Child Care Settings in the United States*, *in* CHILD CARE AND MEDIATING STRUCTURES 18, 23, 31 (Brigitte Berger & Sidney Callahan eds., 1979).

43. Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1337 (Or. 1987) (describing the special relationship of school toward student).

venting employees from intentionally harming others.[44] This imposition does not unduly burden an institution's operation and is consistent with the philosophy that children require a heightened duty of care.[45]

Breach of Duty

Employee abuse of a child in the care of an institution constitutes two separate breaches of duty: the employee's abusive action is a breach of his duty to obey the law that ultimately subjects the employee to criminal penalties,[46] and the institution's failure to meet any of the above listed duties is a breach for which the institution may be civilly liable for failing to protect the child.[47] Generally, a breach of duty is grounds for liability through, for example, negligence[48] or reliance principles.[49] In the area of employee abuse, the judicial system's failure to impose liability on the institution appears to condone the institution's breach of duty and ignores the general ethical duty and specific legal duties of care imposed on the institution.[50]

EMPLOYEE CHILD ABUSE AND THE JUDICIAL RESPONSE

Even if a court finds that an institution owed a duty to the victim of child abuse, the institution often escapes liability through

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44. Kigin v. Woodmen of the World Ins. Co., 541 N.E.2d 735, 736 (Ill. App. Ct. 1989) (reinstating cause of action against campground for neglecting its duty to exercise reasonable care to control employee and prevent him from intentionally harming child).

45. *See* Di Cosala v. Kay, 450 A.2d 508, 519 (N.J. 1982) (recognizing that children require a higher degree of care than adults). Furthermore, according to the U.S. Advisory Board on Child Abuse and Neglect, a general ethical duty is shared by everyone to ensure the safety and well-being of children. Marlene Cimons, *Panel Calls Child Abuse a National Emergency*, L.A. TIMES, June 27, 1990, at A12 (quoting 1990 Report of the U.S. Advisory Board on Child Abuse and Neglect).

46. Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278 (Cal. 1989).

47. Hipp v. Hospital Auth., 121 S.E.2d 273, 275 (Ga. Ct. App. 1961) (breaching the duty to select only competent employees exposes the institution to liability for any assaults committed by the employee).

48. A negligence action may arise when an institution's failure to act jeopardizes a victim, which then may be compounded by a failure to protect. Lisa E. Heinzerling, Comment, *Actionable Inaction*, 53 U. CHI. L. REV. 1048, 1062 (1986) (citing White v. Rochford, 592 F.2d 381, 384 (7th Cir. 1979), *aff'd sub nom.* Ellsworth v. Racine, 774 F.2d 182 (7th Cir. 1985)).

49. Courts may impose liability when the victim or his parents "detrimentally relied" upon the defendant in an appropriate manner. *See* P.L.C. v. Housing Auth., 588 F. Supp. 961, 965-66 (W.D. Pa. 1984) (finding housing authority liable for groundskeeper's sexual assault on tenant who justifiably relied on company for safety). Failure to prove detrimental reliance should not bar liability because geography and economics usually limit a family's choice about which school, church, or hospital the child attends. Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1337 (Or. 1987).

50. See *supra* notes 37-44 and accompanying text for a discussion of the duties imposed on institution.

certain legal doctrines.[51] Because child abusers often choose occupations that involve interaction with children,[52] courts should acknowledge the prevalence of employee abuse and resolve to correct the situation instead of routinely and flatly dismissing victim's claims. No doubt public institutions need protection and that increased liability potentially undermines the institutions' ability to provide necessary community services. Conversely, however, the continual denial of liability in employee abuse cases insulates culpable institutions from their responsibilities and burdens the community by allowing irresponsible institutions to continue to operate. Furthermore, protecting such institutions subjugates the rights and well-being of children. The following discussion of grounds for institutional liability attempts to balance the interests of the institution against the rights of the abused child, while ensuring compensation for the victims of employee abuse.

Tort Concepts: Employee Abuse is Reasonably Foreseeable and Institutional Failure to Prevent Harm Constitutes Negligence

In negligence actions, a plaintiff may recover for an injury caused by a breach of duty.[53] Generally, institutions must meet a reasonable standard of behavior,[54] and the injured child must

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51. Specifically, these doctrines are lack of deliberate indifference, unforeseeability, personal acts beyond scope of employment, sovereign immunity, and charitable immunity. *See infra* text accompanying notes 57-75, 112-16, 167-200.

52. FALLER, *supra* note 11, at 86. Consider the following statement by a Chicago police officer:

> Whenever somebody says, "Gosh, did you hear about that schoolteacher, that priest, that camp counselor who abused the kid?"—it doesn't surprise me. I *expect* it. These people learn early, usually at puberty, that they like kids. Now they have a career choice to make. They're not gonna choose to be, say, a lumberjack. If they're smart in school, they'll become a teacher, a priest, a youth counselor. If they're not so smart, they may become a school janitor or the camp groundskeeper. They know they want access to kids, and they pick a profession deliberately.

Connie Fletcher, *What Cops Could Tell You About Crimes Against Women*, GLAMOUR, Jan. 1991, at 179.

53. KEETON ET AL., *supra* note 39, § 30, at 164-65; *see also* A.L. v. Commonwealth, 521 N.E.2d 1017, 1020 (Mass. 1988) (listing breach of duty as necessary to a claim of negligence). Modifications of traditional negligence principles have resulted in causes of action such as negligent security (a failure to provide adequate protection, as in the case of a tenant raped by an employee of the landlord, or the commission of crimes by a paroled prisoner) and negligent entrustment (entrustment of a person or instrument that creates an unreasonable risk of harm). Although beyond the scope of this Note, these alternative grounds provide viable grounds for imposing liability as well.

54. The concept of "reasonableness" is measured against the conduct of a reasonable person of ordinary prudence in the community. KEETON ET AL., *supra* note 39, § 32, at 174.

prove that the institution's lack of care caused the actual harm.[55] An abused child recovers by proving proximate cause, that is, that the harm the child suffered was a direct result of some institutional action, such as offering services to the victim, hiring the employee, or failing to adequately supervise the employee.[56]

After establishing causation, the victim must prove that the institution knew, or should have known, of the risk of harm; that the institution displayed deliberate indifference to the potential for employee abuse;[57] or that the resulting abuse was reasonably foreseeable.[58] Although some argue that institutions

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55. Recovery in negligence is conditioned upon proving causation, that is, a connection between the institution's act or omission and the resulting injury. *Id.* § 41, at 263.

56. Institutions often counterargue that the actual cause of harm is an act by the employee, which severs the causal connection and relieves the institution of liability. *See* Copithorne v. Framingham Union Hosp., 520 N.E.2d 139, 141 (Mass. 1988); *see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 37, §§ 440, 441 (defining a superceding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about," and an intervening force as a force "which actively operates in producing harm to another after the actor's negligent act or omission has been committed").

Such arguments are not successful when the institution's actions either created or increased the risk that the intervening force would produce harm. *A.L.*, 521 N.E.2d at 1022; Mount Zion State Bank & Trust v. Central Ill. Annual Conference of the United Methodist Church, 556 N.E.2d 1270, 1273 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 839 (Ill. 1990) Additionally, institutions are liable when the intervening force is foreseeable and precautionary measures might have averted the harm. *A.L.*, 521 N.E.2d at 1022. Although the institution cannot be held liable for unanticipated abuse, liability is justly imposed for any foreseeable intervening causes or for the failure to take reasonable precautions.

57. To establish an institution's knowledge of or deliberate indifference to child abuse occurring within the institution, a victim must prove that after the institution received notice of several violations forming a pattern of abuse, the institution deliberately ignored or tacitly authorized the violations and failed to take remedial steps, resulting in further injuries. Doe v. Special Sch. Dist., 901 F.2d 642, 645 (8th Cir. 1990). The court must determine whether the actions of the institution amounted to reckless disregard or gross negligence of the child's constitutional rights. D.T. v. Independent Sch. Dist., 894 F.2d 1176, 1193 (10th Cir.), *cert. denied*, 111 S. Ct. 213 (1990); *see also* Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 141 (2d Cir. 1981) (refusing to hold Department of Social Services liable for sexual abuse in foster home unless plaintiff proved "deliberate indifference" to child's placement—proof of mere negligence, indifference, or inaction was insufficient). The court must also consider whether the institution responded according to "official policy," and if so, whether the policy ignored repeated and frequent abusive actions. *Special Sch. Dist.*, 901 F.2d at 645; Spann v. Tyler Indep. Sch. Dist., 876 F.2d 437, 438-39 (5th Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990).

58. The test of foreseeability is whether the consequences are within the scope of the original risk. *See* Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 912 (Minn. 1983); Sally G. v. Orange Glen Estates Homeowners, 227 Cal. Rptr. 559, 563 (Ct. App. 1986); Clark Equip. Co. v. Wheat, 154 Cal. Rptr. 874, 883-84 (Ct. App. 1979). This foreseeability standard differs from the usual negligence standard of considering the prudent person's response to a certain situation. KIELY, *supra* note 27, at 35.

are not insurers of child safety,[59] no one disputes that institutions are required to use at least reasonable care for the protection of children.[60] Courts are understandably reluctant to impose on institutions the burden of suspecting arguably improbable occurrences. By requiring a standard of knowledge that is too high, however, courts permit institutions to ignore the problem.[61]

Recently, the United States Court of Appeals for the Tenth Circuit applied the knowledge standard in *D.T. v. Independent School District*.[62] In *D.T.*, the school board hired a teacher with a prior sodomy conviction and took no action against the teacher after one report and several allegations of molestation.[63] The court held that the evidence was insufficient to find that the school board was deliberately indifferent to the subsequent abuse of three children.[64] At trial, the children failed to prove a "direct causal connection" between the board's actions and the abuse.[65] As a result, the court refused to impose liability absent any proof that the school sponsored or encouraged the teacher's actions.[66]

Such high knowledge standards are unrealistic. First, no institution publicly recognizes child abuse as an official policy nor sanctions, orders, or participates in employee abuse. Hence, this standard relieves all but the most culpable and knowledgeable

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59. *See* Congleton v. Starlite Skate Ctr., Inc., 333 S.E.2d 677, 680 (Ga. Ct. App. 1985); Antley v. Yamaha Motor Corp., 539 So. 2d 696, 705 (La. Ct. App. 1989) (citing Williams v. Allstate Ins. Co., 268 So. 2d 290, 291-92 (La. Ct. App. 1972)); Bonnet v. Slaughter, 422 So. 2d 499, 501-02 (La. Ct. App. 1982); Prier v. Horace Mann Ins. Co., 351 So. 2d 265, 268 (La. Ct. App. 1977).

60. *Bonnet*, 422 So. 2d at 502; *see A.L.*, 521 N.E.2d at 1021-23. *See generally* Cornhusker Christian Children's Home v. Department of Social Servs., 416 N.W.2d 551, 560 (Neb. 1987), *appeal dismissed*, 488 U.S. 919 (1988) (noting that a child care agency stands *in loco parentis* to the children under its care).

61. For instance, in Community Theatres Co. v. Bentley, 76 S.E.2d 632 (Ga. Ct. App. 1953), a theater manager abused at least two boys for several months. In that case, the manager committed a minimum of 13 attacks on at least two boys in the basement of the theater on a mat unrelated to the business of projecting and showing movies. *Id.* at 633. The court held the theater had no reason to suspect its employee of child abuse and that the victim's failure to prove that the company had actual notice of the abuse absolved the company of liability. *Id.* at 634; *see also* Southern Bell Tel. & Tel. Co. v. Sharara, 307 S.E.2d 129, 130-31 (Ga. Ct. App. 1983) (rejecting plaintiff's argument that employer knowledge of employee marital problems was sufficient to impose liability on employer for attack).

62. 894 F.2d 1176 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 213 (1990).

63. *Id.* at 1192-93.

64. *Id.* at 1193.

65. *Id.* at 1188.

66. *Id.* at 1191.

employer.[67] Furthermore, the lack of a deliberate indifference standard is too high for child abuse cases. Given the amount and extent of the harm that results and the fact that the victim is a defenseless child, a standard of mere indifference would be preferable. Such a standard would not unfairly impose liability on the truly ignorant institution but would hold responsible the institutions that ignored the situation.

Other courts require that the employee abuse be reasonably foreseeable. The only risks from which an institution must protect itself are those that are certain to happen during the operation of the employer's business.[68] The generally foreseeable consequences of the business endeavor determine whether the risks are created by the institution or are inherent in its operations.[69] In the context of employment practices, courts construe foreseeability by determining whether the act is "so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[70] Rarely, however, do courts find employee abuse to be "anything other than highly unusual and very startling."[71]

Upon finding that the abuse amounts to unusual and startling actions and is thus unforeseeable, courts then excuse the institution.[72] Such reasoning ignores the increasing prevalence of child abuse.[73] Because employee abuse is not infrequent, requiring institutions to anticipate such abuse is reasonable. In addition, because employers in nonchildcare fields are forced to

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67. Liability depends upon the degree to which officials demonstrate knowledge, acquiescence, support, and encouragement of child abuse. Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 729 (3d Cir. 1989) (citing Commonwealth v. Porter, 659 F.2d 306, 321 (3d Cir. 1981)), *cert. denied*, 493 U.S. 1044 (1990); *see* A.L. v. Commonwealth, 521 N.E.2d 1017, 1017 (Mass. 1988); Cream v. Mitchell, 264 Cal. Rptr. 876, 879 (Ct. App. 1989).

68. Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 293 (Ct. App. 1981).

69. *Id.* at 291 (citing Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 149 (Ct. App. 1975)).

70. *Id.* See also *infra* note 101 for a discussion of risk spreading.

71. *Alma W.*, 176 Cal. Rptr. at 292 (finding school janitor's abuse during school hours and on school premises per se highly unusual and very startling).

72. *See* Jeffrey Scott E. v. Central Baptist Church, 243 Cal. Rptr. 128, 132 (Ct. App. 1988) (holding church not liable for Sunday school teacher's unforeseeable and self-serving sexual assault); Milla v. Tamayo, 232 Cal. Rptr. 685, 690 (Ct. App. 1986) (holding church not liable for priests' sexual acts with minor because acts were "uncharacteristic of church," unforeseeable, and not ratified by archbishop).

73. Interestingly, one educator stated: "The injury to students by acts of commission or omission by school personnel is not unusual." Bruce Beezer, *School District Liability for Negligent Hiring and Retention of Unfit Employees*, 56 Educ. L. Rep. (West) 1117, 1117 (1990).

include unlikely occurrences in their cost of doing business,[74] such a requirement for institutions that provide services to children is not too burdensome. The unfairness argument is shortsighted also because the courts fail to weigh the great harm to the victim against the small burden to the institution. Simply stated, the employer is in the best position and has the best opportunity to prevent the harm and may include any liability in the cost of doing business.[75]

Employment Law Concepts: Institutions Must Employ Competent Personnel and Assume Responsibility for Employee Actions

As discussed previously, institutions undertaking the care of children may owe several duties to the children and their parents, the breach of which gives rise to actionable claims against the institution.[76] A victim of employee child abuse also may have a claim arising out of the employment relationship between the institution and the abuser. A victim of employee abuse may recover by proving that the institution knowingly hired an incompetent employee or failed to adequately supervise its employees.[77] Alternatively, a victim may base a claim on vicarious liability principles if he is able to prove that the employee acted within the "scope of his employment."[78]

Traditionally, courts interpret the elements of negligent hiring and vicarious liability actions strictly; as a result, most employee abuse cases fail.[79] The judiciary is not wrong in upholding the valid, albeit arguable, point that employers cannot be faulted for every act that occurs during the workday. Blindly applying traditional employment law concepts, however, ignores the fact that the institutions assumed greater than usual em-

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74. For example, storeowners may be liable for injuries that occur on their premises. *See generally* Lloyd v. S.S. Kresge Co., 270 N.W.2d 423, 426 (Wis. Ct. App. 1978) (noting that the duty of the storeowner to render aid to customers is a cost of doing business); Senan E. Green, Note, *Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplications of Vicarious Corporate Liability*, 65 B.U. L. REV. 561, 602 (1985) (stating that a corporation can pass on the costs if held liable for employee negligence).

75. Green, *supra* note 74, at 599.

76. See *supra* notes 37-45 and accompanying text for the various duties that an institution may owe to a child.

77. See *supra* note 37 and accompanying text for a discussion of the duty of reasonable care.

78. See *infra* note 113 and accompanying text for a definition of "scope of employment".

79. *See, e.g.*, Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 289 (Ct. App. 1981) (holding that a school district was not liable for a janitor's sexual assault of a student).

ployer responsibilities and additional obligations by undertaking child care functions.[80] Accordingly, more flexible interpretations of negligent hiring and vicarious liability concepts provide a means for the institution to retain the protection due an employer while ensuring that the institution maintains its duties and obligations to the children entrusted in its care.

Negligent Hiring and Supervision

Parents generally do not have the power to hire and fire the specific employee who cares for their child[81] and, therefore, rely heavily on the institution to hire appropriate personnel. This reliance permits a cause of action in negligent hiring when the institution fails to exercise the requisite care in selecting and hiring employees and in determining the employee's competency.[82] After hiring, employers must supervise employees properly; failure to remove incompetent employees subjects an institution to negligent supervision claims.[83] Fundamentally, negligent hiring and supervision create causes of action when the institution knowingly[84] hires or supervises an inadequate and harmful employee[85] or otherwise unreasonably creates a forseeable risk to a protected interest.[86] A negligent hiring claim may

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80. *See supra* note 42 (discussing institutions' responsibilities *in loco parentis*).

81. A.L. v. Commonwealth, 521 N.E.2d 1017, 1022-23 (Mass. 1988).

82. Hipp v. Hospital Auth., 121 S.E.2d 273, 275 (Ga. Ct. App. 1961); *see* Beezer, *supra* note 73, at 1118. To prove a prima facie case of negligent hiring, the plaintiff must allege the existence of an employment relationship, the employee's unfitness, that the employer knew or should have known of the unfitness, and causation. Sharon S. Howard, *Negligent Hiring and Employer Liability in the Selection of Employees*, 49 Educ. L. Rep. (West) 1, 3 (1988). A negligent retention action may arise when the employee is retained after the employer is aware of the person's unsuitability for the job. *Id.* at 2; *see also* KIELY, *supra* note 27, at 269-70 (noting that a failure to conduct a background check may give rise to a negligent retention action). "Incompetence" or "unfitness" is defined as drinking on the job, physical or mental problems, viciousness, recklessness, or any other conduct that would provide a reasonable employer with notice of the employee's unfitness and likelihood of producing harm. Cindy M. Haerle, Minnesota Developments, *Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory:* Ponticas v. K.M.S. Investments, 68 MINN. L. REV. 1303, 1311-12 (1984); Howard, *supra*, at 3.

83. Corleto v. Shore Memorial Hosp., 350 A.2d 534, 538 (N.J. Super. Ct. Law Div. 1975). In some cases, however, government employees are not easily removed because immunity doctrines prohibit termination. *See* Upton v. Thompson, 930 F.2d 1209, 1211-13 (7th Cir. 1991).

84. The term "knowingly" includes instances when the institution acts without actual knowledge, but when it should have known that the employee was dangerous or inept.

85. Howard, *supra* note 82, at 2. The applicable foreseeability standard requires only that a general zone of risk is apparent, as opposed to an actual forecasting of the particular harm. Di Cosala v. Kay, 450 A.2d 508, 517 (N.J. 1982).

86. *See* Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1336 (Or. 1987), *appeal*

result from employee negligence or from the employee's commission of a criminal offense.[87]

The duty of reasonable care discussed previously[88] applies even more so in the employment setting because of the fact that the parties met through the employment.[89] As long as the plaintiff and the employee each were in a rightful place and met as a direct consequence of the employment, then the employer must reasonably ensure the safety and welfare of those who come into contact with the employee.[90] This obligation applies even to willful or criminal injuries.[91]

Because the institution's liability for employee abuse depends on the fact of employment[92] and on how much the employer knows and how much the employer should know,[93] the institution should evaluate the risk of hiring an unfit employee and then determine the extent to which it must investigate the employee's background. The test is whether the employer conducted a

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dismissed, 817 P.2d 758 (Or. 1991); Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989), *appeal dismissed*, 817 P.2d 758 (Or. 1991); Haerle, *supra* note 82, at 1305-07. Foreseeability is determined on the basis of duties that are characteristic, required, or incidental to an employee's position. KIELY, *supra* note 27, at 290-91.

87. J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391, 394 (Va. 1988).

88. *See supra* note 37.

89. Beezer, *supra* note 73, at 1118.

90. *Id.*; *see also* Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983) (stating that "an employer has the duty to exercise reasonable care . . . in hiring individuals who, because of the employment, may pose a threat of injury to members of the public").

91. Beezer, *supra* note 73, at 1119.

92. Contrast this with a negligent entrustment action, which does not require an employment relationship and is premised on the entrustment of a dangerous chattel to a third party, RESTATEMENT (SECOND) OF TORTS, *supra* note 37, § 405, or the entrustment of a reasonably safe chattel to a third party who is likely to use it in a manner creating an unreasonable risk of harm, *id.* § 390. Such a cause of action may be helpful when the abuse is committed by someone other than an employee (thus negating the possibility of negligent hiring/supervising actions). For instance, in Blanca C. v. County of Nassau, 480 N.Y.S.2d 747 (App. Div. 1984), *aff'd*, 481 N.E.2d 545 (N.Y. 1985), the court found that the social services unit could not be liable for the abuse committed by foster parents, because no employment relationship existed between the unit and the parents. *Id.* at 750. As a result, the court dismissed the vicarious liability, *id.*, negligent selection, *id.* at 752, and supervision claims, *id.*

For further contrast, see the discussion *infra* notes 99-111 and accompanying text on vicarious liability, which requires the plaintiff to prove the harm came from within the scope of employment. In negligent hiring, the plaintiff need not meet the strict scope of employment standards. Howard, *supra* note 82, at 3. For other differences between vicarious liability and negligent hiring, see Haerle, *supra* note 82, at 1307 n.22.

93. *See supra* notes 57-58 and accompanying text. Interestingly, evidence of the employee's prior acts is admissible at trial, generally resulting in greater recovery for the plaintiff. *See, e.g.*, *Ponticas*, 331 N.W.2d at 914 (stating that the jury considered evidence of the employee's criminal record).

reasonable investigation[94] given the level of risk involved in the position.[95] Careful and thorough employee screening in almost every case provides the institution with information regarding the employee's suitability to care for children.[96] An institution may conduct background checks by utilizing electronic databases[97] or by calling previous employers and following up even the slightest intimation of unfitness. Such measures do not seem unduly burdensome considering the harm that may be prevented and the extent of the risk involved.[98]

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94. Reasonableness depends on the job position and the surrounding circumstances. For instance, although it is reasonable for a new tavern owner to retain employees hired by a previous owner, Evans v. Morsell, 395 A.2d 480, 484-85 (Md. 1978), it is not reasonable to hire employees only on the basis of whether previous employers answer "ok" or "not ok" in a telephone reference check, Easly v. Apollo Detective Agency, Inc., 387 N.E.2d 1241, 1244-49 (Ill. App. Ct. 1979). To fail to check an applicant's criminal record, past employment history, and references when the position involves the safety and welfare of others is also unreasonable. *Ponticas*, 331 N.W.2d at 914-15.

95. *Ponticas*, 331 N.W.2d at 911. Employee unfitness is determined by the circumstances of employment and the sensitivity of the occupation. *See* Kendall v. Gore Properties, Inc., 236 F.2d 673, 678 (D.C. Cir. 1956) (distinguishing between "a yard man, not ordinarily to be sent into a tenant's apartment" and an employee "sent, after hours, to work for protracted periods in the apartment of a young women tenant living alone"); Welsh Mfg. v. Pinkerton's, Inc., 474 A.2d 436, 440-41 (R.I. 1984) (holding that an employer providing security guards must scrutinize the employee's background with particular care).

96. *See* J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391, 392 (Va. 1988) (holding an employer liable for negligent hiring because the employer should have known that the employee had a history of sexual assault on children). The concern that an overly thorough search or a refusal to hire may lead to a defamation or an employment discrimination claim should not be ignored. *See Therapist Libeled*, NAT'L L.J., Nov. 6, 1989, at 6 (reporting that a jury awarded three million dollars to a therapist accused of child abuse by her employer). Institutions, however, may attempt to justify such actions using truth and good faith defenses. *See, e.g.*, Parker v. Williams, 855 F.2d 763, 772-73 (11th Cir. 1988) (rejecting employer's good faith defense); Ramirez v. Rogers, 540 A.2d 475, 477 (Me. 1988) (noting that the burden is on the defendant to prove truth defense); Davis v. Durham City Schs., 372 S.E.2d 318, 320 (N.C. Ct. App. 1988) (finding no liability for good faith report of abuse).

97. Although a national database is not currently operational, federal legislation appears ready to correct the situation. *See* Sharon Shahid & Karen Thomas, *Child Abuse: "Big Secret of Shame,"* USA TODAY, Nov. 13, 1991, at A13 (discussing the proposed National Child Protection Act). Under the bill, states must register the names and social security numbers of convicted child abusers with the Justice Department. Institutions may then contact the Department before hiring child care employees. *Oprah Seeks Data Bank on Child Abusers*, WASH. TIMES, Nov. 13, 1991, at A2. Interestingly, as of 1982, central registries recording child abuse *victims* existed in 47 states. *See* Note, *supra* note 9, at 265 & nn.189-91.

98. Given that child safety is at issue, expecting institutions to be extra careful in selecting employees is not unreasonable. *Cf.* D.T. v. Independent Sch. Dist., 894 F.2d 1176 (10th Cir.) (stating that principal ignored rumors and allegations of previous molestation against teacher later convicted on three counts of sexual molestation in principal's school), *cert. denied*, 111 S. Ct. 213 (1990). At the very least, an institution must follow its own standard operating procedures on hiring or be prepared to suffer the consequences. In *Infant C.*, the Boy Scout organization failed to properly process a troop leader application and conducted an inadequate

Vicarious Liability

Vicarious liability[99] imputes negligence or fault of an employee to the employer based on the fact that the employee is acting on behalf of the employer.[100] The rationale is that the employer controls the employee; selects, trains, and trusts the employee; has the opportunity to prevent the employee's acts; and also has greater resources.[101] The employer may be liable even though the employee received specific orders from the employer to use due care.[102] An employer must expect the imposition of liability for any negligent, willful, malicious, or criminal acts committed within the course of employment or in furtherance of the institution's business.[103] Although intentional torts are never per se authorized, courts are willing to find that certain torts are so reasonably connected with the employment that liability is unhesitatingly imposed.[104] Additionally, employers are responsible for the employee's commission of personal acts of a foreseeable nature.[105]

Before a court may impute any fault to the employer, it must first determine the employee's guilt.[106] Next, the following circumstances are evaluated: whether the employee acted within

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investigation that failed to reveal the applicant's previous dismissal from a troop for molesting scouts. Infant C. v. Boy Scouts of Am., Inc., 391 S.E.2d 322, 324-25 (Va. 1990); *see also* Andrews v. United States, 732 F.2d 366, 368 (4th Cir. 1984) (opining that the officers could have averted the harm through proper supervision and investigation).

99. This concept is generally referred to as respondeat superior. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 458 (4th ed. 1971).

100. In the following discussion of vicarious liability, hospitals are not considered liable for the negligence of doctors who provide services to the hospital as independent contractors and not as hospital employees. Corleto v. Shore Memorial Hosp., 350 A.2d 534, 536 (N.J. Super. Ct. Law Div. 1975).

101. PROSSER, *supra* note 99, at 459. Also, in applying vicarious liability, courts consider the ability of the institution to allocate the risk by redistributing the costs of liability to consumers of the employer's goods and services. *See* Haerle, *supra* note 82, at 1304-05. Such liability gives the employer an incentive to take precautions and provide instruction and supervision. *Id.*

102. PROSSER, *supra* note 99, at 461.

103. KIELY, *supra* note 27, at 33. The fundamental question is whether the employee acted "in part by a purpose to further the business." *Id.* An employer may be liable for the employee's misguided purpose of furthering the business. PROSSER, *supra* note 99, at 464-65.

104. PROSSER, *supra* note 99, at 464-65; *see also* Gregor v. Kleiser, 443 N.E.2d 1162, 1166 (Ill. App. Ct. 1982) (holding that an employer who granted an employee authority to maintain order with force was liable for assault).

105. PROSSER, *supra* note 99, at 462-63.

106. Corleto v. Shore Memorial Hosp., 350 A.2d 534, 536 (N.J. Super. Ct. Law Div. 1975); *see supra* note 27.

the scope of employment;[107] whether the conduct mirrored the general kind of work the employee usually performed;[108] whether the conduct occurred within the hours and physical area of employment;[109] whether service to the employer's interests motivated the employee;[110] and whether the employer controlled and supervised the employee.[111]

Scope of Employment

Any acts performed within the scope of employment, even criminal acts, may subject the employer to liability.[112] Scope of employment "refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."[113] An institution is not liable for torts committed outside the scope of employment unless the following criteria are met: the employer intended the act or the results;[114] the employer was negligent or reckless;[115] or the employee purported to act as the employer's agent.[116]

In light of the current trend extending employer responsibility to intentional torts reasonably connected with the employ-

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107. RESTATEMENT (SECOND) OF AGENCY § 219 (1957). Determining the scope of employment is usually a question of fact for the jury. Randi F. v. High Ridge YMCA, 524 N.E.2d 966, 968 (Ill. App. Ct. 1988). In doing so, the jury must consider whether the institution could expect the abuse. *Id.* at 970.

108. RESTATEMENT (SECOND) OF AGENCY, *supra* note 107, § 228.

109. *Id.*

110. *Id.*

111. *Id.* at § 220; *see* Malloy v. Fong, 232 P.2d 241, 249-50 (Cal. 1951) (analyzing the presbytery's degree of control and supervision over its ministers). In *Cordts v. Boy Scouts of America*, the court simplified the test into two parts: (1) whether the conduct was required or incidental to employment and (2) whether the supervisor may reasonably have foreseen the conduct. 252 Cal. Rptr. 629, 631 (Ct. App. 1989).

112. Randi F. v. High Ridge YMCA, 524 N.E.2d 966, 968 (Ill. App. Ct. 1988).

113. Birkner v. Salt Lake County, 771 P.2d 1053, 1056 (Utah 1989) (quoting KEETON ET AL., *supra* note 39, § 70, at 502). Factors to be considered include:

> the time, place and purpose of the act, and its similarity to what is authorized; whether it is one commonly done by such servants; the extent of departure from normal methods; the previous relations between the parties; whether the master had reason to expect that such an act would be done; and many other considerations.

KEETON ET AL., *supra* note 39, § 70, at 502.

114. RESTATEMENT (SECOND) OF AGENCY, *supra* note 107, § 219.

115. *Id.*

116. *Id.*

ment,[117] the extension of the scope of employment concept to include any employee action that affects the children seems appropriate, given the purpose and nature of the institutions involved in employee abuse cases. The courts, however, find it difficult, if not impossible, to find child abuse within the scope of employment,[118] using narrow and literal constructions of the purpose and function of the institution to avoid imposing liability.[119]

The strict interpretation approach ignores the fact that the purpose of the employment is to care for children; any employee action while caring for children arguably falls within the scope of employment.[120] Additionally, an institution may be liable for entirely personal ends of an employee when the institution owes a duty to the victim.[121] Given the direct duty the institution owes to the child and the magnitude of that duty,[122] courts should not allow the institution to avoid liability.

Recognizing that child beatings, rapes, and molestation could never meet any strict scope of employment test, courts should develop alternative rationales or widen the application of the scope doctrine. Instead of holding that the employee's actions fell outside the scope of employment because the acts committed did not serve the employer, the courts could find that the employee abused the *position* of employment and therefore acted within the scope of employment.[123] The applicable test should

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117. PROSSER, *supra* note 99, at 464. The tendency developed as a result of applying allocation of the risk theories. *Id.* at 459.

118. *See* Kimberly M. v. Los Angeles Unified Sch. Dist., 263 Cal. Rptr. 612 (Ct. App. 1989) (determining that the school district was not liable for teacher's sexual misconduct); Jeffrey Scott E. v. Central Baptist Church, 243 Cal. Rptr. 128 (Ct. App. 1988) (holding that the church was not liable for sexual assault because Sunday school teacher's acts were independent, self-serving, and unrelated to church activities); Milla v. Tamayo, 232 Cal. Rptr. 685 (Ct. App. 1986) (holding the church not liable for priests' sexual acts with minor because such acts were uncharacteristic of a priest).

119. *See* Doe v. City of Mount Vernon, 548 N.Y.S.2d 282 (App. Div. 1989) (holding that city was not a child caring agency and thus owed no duty to children sexually abused at a day care center); Blanca C. v. County of Nassau, 480 N.Y.S.2d 747 (App. Div. 1984) (holding social services department not liable for sexual abuse committed by foster parents), *aff'd*, 481 N.E.2d 545 (N.Y. 1985).

120. If an institution assumes the duty to take charge of the child, then the institution should assume responsibility for both the child's care and any mistreatment.

121. PROSSER, *supra* note 99, at 465.

122. *See supra* notes 45, 98 and accompanying text.

123. *See* Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989) (holding that a pastor who had sexual relations with a churchgoer abused their confidential relationship and was acting within the scope of his employment), *appeal dismissed*, 817 P.2d 758 (Or. 1991); *see also* Gaston v. Becker, 314 N.W.2d 728 (Mich. Ct. App. 1981). In *Gaston*, the teacher beat,

consider whether the employee was engaged in a required or incidental pursuit and whether the institution could reasonably foresee the conduct.[124] If either factor applies, then the institution would be liable even if the employee had a malicious intent.[125] This looser standard would not put the institutions on a slippery slope toward strict liability but rather would force them to accept responsibility for the acts an employee commits while acting as an employee.

Unfortunately, courts continue to undermine the potential of vicarious liability by refusing to apply a modified scope of employment analysis. The reasons for such strict judicial interpretation possibly include a fear of either undermining public institutions or creating strict liability. In most cases, the courts determine scope of employment as a matter of law.[126] In reality, reasonable persons may disagree as to the scope of the employment, signaling that the issue is actually a question of fact.[127]

For example, in *Moseley v. Second New St. Paul Baptist Church*,[128] the court granted the institution's motion for summary judgment because the church hired the abuser as a janitor, a position that the court found to have no relation to child safety, and also because the plaintiff failed to substantiate allegations that the janitor performed a security function.[129] Had the victim introduced sufficient evidence that the janitor did perform a security function, the court would have proceeded to try the case.[130] Without any factual support, the court did not have a question of material fact about whether the abuse occurred within the scope of employment and hence could not impose liability.[131]

Another example is that of a day care aide whose responsibilities included assisting children in the bathroom and maintaining hygiene of their private parts.[132] Although evidence

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choked, and slandered a student using racial and other epithets. *Id.* at 731. The majority held that the school district was potentially liable for the beatings but not the epithets. *Id.* at 732. At trial, the victim needed to prove that *he* believed the teacher's use of force was within the scope of the teacher's employment. *Id.*

124. Cordts v. Boy Scouts of Am., Inc., 252 Cal. Rptr. 629, 631 (Ct. App. 1988).

125. *Id.*

126. Webb v. Jewel Cos., 485 N.E.2d 409, 411 (Ill. App. Ct. 1985).

127. Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989).

128. 534 A.2d 346 (D.C. 1987).

129. *Id.* at 348.

130. *Id.*

131. *Id.* at 349.

132. 524 N.E.2d 966, 968-69 (Ill. App. Ct. 1988).

existed to show that the aide sexually assaulted and molested a child under her care,[133] the court in *Randi F. v. High Ridge YMCA* decided as a matter of law that such acts were solely for the aide's personal gratification and beyond the scope of employment.[134] Even though the acts occurred within the time and place of her job, and despite the plaintiff's allegation that the abuse occurred during the performance of assigned tasks and duties of her employment, the court believed the abuse to be too much of a deviation and unanticipated.[135]

These results disregard the fact that "where personal motivations so mingle with the employee's pursuit of occupational duties that it is arguable whether the employee's action is incidental to his duties,"[136] the result should be determined by members of the community and not by the court on a motion to dismiss.[137]

Business Interests

Another requirement for imposing liability for personal acts is that the act be in furtherance of the employer's business interests.[138] Child abuse clearly is not in the institution's interests. Because few personal acts by employees will ever be in the business or ideological interests of an institution, the courts should not read the requirement so strictly.[139] Furthermore, as mentioned earlier, because the employee commits the abuse only because of the very fact of employment within the institution's operations, it seems fair to impose liability on the employer for creating the hazardous situation.[140]

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133. *Id.* at 969.

134. *Id.*

135. *Id.* at 971. The court apparently ignored the fact that the aide's tasks gave her an opportunity to commit the abuse.

136. Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 290 (Ct. App. 1981).

137. *Id.* at 289.

138. Webb v. Jewel Cos., 485 N.E.2d 409, 411 (Ill. App. Ct. 1985). In some cases, the extent of the deviation may be a factor, but the court in *Webb* did not consider the issue. *Id.*

139. John R. v. Oakland Unified Sch. Dist., 769 P.2d 948 (Cal. 1989) (holding that molestation was not within scope of employment); Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989) (determining that therapist's acts were not within scope of employment); *Webb*, 485 N.E.2d at 409 (holding that store security guard acted outside scope of employement when he molested a girl detained for shoplifting); Hoover v. University of Chicago Hosp., 366 N.E.2d 925 (Ill. App. Ct. 1977) (dismissing hospital from case because rape and assault by attending doctor was not in furtherance of hospital's business and was solely for doctor's benefit). Courts generally focus on the extent to which the employee's act affects the conduct of future business. *See, e.g., Birkner*, 771 P.2d at 1058.

140. *See* Beezer, *supra* note 73, at 1119.

When no evidence exists to prove that the institution authorized or ratified the employee's acts, liability is denied.[141] Again, explicit authorization or ratification of child abuse is rare. The same rationale applies to other agency relationships, either paid or volunteer.[142]

Constitutional Theories of Liability and Remedies[143]

The United States Constitution protects citizens from the deprivation of life, liberty, or property without due process of law.[144] The right to be free from child abuse is not a per se fundamental right but may be grounded in the right of privacy via the liberty interest,[145] because the abuse deprives the child of a right to personal or bodily security.[146] The Federal Civil Rights Act of 1871 further protects citizens against the deprivation of any constitutional rights, privileges, or immunities.[147] Courts, however, are reluctant to impose liability for the deprivation of such rights[148] and frequently employ the Federal Tort Claims Act[149] (FTCA) assault and battery exceptions[150] to excuse institutions from liability.[151]

By permitting the abuse to occur, either by commission or omission, institutions violate children's constitutional rights

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141. *See* Milla v. Tamayo, 232 Cal. Rptr. 685 (Ct. App. 1986) (holding archdiocese not liable because archbishop did not ratify the abuse); Community Theatres Co. v. Bentley, 76 S.E.2d 632 (Ga. Ct. App. 1953) (holding company not liable for sexual abuse unauthorized by company).

142. *See generally* Cordts v. Boy Scouts of Am., Inc., 252 Cal. Rptr. 629 (Ct. App. 1988) (holding that sexual abuse committed by scout leader was outside scope of agency).

143. Constitutional theories are considered here only briefly. For more extensive coverage, see William D. Valente, *School District and Official Liability for Teacher Sexual Abuse of Students Under 42 U.S.C. § 1983*, 57 Educ. L. Rep. (West) 645 (1990).

144. U.S. CONST. amends. V, XIV.

145. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (recognizing a liberty interest that encompasses the freedom from bodily restraint, but holding that it was not violated by statute allowing corporal punishment in school); Stoneking v. Bradford Area Sch. Dist., 667 F. Supp. 1088, 1093-95 (W.D. Pa. 1987) (discussing a Fourteenth Amendment liberty interest as encompassing freedom from threats, abuse, intimidation, and harassment), *aff'd*, 856 F.2d 594 (3d Cir. 1988), *cert. granted and judgment vacated*, 489 U.S. 1062 (1989).

146. Schaefer, *supra* note 6, at 1421; Valente, *supra* note 143, at 646.

147. 42 U.S.C. § 1983 (1988).

148. *See, e.g.*, Sherrell v. City of Longview, 683 F. Supp. 1108 (E.D. Tex. 1987) (holding negligent deprivation of civil rights is not actionable).

149. 42 U.S.C. §§ 2671-2680 (1988).

150. *See infra* note 164 and accompanying text.

151. *But see* Doe v. Durtschi, 716 P.2d 1238, 1245 (Idaho 1986) (assault and battery exception to state tort claims statute did not bar recovery against school district that continued to employ a teacher after it had knowledge that the teacher sexually abused students).

and expose the institutions to § 1983 claims.[152] Recovery is permitted if the victim proves that the public or private institution committed a constitutional violation that proximately caused the child's injury.[153] Furthermore, the child must prove institutional culpability, by showing either that the employee acted under "color of law,"[154] or that he acted intentionally or recklessly.[155]

The judicial reaction to the use of constitutional theories of liability in employee abuse cases has been mixed. In 1988, the molestation of three students by a teacher who had previously been convicted for sodomizing other children resulted in a damage award based on the violation of the children's Fourteenth Amendment liberty interests.[156] In other cases, judges refused to hold the institutions accountable when the victim could not prove any pattern of deliberate indifference by the institution.[157]

Statutory Theories of Liability and Remedies

Federal Tort Claims Act

Enacted in 1946, the Federal Tort Claims Act[158] codifies the federal government's waiver of sovereign immunity and general

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152. *See* KEETON ET AL., *supra* note 39, § 131, at 1048; *see also* D.T. v. Independent Sch. Dist., 894 F.2d 1176, 1188 (10th Cir.), *cert denied*, 111 S. Ct. 213 (1990); Valente, *supra* note 143, at 645.

153. *See* Martinez v. California, 444 U.S. 277, 285 (1980); Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1988) (discussing special relationship analysis).

154. *See, e.g., D.T.*, 894 F.2d at 1186-87 (distinguishing teacher's summer activities from school duties regardless of fact that he would be perceived by the students to be acting on school's behalf).

155. The only actionable claims are intentional torts, not negligence. Ruth V. Siegel, *Failure to Report Suspected Child Abuse: Potential Civil Rights Liability for School Districts*, 34 Educ. L. Rep. (West) 345, 347 (1987).

156. Stoneking v. Bradford Area Sch. Dist., 667 F. Supp. 1088 (W.D. Pa. 1987), *aff'd*, 856 F.2d 594 (3d Cir. 1988), *cert. granted and judgment vacated*, 489 U.S. 1062 (1989).

157. Doe v. Special Sch. Dist., 901 F.2d 642, 646-47 (8th Cir. 1990) (finding no liability and imposing costs on the plaintiff); *see also* Doe v. Durtschi, 716 P.2d 1238, 1244-45 (Idaho 1986) (holding that a school district could be liable for negligence if it continued to employ a teacher after having knowledge that he was sexually abusing students); Howard, *supra* note 82, at 8.

158. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, ch. 753, tit. 4, 60 Stat. 812, 842-47 (1946) (current version at 28 U.S.C. §§ 2671-2680 (1988)). Some states have enacted comparable legislation. *See, e.g.*, Idaho Tort Claims Act, IDAHO CODE § 6-901 to -929 (1990), *discussed in Durtschi*, 716 P.2d 1238 (Idaho 1986); MASS. GEN. LAWS ANN. ch. 258, § 2 (1988), *discussed in* A.L. v. Commonwealth, 521 N.E.2d 1017 (Mass. 1988); MICH. COMP.

consent to be sued in tort.[159] The government may be held liable "in the same manner and to the same extent as a private individual under like circumstances."[160] The FTCA voids any distinction between public and private institutions, except for a specific reservation of immunity. Negligent supervision claims are thus possible, as are vicarious liability claims, if the act is within the scope of employment.[161]

The FTCA specifically recognizes that liability may be imposed for omissions as well as for affirmative acts. For this reason, the United States may be held liable for negligent failure to act as well as for affirmative conduct, provided that applicable state law would impose a duty to act upon a private person similarly situated.[162]

However, unlimited application of the FTCA does not occur.[163] Excluded from coverage are any claims related to assault, battery, false imprisonment, or defamation,[164] and an exception is provided for government conduct that involves policy decisions or discretionary functions.[165] In effect, the exceptions reinstate

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LAWS ANN. § 691.1407 (1987), *discussed in* Galli v. Kirkeby, 248 N.W.2d 149 (Mich. 1976); N.M. STAT. ANN. §§ 41-4-1 to -27 (1978), *discussed in* Garcia v. Albuquerque Pub. Schs. Bd. of Educ., 622 P.2d 699 (N.M. Ct. App. 1980).

In 1988, Congress amended the FTCA by enacting the Federal Employees' Liability Reform and Tort Claims Act (FELRTCA) to temper the judicially heightened standards for immunity claims. Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 28 U.S.C. § 2679 (1988)). FELRTCA provides an exclusive remedy against the government for certain tortious acts of federal employees committed within the scope of employment and immunizes the employee from personal liability by substituting the United States for the employee and precluding all other actions. 28 U.S.C. § 2679(b) (1988). The decision of what is within the scope of employment is made by certification of the Attorney General. *Id.* § 2679(d).

159. KEETON ET AL., *supra* note 39, § 131, at 1034. Consent to suits and specific waivers regarding particular matters may be found in other sections of the FTCA. *Id.* at 1034 n.16.

160. 28 U.S.C. § 2674 (1988).

161. Andrews v. United States, 732 F.2d 366 (4th Cir. 1984). In *Andrews*, the court held that the employee's sexual relationship with his patient was not within the scope of his duties as a Navy doctor because the acts furthered only his own interests. *Id.* at 370. However, because the supervising doctors were negligent in performing *their* duties within the scope of their employment, the court imposed liability on the government. *Id.*

162. KEETON ET AL., *supra* note 39, § 131, at 1035. In determining the liability, the court applies the tort law of the state where the harm occurred. *Id.* at 1034.

163. *Id.* at 1035-38.

164. 28 U.S.C. § 2680(h); KEETON ET AL., *supra* note 39, § 131, at 1038. In *Andrews*, the court held that the assault and battery exception was not applicable because the patient consented to sexual intercourse. 732 F.2d at 371. In child abuse cases, however, consent is not possible. David Finkelhor, *What's Wrong with Sex Between Adults and Children, in* CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 401, 403.

165. 28 U.S.C. § 2680(a); KEETON ET AL., *supra* note 39, § 131, at 1039. Courts avoid adjudicating the liability of discretionary functions based on separation of powers doctrine. When a discretionary policy results in an injury at the operational level, however, liability is not avoided. *Id.*

government immunity for certain suits. The courts, however, find liability in most cases of serious physical interference.[166] Because no rational argument can be made that child abuse is not a serious physical interference, government institutions should not avoid liability under the FTCA. Although the institutions attempt to employ the assault and battery or discretionary function exceptions, given the serious physical interference inherent in child abuse cases, courts should not apply the exceptions.

Privileges and Immunities Previously Enjoyed by Institutions Are Virtually Nonexistent

Institutional immunity defenses operate as counterarguments to liability. The institutions claim that regardless of whether liability may be imposed pursuant to tort or employment law concepts, their public or charitable nature gives them a privileged status that exempts them from the application of the law. The privileges are sovereign immunity and charitable immunity, the application of which tends to subordinate the rights of children to the interests of the institutions.

Charitable Immunity

Previously, the doctrine of charitable immunity completely protected charities from all tort liability.[167] Although the doctrine has eroded in almost all jurisdictions,[168] some states have statu-

166. KEETON ET AL., *supra* note 39, § 131, at 1038. Liability is generally not imposed for mere economic harm. *Id.*

167. Charitable immunity for religious institutions differs from the protections offered by the First Amendment; as a result, the issue of institutional liability for employee abuse does not implicate the First Amendment right to the free exercise of religion. *See* Lee W. Brooks, Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 MICH. L. REV. 1296 (1986). The First Amendment does not immunize religious institutions from tort liability but rather is only a defense to religious conduct. *Id.* at 1303. No argument has yet been made that abusing children is a sincerely held religious practice. *See* Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989) (holding that a claim by a parishioner against a pastor for intentional infliction of emotional harm for seducing her was not barred by the religion clauses of the First Amendment), *appeal dismissed*, 817 P.2d 758 (Or. 1991).

168. RESTATEMENT (SECOND) OF TORTS, *supra* note 37, § 895E (declaring that charities are no longer immune from liability merely because of charitable foundations). Some states, however, still immunize charities from liability. *Cf.* KEETON ET AL., *supra* note 39, § 133, at 1070-71 (discussing the various modifications of immunity). *But see* Note, *The Quality of Mercy: "Charitable Torts" and Their Continuing Immunity*, 100 HARV. L. REV. 1382 (1987) (discussing a countertrend of new emerging forms of immunity).

torily reinstated the immunity.[169] Courts upheld, and to some extent still uphold,[170] charitable immunity for fear that liability would divert trust funds contrary to the charitable donor's intent and would discourage future donations.[171] Also, the courts believed that accepting charity would constitute assumption of the risk of charitable negligence.[172] Before being abrogated, the doctrine immunized religious organizations,[173] hospitals,[174] and educational institutions.[175]

In partially reinstating the immunity, however, some states recognized the need to hold charities accountable for certain actions and thus exempted administrative negligence from immunity.[176] As a result, charitable immunity may not protect an institution for any employee abuse that creates a negligent hiring or retention cause of action; the institution is subject to suit as if it were a private corporation.[177] This result is infinitely preferable to the approach taken by the Supreme Court of New Jersey, which upheld the statutory reinstatement of immunity in an action against a church by parents of a child who committed suicide after suffering employee abuse.[178] In *Schultz v. Roman Catholic Archdiocese*,[179] the court, relying on strict statutory con-

169. *See* Schultz v. Roman Catholic Archdiocese, 472 A.2d 531, 532-33, 536 (N.J. 1984) (discussing New Jersey's Charitable Immunity Act).

170. Anthony Jackson, Case Note, *Exclusion of Diocesan Liability for Negligence of Parish Priest*, 58 U. CIN. L. REV. 323 (1989) (discussing a case that applied common law respondeat superior principles in refusing to impute liability).

171. KEETON ET AL., *supra* note 39, § 133, at 1069-70. A further consideration may be that charitable institutions are less likely to be able to pay; however, an inability to pay is generally no excuse on any issue in any forum. *See* Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 700 (Ct. App. 1988) (rejecting defendant's claim that inability to afford liability negates a duty of care).

172. KEETON ET AL., *supra* note 39, § 133, at 1069-70.

173. David Frohlich, Note, *Will Courts Make Change for a Large Denomination?: Problems of Interpretation in an Agency Analysis in Which a Religious Denomination Is Involved in an Ascending Liability Tort Case*, 72 IOWA L. REV. 1377 (1987); *see also Schultz*, 472 A.2d at 536 (determining that New Jersey's Charitable Immunity Act barred sexual abuse claim against archdiocese).

174. *See* 1 STEVEN E. PEGALIS & HARVEY F. WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE §§ 3:31, 3:32 (1980 & Supp. 1991); I. Trotter Hardy, Jr., *When Doctrines Collide: Corporate Negligence and Respondeat Superior When Hospital Employees Fail to Speak Up*, 61 TUL. L. REV. 85, 86 n.3 (1986).

175. *See, e.g.*, Vermillion v. Woman's College, 88 S.E. 649 (S.C. 1916).

176. *See, e.g.*, *Schultz*, 472 A.2d at 532-33, 536 (discussing New Jersey's Charitable Immunity Act).

177. Hipp v. Hospital Auth., 121 S.E.2d 273 (Ga. Ct. App. 1961) (imposing liability on charity for negligent hiring and retention). Corporate negligence actions provide another means of circumventing charitable immunity. Hardy, *supra* note 174, at 89-90 n.14.

178. *Schultz*, 472 A.2d 531.

179. *Id.*

struction, refused to adopt an administrative negligence or negligent hiring exception to the statutory grant of full immunity.[180] The court recognized the nationwide attack on charitable immunity but nevertheless rejected public policy because the legislature had focused on protecting the economic interests of charities.[181]

As the dissent in *Schultz* pointed out, the majority ignored a basic premise of the law of charitable immunity: immunity is conditional.[182] The availability of immunity hinges on whether the institution is pursuing its charitable endeavors at the time of the injurious conduct.[183] Because child abuse clearly does not meet any charitable ends, immunity is not warranted. Finding a lack of immunity subjects the institution to liability for its negligence and forces it to select competent employees[184] and accept responsibility for the injurious actions of its employees.[185]

Sovereign Immunity

Sovereign immunity, or government immunity, bars suits against local, state, and federal governments, and some individual government officials, except when statutory consent to or waiver of liability has been granted.[186] Absent

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180. *Id.* N.J. STAT. ANN. § 2A:53A-7 reads: "No nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes shall . . . be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary . . . ." The statute further mandates that any person "unconcerned in and unrelated to and outside of the benefactions of such corporation" shall have the right to recover. *Id.* The beneficiary distinction sets up an artificial barrier to recovery and produces anomalous results, as shown in *Schultz*.

181. *Schultz*, 472 A.2d at 535.

182. *Id.* at 539 (discussing public policy exceptions).

183. *Id.* at 542 ("The immunity protects the charity in its normal endeavors, and not in activities that are antithetical to its charitable ends.").

184. *See, e.g.*, J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391 (Va. 1988) (holding a religious organization liable for torts caused by negligent employee selection); Hipp v. Hospital Auth., 121 S.E.2d 273 (Ga. Ct. App. 1961) (applying similar standards to a charitable institution).

185. Infant C. v. Boy Scouts of Am., Inc., 391 S.E.2d 322 (Va. 1990); *Victory Tabernacle*, 372 S.E.2d at 391.

186. KEETON ET AL., *supra* note 39, § 131, at 1033; *see* Galli v. Kirkeby, 248 N.W.2d 149 (Mich. 1976) (holding that the hiring of public school personnel is covered by sovereign immunity); Bozarth v. Harper Creek Bd. of Educ., 288 N.W.2d 424 (Mich. Ct. App. 1979) (stating that governmental immunity precludes tort actions against school boards for injuries arising out of negligent employee selection). The rationale for sovereign immunity is the necessity of protecting the government's ability to perform its functions. Garcia v. Albuquerque Pub. Schs. Bd. of Educ., 622 P.2d 699, 700 (N.M. Ct. App. 1980); KIELY, *supra* note 27,

consent,[187] the government is completely immune from tort liability.[188] Regardless of a citizen's entrustment of personal security to the government[189] and the government's role as a fiduciary,[190] the law allows the government to escape its obligations via sovereign immunity.

The policy reasons for excusing liability include protecting public funds, allowing the government to function unhampered, and encouraging the government to provide unprofitable services.[191] Again, considering the nature of the institutions involved, sovereign immunity provides a strong and generally successful defense for governmental institutions embroiled in employee abuse suits.[192] The threshold question is whether a public duty exists; if it does, then the court decides whether sovereign immunity applies to the facts.[193] Schools, hospitals, and social agencies operating as governmental entities usually enjoy the protection of sovereign immunity.[194]

Sovereign immunity, however, provides only a limited defense. Some state legislatures have abrogated the doctrine of sovereign immunity by statutorily dictating that certain defendants have consented to suit.[195] Additionally, some states have waived sov-

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at 159. The immunity has been abrogated in recent years at the federal level. *See supra* notes 158-66 and accompanying text (discussing FTCA). Most states have consented to some liability. See KEETON ET AL., *supra* note 39, § 131, at 1044-45, for the states' various approaches and degrees of abrogation. However, at all levels immunity remains strong for policy and discretionary acts and decisions. *Id.* The hiring of employees is obviously a necessary governmental function. *See* Gaston v. Becker, 314 N.W.2d 728 (Mich. Ct. App. 1981).

187. Such consent to suit may be found in the FTCA or FELRTCA. *See supra* notes 158-59 and accompanying text.

188. KEETON ET AL., *supra* note 39, § 131, at 1033, 1043.

189. SHAPO, *supra* note 39, at 151.

190. *Id.* at 152-53.

191. *See, e.g.*, Garcia v. Albuquerque Pub. Schs. Bd. of Educ., 622 P.2d 699 (N.M. Ct. App. 1980) (justifying partial immunity to protect the public treasury, avoid hampering government functions, and allow services at a reasonable cost).

192. *See* Landstrom v. Illinois Dep't of Children & Family Servs., 892 F.2d 670 (7th Cir. 1990); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

193. See *supra* note 39 and accompanying text defining public duty. *See generally* RESTATEMENT (SECOND) OF TORTS, *supra* note 37, §§ 895A-895C (discussing the extent of federal, state, and local sovereign immunity); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986) (discussing when the government should be liable for injuries resulting from the violation of constitutional rights).

194. *See* Fanning v. Montgomery County Children & Youth Servs., 702 F. Supp. 1184 (E.D. Pa. 1988) (holding that a social worker had absolute immunity); Sherrell v. City of Longview, 683 F. Supp. 1108 (E.D. Tex. 1987) (barring the claim regardless of the public employee's violent propensities); PEGALIS & WACHSMAN, *supra* note 174, at §§ 3:31, 3:32; Note, *Sovereign Immunity for State Hospital Employees After* James v. Jane, 67 VA. L. REV. 393 (1981).

195. Note, *supra* note 194, at 393. In so doing, the legislature places the public employer on par with a private employer; accordingly, public institutions warrant equal liability.

ereign immunity to the extent of insurance coverage.[196] Furthermore, sovereign immunity protects only those who acted with due care; any negligent act or omission waives the immunity,[197] including the negligent act of hiring and retaining employees who commit torts.[198]

Courts recognize the need to compensate the injured individual and balance that need against the government's need to maintain its operations.[199] The need to protect the public treasury is undermined in the long run, however, as society will continue to expend more public funds for the care and support of abused children and the dysfunctional adults they become.[200]

Strict Liability

Strict liability, the imposition of liability without regard to fault,[201] is an extreme but effective method of forcing employers to make reparations to children abused in their institutions. Although not yet recognized by any court, strict liability for employee abuse would ensure that victims receive compensation and encourage employers to operate more carefully. The weaknesses of the strict liability argument include burdening employers who act in good faith and without any culpability.[202] Additionally, strict liability ignores the "preferences, foolishness, or wickedness of third parties,"[203] and thus makes the institution the insurer of child safety.[204]

Strict liability is most commonly applied against manufacturers of defective products;[205] the policy approaches used in determining

196. Beezer, *supra* note 73, at 1123 n.35.

197. Birkner v. Salt Lake County, 771 P.2d 1053, 1059 (Utah 1989).

198. Hipp v. Hospital Auth., 121 S.E.2d 273, 274 (Ga. Ct. App. 1961).

199. A.L. v. Commonwealth, 521 N.E.2d 1017, 1028 (Mass. 1988) (O'Connor, J., dissenting).

200. Alma W. v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 292 (Ct. App. 1981) (discussing economic costs of abused children); *Commentary*, UPI, July 11, 1990, *available in* LEXIS, Nexis Library, UPI File (stating that the cost of ignoring child abuse is unbearable).

201. KEETON ET AL., *supra* note 39, § 75, at 534.

202. *See generally id.* at 534-38 (explaining the history and the policy reasons for imposing strict liability).

203. HUBER, *supra* note 37, at 40.

204. *Cf.* Congleton v. Starlite Skate Ctr., Inc., 333 S.E.2d 677, 680 (Ga. Ct. App. 1985) (refusing to hold proprietor liable when child's injuries resulted from misuse of safe premises by a third party).

205. A product may be manufactured or designed defectively or may lack adequate warnings about proper usage. April A. Caso, Note, *Unreasonably Dangerous Products from a Child's Perspective: A Proposal for a Reasonable Child Consumer Expectation Test*, 20 RUTGERS L.J. 433, 436 (1989).

whether strict liability should apply, however, can guide courts in evaluating employer liability in employee abuse cases. The consumer expectation test determines the "reasonable expectations of the ordinary consumer";[206] the risk-utility approach balances the utility of the product to the consumer and the public, the likelihood and extent of injury, the availability of safer alternative products, the feasibility of alternatives, and the consumer's ability to avoid injury.[207]

Applying the consumer expectation test to employee abuse results in a finding that institutions should be liable for employee abuse: both parents and children expect the institution to guard against abuse and this expectation is reasonable.[208] As for the risk-utility factors, although the benefits of scouting, education, and religious activity are many, a child who suffers abuse while participating in the activity most likely believes the risks outweigh the benefits. The magnitude of the harm to a child who suffers employee abuse is great,[209] and the child is often unable to avoid the abuse.[210] Furthermore, by properly conducting its operations, an institution may feasibly offer children a safer environment.[211] On balance, the utility of the benefits provided to both the child and society is outweighed by the risk of harm and availability of alternatives. Accordingly, under either strict liability test,[212] institutions must assume responsibility for the

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206. Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 798 (Wis. 1975); *see* Caso, *supra* note 205, at 437-38 (describing the consumer expectation test).

207. Caso, *supra* note 205, at 437 n.19.

208. *Cf. id.* at 441-50 (discussing the extent to which reasonable consumer expectations of the parent and child differ). This distinction is inappropriate in the employee abuse context, because the interests of both parent and child are the same. However, April Caso does argue that in products liability cases, the expectation of the child-user should control. *Id.* at 454, 459.

209. *See supra* note 12.

210. In A.L. v. Commonwealth, 521 N.E.2d 1017 (Mass. 1988), the teacher threatened to abuse the child's younger brother if he reported the teacher's actions. *Id.* at 1019. In Milla v. Tamayo, 232 Cal. Rptr. 685 (Ct. App. 1986), not only did the priests tell the child that intercourse was "ethically and religiously permissible," but they also sent her to the Philippines to keep her quiet. *Id.* at 687-88. Furthermore, children lack free will and are incapable of consenting to the contacts. Finkelhor, *supra* note 164, at 403-04.

211. If an institution is not able to properly conduct its business, however, the child may be left without any alternatives because the choice of institution may be limited. *See, e.g.*, Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326 (Or. 1987) (noting that Oregon compulsory attendance law leaves most families few choices about where to send their children to school); *supra* note 49 (noting lack of alternatives).

212. A hybrid of the two tests achieves the same result, because it first measures reasonable consumer expectations and if none exist, it then balances the risk-utility factors. Caso, *supra* note 205, at 439.

abuse inflicted on a child, regardless of any actual institutional fault.

Criticism of the strict liability argument is directed at the cases in which institutions may be found liable for an employee's abusive actions that were unpreventable. The counterargument is equally persuasive: the premise of strict liability is that no fault is necessary and so it is for society to choose who should be the liable party. Neither society nor the courts could be faulted for favoring the interests of children over an artificial institution.

PUBLIC POLICY REASONS FOR IMPOSING LIABILITY

As shown above, legal theories are already in place for imposing liability for employee child abuse on institutional employers.[213] Institutional employer liability for employee child abuse is not unfounded nor unreasonable.[214] In determining such claims, the courts should continually balance fairness to children against the need for effective community services.[215] The public policy reasons that support the argument for institutional liability for employee abuse include the availability of insurance,[216] licensure and certification requirements,[217] and potential malpractice liability.[218] Finally, many of the reasons for the criminal justice system's approach to punishment support the argument in favor of institutional liability.

Institutions May Insure Against Child Abuse

Traditionally, courts refused to hold institutions liable for employee child abuse for public policy reasons based on the nature

213. *See supra* text accompanying notes 36-212.

214. An institution is already subject to liability for ordinary acts of negligence committed by its employees and, as in most tort cases, liability is not excused upon proving lack of knowledge or foreseeability. KEETON ET AL., *supra* note 39, §§ 69-70, at 499-503. In employee abuse cases, many victims can prove the institution had the requisite knowledge and anticipated the plaintiff's expectation of protection. *E.g.*, Wood v. Strickland, 420 U.S. 308 (1975) (holding that schools are not immune when they know or should know that their actions would violate a student's constitutional rights); *A.L.*, 521 N.E.2d at 1022-23 (taking into account whether threatened persons had the opportunity to protect themselves); Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688 (Ct. App. 1988) (holding that attacks on students were reasonably foreseeable, and that this satisfied plaintiff's burden); *see also* Beezer, *supra* note 73, at 1117.

215. *A.L.*, 521 N.E.2d at 1026 (Hennessey, C.J., concurring).

216. *See infra* notes 219-41 and accompanying text.

217. *See infra* notes 242-61 and accompanying text.

218. *See infra* notes 262-78 and accompanying text.

and services provided by the institutions. Many of these concerns are unfounded in light of the possibility of insurance coverage. An institution may insure against acts of employee child abuse, and individual professionals also may obtain insurance.[219] The institutions that this Note has considered—schools, churches, hospitals, and other organizations—are in the business of rendering services and care to children. Most institutions may anticipate that some amount of child abuse may result in the course of business.[220] If so, then such institutions should be permitted to insure against the abuse, and the insurer should cover the institution when the foreseen abuse occurs.[221]

Insurers are not required to cover intentional torts because indemnification may result in encouragement of future tortious acts.[222] If the abuse is insured, then the actual perpetrator does not "pay" for the crime and may freely commit further acts knowing of likely indemnification.[223] In the case of institutional liability, however, the institution itself is not committing the intentional abuse. Insurance coverage for criminal acts violates public policy,[224] but courts misinterpret the policy of prohibiting indemnification for one's *own* violation of criminal statutes and fail to recognize that the institution is not the actual criminal.[225] For example, homeowner insurance policies do not cover child abuse in the home by the person maintaining the policy, because to do so would absolve the perpetrator of liability and in a sense,

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219. Worcester Ins. Co. v. Fells Acres Day Sch., Inc., 558 N.E.2d 958, 966 (Mass. 1990) (sexual abuse covered under "Special Multi-Peril" policy). Furthermore, liability insurance is available to churches for pastoral miscounseling. C. Eric Funston, Note, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507, 508 & n.11 (1983). Additionally, insurance coverage may preclude the sovereign immunity defense in some states. Beezer, *supra* note 73, at 1123 n.35; 2 Med. & Hosp. Negl. (Callahan) § 20 (1988-90).

220. As Bruce Beezer stated: "The injury to students by acts of commission or omission by school personnel is not unusual." Beezer, *supra* note 73, at 1117.

221. In discussing the effects of the tort liability epidemic, Peter Huber points out that for "day care centers . . . insurance became wholly unavailable at any price." HUBER, *supra* note 37, at 13. The lack of insurance not only results in underinsured operations but also forces some enterprises out of business entirely. *Id.* Although promoting the "survival of the economically fittest" has some merit, such a system has a discriminatory effect. Specifically, the underprivileged population suffers the most from the effects of underinsured institutions or no institutions at all. *Id.* at 13-14; *Congress Told Insurance Costs Critical*, UPI, Dec. 3, 1985, *available in* LEXIS, Nexis Library, UPI File. See *supra* notes 20-21 and accompanying text for a discussion of societal abuse.

222. *Worcester Ins. Co.*, 558 N.E.2d at 970.

223. KIELY, *supra* note 27, at 21.

224. *Id.* at 22 n.78.

225. *Id.*

reward the abuser for the abuse.[226] In the institutional situation, however, the employer is insuring against the acts of another and therefore is neither punished nor rewarded.

Insurers need not indemnify institutions if the policy contains an "intentional injury" exclusion provision,[227] because insurance does not protect one from the consequential harm of expected or intended acts.[228] In cases of child abuse, harm to the child is viewed as inherent in the act itself[229] and "substantially certain to result,"[230] and therefore, the intent to injure is presumed.[231] Yet, much of the abuse committed is with the institution's knowledge.[232] In such cases, knowledge should not void insurance coverage on claims of negligence, because the knowledge and subsequent failure to act or protect may be construed as recklessness. The abuse is thus neither expected nor intentional, but accidental, and therefore covered.[233] Furthermore, if abuse at an institution is so prevalent that it may be considered a routine practice,[234] then courts must impute liability regardless of whether the abuse serves to further the institution's business.[235]

The concept of "deep pockets" complements the insurance rationale. The deep pocket theory recognizes that the institution is financially more capable than the individual employee of compensating the abused child.[236] That does not mean imposing liability on the employer merely because the institution has the

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226. *Id.*

227. *See* Allstate Ins. Co. v. McCranie, 716 F. Supp. 1440 (S.D. Fla. 1989), *aff'd sub nom.* Allstate Ins. Co. v. Manning, 904 F.2d 713 (11th Cir. 1990); Horace Mann Ins. Co. v. Leeber, 376 S.E.2d 581 (W. Va. 1988).

228. John D. Boyle & Michael R. O'Malley, *Insurance Coverage for Punitive Damages and Intentional Conduct in Massachusetts*, 25 NEW ENG. L. REV. 827 (1991).

229. Allstate Ins. Co. v. Thomas, 684 F. Supp. 1056, 1059-60 (W.D. Okla. 1988).

230. KIELY, *supra* note 27, at 19.

231. "A majority of the courts have held that in liability insurance cases involving sexual abuse of children, the intent to cause injury can be inferred as a matter of law." Foremost Ins. Co. v. Weetman, 726 F. Supp. 618, 620 (W.D. Pa. 1989), *aff'd*, 904 F.2d 694 (3d Cir.), *aff'd sub nom. In re* Platek, 904 F.2d 696 (3d Cir.), *and aff'd sub nom. In re* Weetman, 904 F.2d 697 (3d Cir. 1990); *see* Whitt v. Deleu, 707 F. Supp. 1011, 1014-15 (W.D. Wis. 1989); *Thomas*, 684 F. Supp. at 1058, 1060; Worcester Ins. Co. v. Fells Acres Day Sch., Inc., 558 N.E.2d 958, 965-66 (Mass. 1990); KIELY, *supra* note 27, at 18.

232. *See, e.g.*, Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989) (principal knew for a period of years that teacher was abusing students), *cert. denied*, 493 U.S. 1044 (1990); A.L. v. Commonwealth, 521 N.E.2d 1017 (Mass. 1988) (principal ignored report from abused child's mother who witnessed abuser's suspicious behavior).

233. *Worcester Ins. Co.*, 558 N.E.2d at 970.

234. Again, consider the facts of *Stoneking*, in which over the course of years several students reported the teacher's abuse to institutional supervisors. *Stoneking*, 882 F.2d at 720.

235. *Worcester Ins. Co.*, 558 N.E.2d at 969.

236. HUBER, *supra* note 37, at 12.

ability to pay: "What has been done . . . is not to institute a system of liability without fault, but to *broaden the fault liability* to include those who may properly be held responsible."[237] Furthermore, the fact that an institution is a larger entity does not support the assumption that the institution is always capable of paying.[238] Institutions of this nature generally do not enjoy wide profit margins, and their ability to pay large judgments is questionable.[239] Because courts agree that an inability to pay is not a valid excuse,[240] insurance provides a fair and effective means of ensuring due compensation.[241]

Institutions and Employees Are Subject to Licensure Standards and Malpractice Actions

Many service occupations require licensure or certification, and public policy dictates that such certifications should be contingent on a continued absence of abusive behavior.[242] Licensure is the authorization granted by a government agency to individuals in certain professions and occupations.[243] Licensure certifies that

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237. PROSSER, *supra* note 99, at 553 (emphasis added).

238. For example, 60% of day care centers are nonprofit organizations. Bane et al., *supra* note 42, at 27. Schools, religious centers, and day cares are sponsored by both profit and nonprofit organizations.

239. *See* Galli v. Kirkeby, 248 N.W.2d 149, 156 (Mich. 1976) (Coleman, J., dissenting) (stating that if the legislature allows liability, then it must give notice to the institutions so that they have an opportunity to seek insurance or budget funds to cover any potential liability).

240. Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 700 (Ct. App. 1988) (stating that balancing needs is more important). In fact, evidence of insurance is generally inadmissible in tort litigation because of the great likelihood that jurors will attach undue value to the evidence and hence prejudice the defendant. *See, e.g.*, FED. R. EVID. 411. The rule states:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

241. No doubt many will attack this suggestion by claiming that such an approach earlier resulted in a tort liability crisis. *See generally* HUBER, *supra* note 37, at 12-14 (arguing that the recently expanded tort liability system, in both its safety and insurance effects, is highly regressive; those with the least are hurt the most); *Congress Told Insurance Costs Critical*, *supra* note 221 (discussing the problem of rising insurance costs resulting from skyrocketing damage awards).

242. The purpose of licensure is "to protect the public health, morals, safety, and general welfare." 1 DANIEL B. HOGAN, THE REGULATION OF PSYCHOTHERAPISTS 238 (1979). "Investigating nonfamilial abuse and neglect should be the responsibliilty of law enforcement, *licensing*, or other agencies with the expertise and authority to investigate such cases, not of the Child Protective Service Agency. Furthermore, such units must be independent of the agency or facility being investigated, so that there is no conflict of interest." BESHAROV, *supra* note 41, at 15 (emphasis added).

243. FRANK P. GRAD & NOELIA MARTI, PHYSICIANS' LICENSURE AND DISCIPLINE 54 (1979).

" 'those licensed have obtained a minimal degree of competency [and] insure[s] that the public health, safety and welfare will be reasonably well protected.' "[244] A license places its holder in a position of trust and requires the professional to act responsibly;[245] a violation of licensing standards is a breach of trust,[246] as well as a violation of law.[247]

Many professions already impose certification requirements on their members, and many institutions require employees to be certified.[248] Institutions should investigate an employment applicant's qualifications and must be assured that the applicant is properly licensed. Failure to do so constitutes corporate negligence.[249] Teachers,[250] doctors,[251] day care personnel,[252] social workers,[253] volunteers,[254] and even clergy[255] all must meet licensing requirements. A breach of any licensing

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244. *Id.* at 54 (quoting U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT ON LICENSURE AND RELATED PERSONNEL CREDENTIALING 7 (1971)). Additionally, child care-related organizations are subject to licensing independently of the professionals who work in them. Chalkboard, Inc. v. Brandt, 902 F.2d 1375, 1376 (9th Cir.), *cert. denied*, 111 S. Ct. 509 (1990).

245. Padilla v. Minnesota State Bd. of Medical Examiners, 382 N.W.2d 876, 887 (Minn. Ct. App. 1986). Professionals can be required continually to meet licensing standards. *In re* the Revocation of the License of Polk, 449 A.2d 7, 20 (N.J. 1982).

246. Horak v. Biris, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985).

247. Birkner v. Salt Lake County, 771 P.2d 1053, 1058 (Utah 1989) (engaging in sexual activities with clients is in direct violation of Utah statute that expressly forbids such conduct in all circumstances).

248. *See infra* notes 250-55.

249. Hardy, *supra* note 174, at 91.

250. D.T. v. Independent Sch. Dist., 894 F.2d 1176, 1179 (10th Cir.) (discussing teacher certification requirements), *cert. denied*, 111 S. Ct. 213 (1990); *see also* 2 WILLIAM D. VALENTE, EDUCATION LAW 503 (1985) (outlining teacher certification requirements).

251. *See* GRAD & MARTI, *supra* note 243, at 54-56. *See generally* 2 HOGAN, *supra* note 242 (discussing psychotherapist and counselor licensing requirements, policy, and analysis). Hospitals are subject to separate licensing standards. *See* Wogelius v. Dallas, 504 N.E.2d 791 (Ill. App. Ct. 1987) (discussing the Illinois Hospital Licensing Act requirements).

252. Bane et al., *supra* note 42, at 42; *see* Chalkboard, Inc. v. Brandt, 902 F.2d 1375 (9th Cir.) (discussing standards for day care license), *cert. denied*, 111 S. Ct. 509 (1990); *State Day-Care Rules*, USA TODAY, May 1, 1989, at A8 (reporting each state's minimum standards for licensing day care centers).

253. Birkner v. Salt Lake County, 771 P.2d 1053, 1058 (Utah 1989); Horak v. Biris, 474 N.E.2d 13 (Ill. App. Ct. 1985). Furthermore, some states require social workers to "register" with the state in addition to obtaining a license. *Id.* at 19.

254. Infant C. v. Boy Scouts of Am., Inc., 391 S.E.2d 322 (Va. 1990). The scout leader selection process, as described in *Infant C.*, is as follows: A local council finds a community organization to sponsor a troop, and then a committee of the organization, composed of parents and members, selects a scout leader. After the leader is chosen, the organization notifies the local council of the selection, which in turn notifies the Boy Scouts of America (BSA) headquarters. BSA checks a confidential file listing unfit people and notifies the local council of those who meet BSA requirements with approval. BSA conducts no actual investigation. *Id.* at 324-25.

255. *See* Washington v. Motherwell, 788 P.2d 1066, 1069 (Wash. 1990) (en banc) (recognizing that clergy status is conferred by license).

standard may subject the holder to disciplinary action, including license revocation,[256] regardless of any criminal proceedings.[257]

In addition to licensure and certification, many professions are subject to professional codes of ethics. For example, the medical profession requires its members to be of "good moral character" and may expel any member failing to meet its standards or who otherwise engages in unprofessional conduct.[258] Social workers likewise are subject to a code of ethics.[259] Furthermore, state statutes may also set standards of professional conduct.[260] Statutes define the parameters of unprofessional conduct; however, because most professional fields are self-regulated, the interpretation of the statute is left to the professions' review boards.[261]

Malpractice claims, which are a modification of traditional negligence principles, may be asserted for a failure to provide good medical care;[262] failure to provide good psychiatric care;[263]

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256. *In re* the Revocation of the License of Polk, 449 A.2d 7 (N.J. 1982); Padilla v. Minnesota State Bd. of Medical Examiners, 382 N.W.2d 876 (Minn. Ct. App. 1986); *Horak*, 474 N.E.2d at 19. Interestingly, disciplinary actions are not viewed as punishment but rather as protective measures for the public good. *Padilla*, 382 N.W.2d at 887.

257. Story v. Wyoming State Bd. of Medical Examiners, 721 P.2d 1013 (Wyo. 1986); Story v. Wyoming, 721 P.2d 1020 (Wyo.), *cert. denied*, 479 U.S. 962 (1986). Criminal proceedings are independent of any disciplinary board actions. *In re* Plantier, 494 A.2d 270 (N.H. 1985).

258. *In re* Plantier, 494 A.2d at 272 (empowering medical board to discipline members for dishonest, unprofessional, or immoral conduct); Bernstein v. Board of Medical Examiners, 22 Cal. Rptr. 419 (Ct. App. 1962) (revoking psychiatrist's license for crime of moral turpitude, specifically, sexual intercourse with a minor).

Doctors are bound by the Hippocratic oath, which states: " 'In every house where I come, I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women and men.' " Andrews v. United States, 732 F.2d 366, 368 n.2 (4th Cir. 1984) (quoting STEADMAN'S MEDICAL DICTIONARY 579 (22d ed. 1972)).

259. *Horak*, 474 N.E.2d at 19.

260. *See* ILL. REV. STAT. ch. 111, para. 6315(b) (1979), *discussed in Horak*, 474 N.E.2d at 19; MINN. STAT. § 147.091 (1989), *prior version discussed in Padilla*, 382 N.W.2d at 884-86; N.H. REV. STAT. ANN. § 329:17 (1991), *prior version discussed in In re Plantier*, 494 A.2d at 271; N.J. STAT. ANN. 45:1-21, 9-16 (1991), *current version of 45:1-21 and prior version of 9-16 discussed in Polk*, 449 A.2d at 21; WYO. STAT. § 33-26-129(b) (1977), *discussed in Story*, 721 P.2d at 1014-17.

261. *See, e.g., Padilla*, 382 N.W.2d at 886-87 (noting that the medical profession defines and enforces its own standards). Board decisions are made using a preponderance of the evidence standard; clear and convincing evidence supporting the decision is not required. *Polk*, 449 A.2d at 12.

262. Good medical care is determined by reference to the standards of other reputable doctors practicing in the same or similar locality and under similar circumstances. Richard H. v. Larry D., 243 Cal. Rptr. 807, 809 (Ct. App. 1988).

263. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 353 (Cal. 1976) (holding therapist

negligence in marital or spiritual counseling;[264] failure to adequately instruct;[265] or failure to provide competent counseling.[266] Additional support for a malpractice case may be

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liable for failing to warn of patient's deadly threats); Linda Jorgenson et al., *The Furor over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645, 665 (1991) (citing Masters and Johnson study calling for the criminalization of psychotherapist-patient sex in lieu of civil malpractice actions); Patrick S. Cassidy, Comment, *The Liability of Psychiatrists for Malpractice*, 36 U. PITT. L. REV. 108 (1974) (discussing psychiatric malpractice in general); see *supra* note 18 for a discussion of the prevalence of psychotherapist abuse of minor patients.

264. *See generally* Robert J. Basil, Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 RUTGERS L.J. 419 (1988) (analyzing the constitutional problems inherent in clergy malpractice actions and examining the role of the judiciary in such disputes); Kelly B. Rouse, Note, *Clergy Malpractice Claims: A New Problem for Religious Organizations*, 16 N. KY. L. REV. 383 (1988) (analyzing the emerging tort of clergy malpractice); *see also* Nally v. Grace Community Church, 204 Cal. Rptr. 303 (Ct. App. 1984) (holding church liable for suicide after inadequate pastoral counseling). Courts distinguish the clergy malpractice action from a negligent breach of duty because of First Amendment concerns. In order to review a cause of action for clergy malpractice, the court must determine the community standard of care; such a determination, however, would require an examination of religious values, thus breaching the separation of church and state. Rouse, *supra*, at 394-95.

In Milla v. Tamayo, 232 Cal. Rptr. 685 (Ct. App. 1986), a case involving the seduction of a 16-year-old girl by several priests, the court considered professional malpractice conspiracy. The California Court of Appeal, after finding that such claims were not barred by any statute of limitations and were a valid cause of action, dismissed the action against the priests' employer, the Archbishop of the Archdiocese of Los Angeles, on the grounds that the acts were unforeseeable. *Id.* at 690.

265. *See generally* Karen H. Calavenna, Comment, *Educational Malpractice*, 64 U. DET. L. REV. 717 (1987) (discussing the possible theories of recovery for educational malpractice). Most courts, however, do not recognize such a claim. *See* KIELY, *supra* note 27, at 309. One reason for failing to recognize educational malpractice is that teaching is very much a discretionary matter, and courts are reluctant to interfere with educational policies and the daily administration of schools. *See, e.g.*, Donahue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979); KEETON ET AL., *supra* note 39, § 131, at 1048-49. In the case of child abuse, however, a teacher's academic freedom is not at issue; rather, the issue is the educator's breach of a legal duty of care to the child. Child abuse clearly does not meet the profession's reasonable care standard, and hence educational malpractice claims for child abuse should be valid. *See generally* Joel E. Smith, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice*, 1 A.L.R.4TH 1139 (1990); Perry A. Zirkel & Allan G. Osborne, *Are Damages Available in Special Education Suits?*, 42 Educ. L. Rep. (West) 497 (1988).

266. Social worker malpractice claims allege that an agency failed to provide competent counseling or guidance, failed to meet a code of ethics, or otherwise breached duties of loyalty, trust, and confidence. Horak v. Biris, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985). Controversy exists over recognizing a claim for social worker malpractice. *Compare Horak*, 474 N.E.2d 13 *with* Martino v. Family Serv. Agency, 445 N.E.2d 6, 8-9 (Ill. App. Ct. 1982) (denying social worker malpractice claims because the harm was unintentional, no policy reasons justified permitting such claims, and not all of society's harms were viewed as reparable through litigation). *See also* Wogelius v. Dallas, 504 N.E.2d 791, 796 (Ill. App. Ct. 1987) (citing *Horak*); Janet B. Jones, Annotation, *Social Worker Malpractice*, 58 A.L.R.4TH 977 (1987).

found in various state statutes.[267]

Judges, however, have expressed concern over the difficulty of conclusively determining the presence and source of an injury.[268] The appropriate standard of liability is one that balances children's rights against the responsibilities of the institution and the competence of courts to make judgments in technical fields.[269]

Recognizing malpractice, whether in medicine, religion, education, or social work, as a grounds for recovery in employee abuse cases is justified to prevent shielding "professionals from any consequences of their actions to the detriment of those individuals who turn to them in reliance upon their professional expertise."[270] Malpractice liability also complements and serves as a means of enforcing various professional and institutional licensing and certification requirements.

Certification and accreditation associations set minimally acceptable practice standards. Any misrepresentation of members' capabilities exposes the associations to liability.[271] In some instances, the funding the institution needs is contingent upon its maintaining certification and conforming to regulations.[272] Accordingly, associations should withhold certification and funding when institutions fail to protect children from abusive employees. An institution whose continued existence is determined by the quality of its employees and care would be pressured to maintain an abuse free environment. Given that much of the foundation is

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267. In California, for example, a sexual relationship between a doctor and patient is a cause for discipline. CAL. BUS. & PROF. CODE § 726 (West 1990). *See generally* Denise LeBoeuf, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOMEN'S L.J. 83 (1988) (discussing cause of action against hospital and doctor for sexual relationship with patient).

268. Claims for sports injuries, conversely, are upheld because the source and injury are identifiable. *See generally* John P. Lenich, *One Strike and You're Out: An Overview of Negligence and High School Athletics*, 40 Educ. L. Rep. (West) 1 (1987) (discussing different instances of negligence in the school sports context and the practical lessons such cases offer to school administrators and coaches). As mentioned at the outset, child abuse is often subtle and concealed. *See supra* note 24.

269. *See* Johnston v. Ann Arbor Pub. Schs., 569 F. Supp. 1502, 1508 (E.D. Mich. 1983) (dismissing handicapped child's mistaken evaluation claim as not stating a cause of action under the Rehabilitation Act and showing deference to state officials' professional judgment).

270. *Horak*, 474 N.E.2d at 19.

271. David E. Willett, *Judicial Review: Liability in Tort for Certification or Accreditation Activities*, *in* LEGAL ASPECTS OF CERTIFICATION AND ACCREDITATION 103 (Donald G. Langsley ed., 1981).

272. Bane et al., *supra* note 42, at 42 (stating that day care centers must comply with federal requirements and regulations to receive federal funds).

already laid, certification and accreditation requirements are an underutilized means of attacking the employee child abuse problem. In addition, allowing institutions in which employees have previously committed abuse to remain certified is contrary to public policy.

Moreover, an institution's unreasonable reliance on the certification process may arguably create exposure to liability. In *D.T. v. Independent School District*,[273] the school district relied on the fact that individuals with criminal records cannot be certified as teachers, and therefore did not perform a criminal background check on an applicant who was later accused of abusing several students. A criminal background check would have revealed the applicant's prior conviction for sodomy.[274] Basing important and potentially harmful decisions on the presumed nonnegligence of others is inappropriate when children are involved.[275]

With employees who are not subject to specific licensure standards, the institution must at least assure itself of the employee's fitness and competency. The duty rests solely on the institution, and if it fails to meet its duty by not hiring competent personnel, the institution may be liable for the employee's malpractice.[276]

Malpractice liability offers another avenue of recovery against institutions employing professionals. Malpractice liability adapts the basic principles of negligence (duty, breach, causation, injury)[277] to certain professional fields that are subject to a second standard of care beyond the ordinary duty to exercise reasonable care. The additional duty requires professionals to "possess a standard minimum of special knowledge and ability."[278] Failure to meet the appropriate standard results in malpractice liability.

Punishing the Institution Is Necessary and Justified

The criminal justice system punishes undesirable conduct based on the following theories:[279] prevention,[280] restraint,[281] rehabilita-

273. 894 F.2d 1176 (10th Cir.), *cert. denied*, 111 S. Ct. 213 (1990).

274. *Id.* at 1178-79.

275. *But see id.* at 1194 (holding that school district was not liable for failing to investigate completely the teacher's background).

276. Hipp v. Hospital Auth., 121 S.E.2d 273, 275 (Ga. Ct. App. 1961).

277. Intentional acts also may constitute malpractice. Waters v. Bourhis, 709 P.2d 469, 475 (Cal. 1985).

278. KEETON ET AL., *supra* note 39, § 32, at 185.

279. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 23-26 (2d ed. 1986).

280. Also commonly referred to as particular deterrence. *Id.*

281. Also commonly referred to as incapacitation, isolation, or disablement. *Id.*

tion, deterrence, education, and retribution.[282] These theories interact and conflict;[283] some cases gear punishment toward the individual criminal, hence particular deterrence and incapacitation are appropriate goals. In other cases, the crime committed determines the punishment, thus ignoring the criminal and attempting to deter any further commission of the crime.[284]

The criminal law theories of punishment provide a sound analogy for imposing civil liability on institutions for child abuse committed by their employees. Imposing liability on an institution may deter the specific institution's management, supervisors, or coemployees from concealing the abuse.[285]

Because "[t]he ideal approach to child abuse is prevention,"[286] imposing liability may activate and educate an institution, leading to a heightened awareness and the prevention of future occurrences. Similarly, the institution may offer programs to rehabilitate employees with known deficiencies and proclivities in order to avoid later liability.

Most importantly, imposing liability provides compensation to the victim,[287] which may provide necessary counseling to aid the child and his or her family in recovering from the ordeal.[288]

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282. Retribution is sometimes referred to as "just desserts." *Id.*

283. *Id.* at 27.

284. *Id.* at 28. For example, in drug cases, judges are authorized to impose punishment based on the charges against the defendant. A person found guilty of possessing a kilogram of marijuana might be sentenced to one year in prison, with the length of the sentence determined by the amount of the drug possessed, rather than the circumstances of the defendant as an individual.

285. In many professions, the members obey a "code of silence" that serves as a blockade against any inquiries concerning members' actions. KEETON ET AL., *supra* note 39, § 32, at 188. The medical profession, in particular, is known for its code of silence. *Id.* at 188 n.50.

286. Horowitz & Duff, *supra* note 41, pt. II, at 2.

287. The family of the victim generally is not successful in recovering damages; some parents attempt emotional distress claims, but courts generally deny recovery because the parents did not actually witness the abuse and their claims are therefore noncontemporaneous torts. *See* Cordts v. Boy Scouts of Am., Inc., 252 Cal. Rptr. 629 (Ct. App. 1988) (denying parents' cause of action because not direct victims); Miller v. Cook, 273 N.W.2d 567 (Mich. Ct. App. 1978) (denying parents' request for damages because no action exists for mental anguish sustained upon learning of a noncontemporaneous tort upon a family member). In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, the court permitted the mother's claim to go to trial, but only because the psychotherapist undertook an obligation to treat both mother and son. 770 P.2d 278, 282-83 (Cal. 1989). The subsequent abuse of the son breached the duty the therapist owed to the mother and gave her a cause of action. *Id.*

288. By comparison, in Great Britain, many families fail to receive compensation because they are unaware of the help available. Craig Seton, *Campaign to Compensate Victims of Child Abuse*, THE TIMES (London), Sept. 26, 1990. Parents often sue the perpetrator but overlook other sources of compensation, such as Great Britain's Criminal Injuries Compensation Board. *Id.* One innovative source of compensation is the Massachusetts Children's

Generally, avenues of recovery are very limited in abuse cases; it is thus necessary to find additional recourses for the victims.[289] Adequate treatment could rehabilitate eighty percent of families.[290] Penalties against the institution serve as just desserts for its actions, particularly in cases in which employers actively ratify the abuse. In some cases, punishment of the employer is secondary to the need to compensate the victim. Compensation not only serves the family's physical needs but also assists in emotional healing by relieving the family of any guilt.[291]

A Matter of Trust

Above all, parents entrust the care and safekeeping of their children to various institutions;[292] in some instances, employers flagrantly violate that trust, to the detriment of the most innocent of victims. The violation of trust can result in children suffering abuse and accompanying irreparable physical and psychological injuries.[293] As a matter of public policy, institutions that voluntarily assume the great responsibility of child care and supervision cannot continue to breach their duties without punishment: "[I]t is better to impose liability on someone [here, the institution] who has caused *no* harm . . . than to leave uncompensated someone [here, the child] who clearly has been wronged."[294] Although in some cases the institutions arguably did not directly

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Trust Fund, which receives revenue from the Massachusetts Lottery. Gloria Negri, *Bill Proposes to Tap Lottery to Fund War on Child Abuse*, BOSTON GLOBE, Dec. 2, 1991, at 13. Even though the victim may find an avenue of recovery, statutes of limitations may block pursuit of the cause of action. Salten, *supra* note 24, at 190-91. Also, the victim must pursue the cause of action personally or with a guardian. Intentional infliction of emotional distress actions brought by the family of the victim generally are not permitted because of the lapse in time between the abuse and distress. *Miller*, 273 N.W.2d at 568-69.

289. M. LaVonne Thompson, *Civil Suit: An Abused Child's Only Protection*, 6 PROBATE L.J. 85, 87 (1984).

290. H.R. REP. No. 685, *supra* note 10, at 4, *reprinted in* 1974 U.S.C.C.A.N. 2766 (statement of Dr. Brandt Steele and Brian Fraser of the National Center for the Prevention of Child Abuse and Neglect of the University of Colorado Medical Center).

291. *See also* Dick Dahl, *Making Sex Abusers Pay*, MASS. LAW. WKLY., Apr. 15, 1991, at 33 (reporting that a victim's suit against a perpetrator has therapeutic value and may relieve feelings of victimization).

292. *See* A.L. v. Commonwealth, 521 N.E.2d 1017, 1022 n.10 (Mass. 1988) (stating that the children's parents, denied access to teacher's criminal record, had no choice but to rely on institution to protect their children).

293. Doe v. Durtschi, 716 P.2d 1238, 1241 (Idaho 1986) (minor plaintiffs alleging such injuries).

294. HUBER, *supra* note 37, at 81 (discussing alternative liability generally).

cause the harm, they are by no means innocent bystanders.[295]

Institutions are in the best position to prevent employee abuse and may do so without undue expense. Adequately investigating new employees, by means of personal references, contacts with former employers and coworkers, and, if the employee previously worked with children, with those children's parents, is the first step. Following standard operating procedures and expending a small amount of additional effort by employers could do much to prevent employee abuse from occurring.

Employee abuse is preventable after the hiring stage as well. Most importantly, an institution cannot fail to investigate every rumor, suggestion, or intimation of suspicious activity. Adequate supervision—regular monitoring and evaluation of employee conduct as opposed to constant behind-the-scenes surveillance—is a must. Training and workshops on the facts and dynamics of child abuse may also be helpful; at a minimum, they create awareness among coworkers. Finally, to prepare for any employee abuse that may occur, an institution should seek insurance coverage, budget funds for settling claims, or at the very least establish an emergency fund for use in compensating the victims and their families.

CONCLUSION

Child abuse committed by adults responsible for a child's care occurs often, and its frequency is increasing.[296] In the institutional setting, the volume of lawsuits brought by victims against their abusers and the abusers' employers reflects the growing number of reported cases and also the growing need for a solution.[297] The courts, however, relying on flawed analysis and outmoded immunities, traditionally have refused to hold institutions liable for child abuse committed by their employees.[298]

By avoiding the imposition of liability on institutions, courts perpetuate the vicious cycle of abuse: abused children become

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295. Prevention is not solely the responsibility of the institution, of course. Parents must continually monitor to ensure that institutions properly care for their children; this Note by no means suggests the abdication of parental responsibilities. However, in doing what is best for their children, parents must send them to school, church, and play. In doing so, parents trust the institutional caretakers to do their best for the children as well.

296. *See supra* notes 4-7, 11.

297. *See generally supra* notes 4-7 (documenting the increased incidence and reporting of child abuse in the United States).

298. *See supra* notes 51-212 and accompanying text.

abusive adults.[299] Failure to impose liability may deprive victims of resources necessary for recovery, and the poor success rate of victim claims discourages other victims from bringing suit against truly culpable institutions. Although strict liability provides one possible way to increase the number of successful claims, the harsh effects on public institutions potentially undermine that approach. Rather, broadening the liability base to include the supervising institution when the abuse occurred due to intentional wrongdoing or negligence by the institution satisfactorily meets the needs of the child and justly punishes the institution.[300]

To improve the plight of abused children, the judicial system need not devote all of its creative energies to fashioning new theories or gearing up its strict liability mechanisms. Several effective rationales already exist to attack the child abuse crisis occurring in institutions, including negligent hiring and supervision, vicarious liability, and constitutional remedies. As this Note reviewed, these doctrines need adjustment to meet the facts of child abuse cases, but a major judicial overhaul is unnecessary.

Courts should not delay in responding to the child abuse crisis.[301] The legal community's failure to address the issue appears to be passive condonation, which makes the legal system equally culpable as the institution allowing the abuse to occur.[302] Courts contribute to the prevalence of child abuse when they fail to appreciate that "[n]ot only are child abuse and neglect wrong, but the nation's lack of an effective response to them is also wrong."[303] The United States Advisory Board on Child Abuse and Neglect encourages active public involvment in child abuse prevention, and "urge[s] all citizens 'to recognize that a serious emergency . . . exists within American society. . . . [E]ach American [must] understand that he or she is personally responsible for preventing harm to all the maltreated children of the na-

299. RONALD B. FLOWERS, CHILDREN AND CRIMINALITY: THE CHILD AS VICTIM AND PERPETRATOR 92 (1986); Reidy, *supra* note 25, at 471; *see also* VINCENT J. FONTANA & DOUGLAS J. BESHAROV, THE MALTREATED CHILD 12, 27-30 (3d ed. 1977) (discussing various social and family experiences that may cause a person to grow into a child abuser). The problem comes full circle when the abused child-abusive adult enters the child care field and seeks out victims, thus allowing the horrible history to repeat itself. Schaefer, *supra* note 6, at 1441.

300. PROSSER, *supra* note 99, at 464, 553.

301. Gil, *supra* note 16, at 126-27.

302. Indeed, one author suggested that legal institutions contribute to the prevalence of abuse and, with cultural and social factors, are a source of child abuse. *Id.* at 120-22.

303. Cimons, *supra* note 45, at A12 (quoting a report of the U.S. Advisory Board on Child Abuse and Neglect released June 26, 1990).

tion.' "[304] The American people have responded with legal action[305] and by entrusting the care of their children to the judicial system.

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304. *Id.*

305. Even Congress has responded. *See* Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106 (1988). The Act established a National Center on Child Abuse and Neglect, an advisory board, an interagency task force, and a national clearinghouse. *Id.* §§ 5101-5104. The Act also makes provisions for research, financial, and educational grants and programs. *Id.* §§ 5105-5106. These government resources are intended to prevent and treat child abuse and neglect. More recently, a bill has been proposed in Congress to create a national child abuse registry. *See supra* note 97; Anne Groer, *Girl Inspires Bill to Track Abusers*, CHI. TRIB., Oct. 27, 1991, at C8.